

DATE: March 4, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-19757

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge James A. Young issued a decision, dated December 17, 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 erred by finding that Applicant had failed to satisfy two liens filed for unpaid taxes; and (2) whether the Administrative Judge's unfavorable security clearance 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 August 19, 2002. The SOR was based on Guideline F (Financial Considerations). Applicant submitted an answer to the SOR, in which she indicated "I don't feel I need a hearing. I think a decision can be made without a hearing." 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 Judge issued a written decision, dated December 17, 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 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⁽¹⁾

1. Whether the Administrative Judge erred by finding that Applicant had failed to satisfy two liens filed for unpaid taxes. Applicant challenges the Administrative Judge's findings that she has not satisfied liens filed in 1990 and 1991 for unpaid taxes (subparagraphs 1.b and 1.c). Applicant contends she has paid the taxes and the liens were removed. In support of this claim of error, Applicant: (a) has submitted documentation from a county recorder's office; and (b) argues that Department Counsel stated, in the FORM, that Applicant had paid off the tax liens.

The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. In deciding whether the Administrative Judge's findings of fact are supported by substantial record evidence (Directive, Additional Procedural Guidance, Item E3.1.32.1), the Board is limited to considering the record evidence that was before the Judge when he decided Applicant's case. Accordingly, the Board cannot find that the Judge made an erroneous factual finding based on new evidence submitted on appeal.

In responding to the SOR, Applicant stated she had resolved the tax liens in September 2001 and submitted documentation in support of her claim. In responding to the FORM, Applicant stated that she had paid her back taxes and had the liens filed against her removed. Considering the documentation submitted by Applicant with her answer to the SOR and Department Counsel's concession in the FORM that Applicant had paid off the tax liens, the Administrative Judge erred by finding Applicant did not satisfy the tax liens covered by SOR subparagraphs 1.b and 1.c. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

Although the Administrative Judge erred by finding that Applicant had not paid and satisfied the tax liens covered by SOR subparagraphs 1.b and 1.c, that error was harmless under the particular facts of this case. The debts covered by SOR subparagraphs 1.b and 1.c total \$169.59, while the debt covered by SOR subparagraph 1.f is approximately \$56,900. Considering the large disparity between the combined value of the debts covered by subparagraphs 1.b and 1.c and the value of the one debt covered by SOR subparagraph 1.f, it is highly unlikely that the Judge's adverse formal findings about SOR subparagraphs 1.b and 1.c were decisive or pivotal to his overall adverse conclusions under Guideline F. Accordingly, even though the Board concludes that the Judge should have entered formal findings in favor of Applicant with respect to SOR subparagraphs 1.b and 1.c, such favorable formal findings do not warrant remand or reversal of this case. *See* ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

2. Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. The Administrative Judge made findings and reached conclusions about Applicant's history of financial difficulties as follows: (a) Applicant and her husband had a federal income tax delinquency for tax years 1990-1994 which, as of October 2002, had grown to \$56,898.01 (including penalties and interest); (b) Applicant has made an offer of compromise to the Internal Revenue Service (IRS); (c) the IRS had not replied to the offer of compromise as of the time Applicant responded to the FORM; (d) Applicant's history of not meeting her financial obligations in a timely manner since 1985 falls under Guideline F; (e) Applicant's efforts to satisfy her debts were made in good-faith; and (f) Applicant's efforts to address her financial difficulties were not sufficient to rebut, explain, or mitigate the security concerns raised under Guideline F.

On appeal, Applicant does not challenge the Administrative Judge's findings about her federal income tax delinquency. However, Applicant: (i) refers to her offer of compromise to the IRS; (ii) attaches to her appeal brief a letter from the IRS acknowledging receipt of her offer of compromise; and (iii) states that the IRS has told her that an IRS examiner

has not yet been assigned to her case. The Board construes Applicant's statements as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

As noted earlier in this decision, the Board cannot consider new evidence on appeal. Even if the Board had the authority to consider new evidence on appeal, Applicant's appeal statements about the status of her offer of compromise do not demonstrate factual or legal error by the Administrative Judge, nor do they provide any legitimate basis for the Board to remand the case to the Judge. The Judge specifically found that Applicant had made an offer of compromise to the IRS and that the IRS had not acted on it as of the time Applicant responded to the FORM. Applicant's proffer of new evidence adds nothing material to her case: (1) it does not demonstrate the Judge's findings and conclusions about her federal income tax delinquency are arbitrary, capricious, or contrary to law based on the record evidence properly before him; and (2) it does not demonstrate any legitimate reason why the Board should remand the case to the Judge to reopen the record and consider Applicant's new evidence.

Security clearance decisions are not an exact science, but rather involve predictive judgments about a person's security eligibility based on consideration of the person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Applicant's history of financial difficulties provides a sufficient basis for the Administrative Judge's adverse conclusions about Applicant's security eligibility. *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). Given the undisputed evidence that Applicant still has not satisfied her federal income tax delinquency, the Judge's adverse security clearance decision is not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Therefore, 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 Administrative Judge entered formal findings in favor of Applicant with respect to SOR subparagraphs 1.a, 1.d, and 1.e. Those favorable formal findings are not at issue on appeal.