

DATE: April 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-19278

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

James R. Klimaski, Esq.

Administrative Judge John G. Metz, Jr. issued a decision, dated November 26, 2002, in which he 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 Administrative Judge's finding that Applicant was financially overextended was supported by the record evidence; (2) whether it was arbitrary, capricious, contrary to law and not supported by the record evidence for the Judge to find that Applicant falsified material facts concerning a prior arrest on a security clearance questionnaire; and (3) whether it was arbitrary, capricious, contrary to law and not supported by the record evidence for the Judge to find that Applicant falsified material facts concerning delinquent debts on a security clearance questionnaire. 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 April 19, 2002. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). A hearing was held on October 22, 2002.

The Administrative Judge issued a written decision date November 26, 2002, in which he 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 adverse 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 [\(1\)](#)

1. Whether the Administrative Judge's conclusion that Applicant was financially overextended was supported by the record evidence. The Administrative Judge concluded that Applicant had a history of bad debts that was partially caused by loss of employment but was also the product of his decision to attend graduate school without employment and without the aid of student loans. The Judge concluded that Applicant had recently improved his financial standing, but he still had two outstanding credit card accounts with an aggregate balance of approximately \$12,000. The Judge concluded that these remaining debts were security clearance disqualifying because Applicant had not resolved them despite an annual income in excess of \$70,000. The Judge also concluded that Applicant had no solid plan for restitution and had only expressed a vague intent to eventually pay.

On appeal, Applicant asserts there is no basis for the Judge's adverse formal findings under Guideline F. Specifically, he argues: (a) the Administrative Judge did not consider Applicant's continuing efforts to negotiate a settlement on the two outstanding credit cards and to clear up the accounts; (b) the Administrative Judge improperly criticized Applicant for his decision to attend graduate school without employment and without loans, and inappropriately attached negative security significance to what was essentially a personal judgment call; (c) the Judge failed to utilize the "whole person" approach and never took into account the fact that Applicant has paid off or is current on his major bills and currently has an excellent financial status; (d) there is no evidence that Applicant deliberately ignored his bills after securing employment in 1998; and (e) Applicant's financial difficulties had no effect on his existing security clearances and there is no evidence that he ever leaked classified information because of financial problems.

(a) In his findings of fact the Administrative Judge accepted Applicant's testimony that Applicant was unable to reach a settlement with the two outstanding credit card accounts in part because he had difficulty getting reliable information on who the authorized collection agents were. The Judge noted, however, that Applicant had provided no documentary corroboration of his efforts to pay or otherwise resolve the outstanding accounts and Applicant had not stated how or when he would pay the accounts. In his conclusions, the Administrative Judge noted that Applicant had made some progress toward improving his overall financial posture but also concluded that Applicant's belated, uncorroborated and incomplete efforts to repay the credit card debts despite having increases in earnings worked against the application of any mitigating factors.

Applicant argues that he was making a good-faith effort to settle his debts and that Financial Considerations Mitigating Condition E2.A6.1.3.6 [\(2\)](#)

should have applied to the case. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Administrative Judge erred.

In his appeal brief Applicant asserts Department Counsel did not meet its burden of proof that there was no good-faith effort to resolve debts. His assertion is without merit as it erroneously assumes that the burden is on Department Counsel to establish the inapplicability of mitigating conditions. Once Department Counsel established its case under the Financial Considerations Guideline, Applicant bore the burden of establishing the applicability of any mitigating factors. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 3.

Applicant also cites to a case decided by a DOHA Hearing Office Administrative Judge in support of his argument that Mitigating Condition E2.A6.1.3.6 applies to his situation. Although decisions by Hearing Office Judges may be cited as persuasive authority, they are not legally binding on other Hearing Office Judges in other cases nor are they legally binding on the Appeal Board. Furthermore, the case cited by Applicant is factually distinguishable from Applicant's case.

A review of the record in the case convinces the Board that the Administrative Judge's findings and conclusions regarding Applicant's outstanding indebtedness were adequately supported by the evidence. Applicant's ability to argue for an alternate interpretation of that evidence fails to establish that the Judge's findings and conclusions were arbitrary, capricious or contrary to law.

(b) Applicant faults the Administrative Judge for criticizing Applicant's failure to obtain loans while in graduate school to relieve his indebtedness. He characterizes his decision as a personal judgment call and asserts that whether the call he made was good or bad does not reflect on whether he can be trusted with classified information. Applicant also assails the Judge for his "sarcastic tone" concerning Applicant's decisions on how to pay for graduate school and his other expenses while in school.

The Administrative Judge properly considered the decisions Applicant made concerning his finances when determining what events contributed to Applicant's financial difficulties. He also properly considered which of those events were the product of Applicant's choices and which were a result of circumstances beyond his control. It was also proper for the Judge to consider Applicant's judgment as it related to the management of his finances. In this context it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant's financial difficulties subsequent to 1998 were largely the result of his decision to forgo employment income and attend graduate school without obtaining educational loans. The record evidence provides reasonable support for the Judge's findings and conclusions on these points. Concerning Applicant's complaint about the Judge's "sarcastic tone," some of the language in the Judge's decision is forceful and pointed. However, the Board does not find the cited part of the Judge's decision sarcastic or inflammatory. Applicant has failed to establish error.

(c) Applicant claims the Administrative Judge failed to utilize the "whole person" approach to deciding the case. He asserts the Judge relied on only negative information and never took into account evidence of Applicant's payment of his undergraduate school loans, his mortgage, his timely payoff of a car loan, his present efforts at timely bill payment and his excellent financial status. Applicant's argument is not persuasive.

There is a rebuttable presumption that an Administrative Judge has considered all the evidence unless the Judge specifically states otherwise. Furthermore, the Judge need not mention each piece of evidence he considers in making his decision. A review of the Judge's decision in this case reveals that the Judge did consider favorable evidence. He chronicled instances in which Applicant retired outstanding delinquent debts, and made findings favorable to Applicant on three of the five SOR allegations under the Financial Considerations Guideline. In his conclusions, the Judge acknowledged that Applicant was making progress in repairing his finances. However, such a conclusion does not make the Judge's ultimate negative determination arbitrary, capricious or contrary to law given the record evidence that Applicant had two substantial long overdue credit card debts outstanding and had not demonstrated a solid plan for repayment. The existence of the two outstanding credit card debts also negates Applicant's appeal characterization of his financial status as excellent.

The Administrative Judge was required to weigh the evidence, both favorable and unfavorable in making his ultimate security clearance determination. The Judge concluded that the favorable evidence of improvement in Applicant's financial posture was not enough to demonstrate changed circumstances sufficient to warrant a favorable security clearance decision. Considering the record as a whole, Applicant has failed to demonstrate that the Judge failed to apply the "whole person" approach or that he weighed the evidence in a manner that was arbitrary, capricious or contrary to law.

(d) Applicant asserts on appeal that there is no evidence that he deliberately ignored his bills after he secured employment in 1998. A review of the Administrative Judge's decision indicates the Judge made no such specific finding. Moreover, the Judge need not have concluded that Applicant deliberately intended to ignore his outstanding

bills before deciding against him under the Financial Considerations Guideline. Failure to pay bills can have security significance under the Financial Considerations Guideline that is not diminished by the fact that Applicant did not specifically intend not to pay his bills. *See, e.g.*, Financial Considerations Disqualifying Condition E2.A6.1.2.3 ("*Inability or unwillingness to satisfy debts*")(*italics added*). Applicant fails to establish that the Judge erred.

(e) Applicant maintains that his financial difficulties had no effect on his ability to hold his existing security clearances and there is no evidence that he ever "leaked" classified information because of financial problems. Even in the absence of any evidence that an applicant has committed a security violation, the federal government can deny or revoke access to classified information based on applicant's conduct or circumstances that raise security concerns. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). A history of excessive indebtedness or ongoing 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 federal government does not have to wait until an applicant's financial difficulties result in a security violation before reaching a conclusion that such difficulties pose a security risk.

2. Whether it was arbitrary, capricious, contrary to law and not supported by the record evidence for the Judge to find that Applicant falsified material facts concerning a prior arrest on a security clearance questionnaire. The Administrative Judge found that Applicant falsified a security clearance questionnaire on October 21, 1998 by failing to disclose that he had been arrested for disorderly intoxication in January 1995. The Judge noted that Applicant denied an intent to falsify the questionnaire because he had been told by his attorney and state officials he did not have to disclose the arrest because it had been expunged from state records. The Judge did not find Applicant's explanation for the omission credible.

On appeal Applicant argues (a) the facts of the case do not support a finding of intent to falsify and the government produced no documentary or testimonial evidence that proved such intent; (b) the Administrative Judge erred in finding Applicant not credible; (c) the Judge erred by not crediting Applicant for bringing the arrest to the attention of a Defense Security Service (DSS) investigator during a 1999 interview; (d) the Judge's factual findings amount to little more than inferences which are arbitrary, capricious and contrary to law; and (e) three mitigating factors apply to Applicant's January 1995 arrest. Applicant's arguments lack merit.

(a and d) Resolving falsification allegations where there is no dispute that the required information was omitted calls on an Administrative Judge to make a determination concerning the applicant's intent or state of mind. Such a determination is rarely resolved through direct evidence. To the extent that Applicant argues on appeal that the government failed to produce any *direct* evidence of intent, such an argument is misplaced. Absent an admission that there was a falsification, an Administrative Judge must rely on circumstantial evidence and an assessment of an applicant's credibility in deciding what the applicant intended at the time of the omission.

Applicant asserts that the Judge's characterization of the arrest question on the questionnaire as "plain" was error and that it was reasonable for Applicant to consider the expungement of his arrest as the state's business. In this case the Judge was required to evaluate Applicant's explanation that he was confused by the arrest question and resolved his confusion by asking his attorney and state law enforcement authorities whether or not he was required to reveal an expunged state arrest. As part of that evaluation, the Judge was required to scrutinize Applicant's claim that he saw no difference between state and federal law and, because of that mind set, Applicant did not consult any federal officials about how to handle the arrest on the questionnaire and he was not sensitized to the language on the questionnaire which provided an exception to listing certain expungements only under federal law.

Applicant's statements about his intent and state of mind when he completed the security clearance questionnaire are relevant evidence, but they were not binding on the Administrative Judge. As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole. Applicant's denial of any intent to falsify did not preclude the Judge from weighing the record evidence and making a finding that contradicted Applicant's denial. The Judge's finding that Applicant falsified the questionnaire arises from legally permissible inferences drawn from the record evidence. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification is unsustainable.

(b) Applicant asserts the Administrative Judge erred by finding that Applicant was not credible. Credibility determinations of an Administrative Judge are given deference on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.* In this case the Judge articulated reasons why he did not consider portions of Applicant's evidence regarding the falsification issue worthy of belief. The Judge's conclusions regarding Applicant's credibility are reasonable and Applicant has failed to demonstrate that the Judge's conclusions are arbitrary, capricious or contrary to law.

(c) Applicant argues that the Judge should have credited Applicant with disclosing his arrest to a DSS investigator during 1999 subject interview approximately five months after the completion of the security clearance questionnaire. Applicant claims he told the investigator about the arrest prior to being asked about it. However, the fact that Applicant eventually disclosed the arrest to an investigator does not negate the fact that he had an initial duty to disclose the arrest on the security clearance questionnaire. The Administrative Judge did not commit error by concluding that the subsequent disclosure did not mitigate the earlier falsification. ⁽³⁾

His conclusion that any disclosure made by Applicant to the investigator was not made promptly or in good faith is reasonably supported by the record evidence.

On appeal, Applicant makes reference to a Defense Security Service document entitled *Personal Security Investigations: Frequently Asked Questions*. He quotes a passage from the document that deals with omissions or mistakes made on security clearance questionnaires. The passage advises persons to tell their security officer or investigator at the time of the subject interview about mistakes they made or important information they omitted when filling out the questionnaire. Applicant claims that he was simply following the instruction by telling the investigator about the arrest and argues that the Judge was wrong in faulting him for not reporting the expunged arrest sooner.

The raising of the matter of the document for the first time on appeal constitutes a proffer of new evidence, which the Board cannot consider. *Directive, Additional Procedural Guidance, Item E3.1.29.* Even if the Board were permitted to consider the document, there is no record evidence that Applicant relied upon the excerpted guidance or that it influenced his behavior during his security clearance investigation.

(e) Applicant cites three mitigating factors under the Criminal Conduct Guideline (Guideline J) ⁽⁴⁾

and focuses on the underlying offense when arguing that the Judge's adverse decision about falsification of his arrest record should be reversed. Applicant appears to argue that the security significance of the falsification derives from the security significance of the event that was the subject of the falsification. This argument lacks merit. An act of falsification has security significance independent of any security significance of the underlying conduct. Furthermore, the Guideline J mitigating conditions are not relevant to this case because the SOR did not allege any of Applicant's conduct fell under Guideline J. Applicant has not demonstrated error on the part of the Administrative Judge. ⁽⁵⁾

3. Whether it was arbitrary, capricious, contrary to law and not supported by the record evidence for the Judge to find that Applicant falsified material facts concerning delinquent debts on a security clearance questionnaire. On his October 21, 1998 security clearance questionnaire, Applicant did not indicate that he had any delinquent debts that were more than 90 days past due. The Administrative Judge found that Applicant had falsified his answer on the questionnaire because he had two debts that were more than 90 days delinquent and he had knowledge of the status of those debts. Applicant contends on appeal that the Judge's findings regarding his questionnaire responses about the debts are arbitrary, capricious, and contrary to law because: (a) Applicant did not know that the two accounts were past due at the time he completed the questionnaire and there is no record evidence establishing that he knew about the arrearages; and (b) the Judge improperly found that Applicant falsified his questionnaire concerning the status of overdue debts not alleged in the SOR and used this conclusion to improperly bolster his finding of falsification on the two debts alleged. These two arguments can be addressed together.

The Administrative Judge chose to resolve the issue of Applicant's knowledge about the two debts against Applicant. Given the state of the record evidence, his resolution of this issue was not arbitrary, capricious nor contrary to law and was reasonably supported by the record evidence. Applicant's statements concerning his knowledge about the past due status of his accounts were evidence that the Judge was required to consider. The Judge was not, however, obligated to

accept Applicant's statements as a matter of law. Applicant argues on appeal that the Judge could not use credit reports that were prepared subsequent to the date of Applicant's completion of the security clearance questionnaire to establish his knowledge of the overdue accounts. This argument is flawed. The credit reports in question make historical representations as to the status of Applicant's accounts in and around the October 1998 time frame. The Judge could base his findings about the extent of Applicant's knowledge of the accounts, in part, on that historical record. The date of the preparation of the credit reports is not dispositive as to the establishment of that historical record.

The Administrative Judge noted that when filling out the questionnaire, Applicant had failed to list other overdue debts that should have been listed. Because these omissions were not alleged in the SOR, the Judge did not consider them on the merits of the case. He did, however, consider them in his overall assessment of Applicant's credibility. ⁽⁶⁾

Applicant asserts on appeal that this is material error because the Judge's findings are based on credit reports dated several years after Applicant filled out the security clearance questionnaire. As indicated in the preceding paragraph, the fact that the credit reports were created subsequent to Applicant's completion of the questionnaire does not detract from their evidentiary value concerning Applicant's credit history at the earlier time. Applicant's argument lacks merit.

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

1. The Judge found in favor of the Applicant under subparagraphs 1.c, 1.d, and 1.e of the SOR (Guideline F) and subparagraph 2.b of the SOR (Guideline E). Those formal findings are not at issue on appeal.

2. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

3. Personal Conduct Mitigating Condition E2.A5.1.3.3 provides: "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

4. They are Criminal Conduct Mitigating Conditions E2.A10.1.1 ("The criminal behavior was not recent"), E2.A.10.1.3.2 ("The crime was an isolated incident"), and E2.A10.1.3.6 ("There is clear evidence of successful rehabilitation").

5. In this section of his brief Applicant again cites and relies on a decision of a Hearing Office Judge. As stated earlier, such decisions are not binding on the Board. Furthermore, the decision cited by Applicant is distinguishable because it involved conduct alleged under Guideline J.

6. An Administrative Judge may consider uncharged conduct in assessing an applicant's credibility. *See, e.g.*, ISCR Case No. 01-07360 (April 10, 2002) at p. 5.