

DATE: March 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17474

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn Moen Braeman issued a decision, dated November 27, 2002, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Board can consider Applicant's offer to present additional evidence on his behalf; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated May 15, 2002. The SOR was based on Guideline F (Financial Considerations).

Applicant submitted an answer to the SOR, in which he stated that he did not want a hearing in his case. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to it. The case was then assigned to the Administrative Judge for disposition.

The Administrative Judge issued a written decision, dated November 27, 2002, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's unfavorable decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at

pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Appeal Issues

The Administrative Judge made findings of fact about Applicant's history of financial difficulties. The Judge concluded that Applicant had engaged in the conduct alleged in SOR subparagraphs 1.b, 1.c, and 1.d, but that he had presented sufficient evidence to warrant favorable formal findings with respect to those SOR subparagraphs. However, the Judge concluded that Applicant had failed to demonstrate extenuation or mitigation of the still-delinquent debt covered by SOR subparagraph 1.a (totaling more than \$14,000), and that Applicant had failed to demonstrate that he is now financially responsible. The Judge further concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Judge's formal findings in favor of Applicant with respect to SOR subparagraphs 1.b, 1.c, and 1.d are not at issue on appeal.

1. Whether the Board can consider Applicant's offer to present additional evidence on his behalf. On appeal, Applicant states: (a) he has made arrangements to resolve the debt covered by SOR subparagraph 1.a; (b) he hopes that his efforts to deal with the debt covered by SOR subparagraph 1.a will show he is serious about handling his financial affairs; (c) a named federal government official has written to Applicant's employer to indicating a willingness to have Applicant return once his security clearance is resolved; and (d) the named federal government official is willing to write a character letter on Applicant's behalf. The Board construes these statements as raising the issue of whether the Board can consider Applicant's offer to present additional evidence on his behalf.

The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. An Administrative Judge's findings and conclusions will be reviewed on appeal in light of the record evidence that was available to the Judge. Directive, Additional Procedural Guidance, Item E3.1.32.1. An appealing party cannot fairly challenge a Judge's findings and conclusions based on evidence that was not presented for the Judge's consideration.

Applicant had the opportunity to submit additional evidence on his behalf when he responded to the FORM. In fact, Applicant took advantage of that opportunity and submitted documentation for the Administrative Judge to consider in his case. It is too late in the process for Applicant to offer to present additional information for consideration in his case.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant does not challenge the Administrative Judge's findings about his history of financial difficulties, including the Judge's findings about Applicant's failure to resolve the debt covered by SOR subparagraph 1.a. However, Applicant states: (a) he is "a very reliable and hard working person"; (b) he has worked with his present employer since 1988 and has progressed to the position of project manager; (c) he has "always displayed a high level of professionalism"; (d) his job as a security officer and the well-being of the United States are very important to him; and (e) he would do nothing to intentionally cause harm to either the United States or his job.

Applicant's appeal statements about his job performance go beyond the record evidence and, as such, they constitute new evidence, which the Board cannot consider. Furthermore, as noted earlier in this decision, Applicant had the opportunity during the proceedings below to submit additional information for the Administrative Judge to consider in his case. The Board construes the remaining appeal statements made by Applicant as raising the issue of whether the Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law.

The federal government need not wait until an applicant mishandles or fails to safeguard classified information before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). There are many kinds of conduct and circumstances other than security violations that can provide a rational basis for an adverse security clearance decision. A history of excessive indebtedness or recurring financial difficulties can provide a rational basis for an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 96-0454 (February 7, 1997) at p. 2 (discussing negative security significance of a history of excessive indebtedness or recurring financial difficulties).

The Administrative Judge's findings about the facts and circumstances of the delinquent debt covered by SOR subparagraph 1.a are not challenged by Applicant on appeal. The Judge's findings about that delinquent debt provide a rational basis for her adverse conclusions about Applicant's security eligibility under Guideline F and her overall adverse security clearance decision. Applicant's appeal arguments do not demonstrate factual or legal error by the Judge, and they fail to demonstrate that the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board