

DATE: February 26, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-24356

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Thomas Albin, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated October 11, 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 it was arbitrary, capricious or contrary to law for the Administrative Judge to fail to apply a mitigating condition addressing the issue of Applicant's financial difficulties being the result of circumstances beyond his control; (2) whether the Administrative Judge's adverse conclusions regarding Applicant's financial history are sustainable based on the evidence of record; (3) whether the Administrative Judge's adverse conclusions regarding Applicant's gambling and unpaid taxes under the Personal Conduct Guideline (Guideline E) are sustainable; (4) whether the Administrative Judge's findings that Applicant falsified two of his answers regarding finances on a 1999 security clearance questionnaire are sustainable; and (5) whether the Administrative Judge's adverse conclusions regarding Applicant's work-related misconduct are sustainable given the record evidence. For the reasons that follow, the Board affirms the Judge's adverse security clearance decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated May 17, 2002. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). A hearing was held on July 26, 2002. The Administrative Judge issued a written decision, dated October 11, 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.

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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to fail to apply a mitigating condition pertaining to financial difficulties being the result of circumstances beyond an applicant's control. Regarding the Administrative Judge's disposition of subparagraph 1.e ⁽²⁾ of the SOR, Applicant correctly quotes the Administrative Judge's decision as stating, "Applicant testified credibly his bankruptcy in 1996 was not due to gambling, but rather to a significant delay in his receipt of workmen's compensation benefits." Applicant argues that this conclusion means the Judge should have further concluded that Applicant's financial difficulties arose from conditions beyond his control, and applied Financial Conditions Mitigating Condition E2.A6.1.3.3. ⁽³⁾ Applicant claims that since the Judge accepted his statements regarding his financial difficulties, it was error for the Judge not to apply the mitigating factor and find subparagraph 1.e in Applicant's favor. Applicant's argument is not persuasive.

Subparagraph 1.e of the SOR covers a spectrum of Applicant's financial history that extends significantly beyond his filing for bankruptcy in 1996. It encompasses his failure to timely make state income tax payments from 1995 to 2000. The Judge's acknowledgment that external circumstances led to Applicant's 1996 bankruptcy filing did not, as a matter of law, require her to also find that external circumstances were the root cause of Applicant's income tax payment delinquencies for the following four years. Indeed, there is record evidence to support the Administrative Judge's conclusion that Applicant's failure to pay his income taxes resulted largely from his own choices and was not the result of matters beyond his control.

Moreover, in making his argument regarding subparagraph 1.e of the SOR, Applicant takes the quoted passage from the Judge's decision out of context. That passage is part of a larger discussion in which the Judge is setting forth reasons for her conclusion that Applicant's failure to pay his income tax obligations in a timely manner was not attributable to gambling losses. Concluding Department Counsel had failed to demonstrate a connection between Applicant's financial difficulties and his gambling losses, the Judge cited instances of Applicant's financial difficulties apart from his failure to pay taxes that did not result from his gambling. The fact that one of these instances was a one-time bankruptcy filing that resulted, at least in part, from a delay in Applicant's receipt of workman's compensation benefits does not detract from the Judge's larger, more significant conclusion that Applicant's longstanding failure to pay his income taxes resulted from his conscious disregard of his financial obligations.

For all the foregoing reasons, it was not arbitrary, capricious, or contrary to law for the Judge to not apply Financial Considerations Mitigating Condition E2.A6.1.3.3.

2. Whether the Administrative Judge's adverse conclusions regarding Applicant's financial history are sustainable based on the evidence of record. Applicant takes exception to the Administrative Judge's negative findings regarding his financial history. Specifically, Applicant argues: (i) with regard to subparagraph 1.f ⁽⁴⁾ of the SOR, the Judge's adverse finding is error because the record evidence indicates that Applicant's failure to file and pay income taxes was not financially motivated and such failure has security significance only under Guideline E; and (ii) with regard to

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subparagraph 1.g of the SOR, since the Administrative Judge found that Applicant was not a "high stakes" gambler and that his financial problems were not attributable to gambling losses, it was error for the Judge to find against him under this subparagraph because of his failure to file income taxes in a timely fashion. Applicant's arguments have mixed merit.

The main thrust of Applicant's argument with regard to subparagraph 1.f is that because there is no evidence that Applicant failed to file and pay his income taxes as a result of lack of funds, and because the Judge made findings accordingly, his failure to file and pay has no significance under the Financial Considerations Guideline. In making this argument, Applicant relies on the "The Concern" section of the Guideline, which cites the risks involved when a person is "financially overextended" or has "unexplained affluence." He asserts that the Financial Considerations Guideline is applicable only when an applicant's conduct fits within one of these two specific concerns.

Applicant's view of the scope of the Financial Considerations Guideline, based as it is only upon the language in the preambulatory "The Concern" section, is too narrow and would render meaningless several of the specific disqualifying conditions listed in the body of the Guideline, including two specifically relied upon by the Administrative Judge in resolving this case.⁽⁶⁾ These provisions speak to the concept of neglect or willful disregard of financial obligations regardless of an applicant's resources and are not dependent upon the concept of inability to pay. The Board will not interpret provisions of the Directive in a manner that renders meaningless other parts of the Directive or in a manner that would undermine the effectiveness of the industrial security program in protecting the national security. *See* DISCR Case No. 87-2107 (October 25, 1990) at p. 7 (Directive should be construed in a manner that effectuates its essential purpose of protecting classified information). Persons who ignore their financial responsibilities are engaging in behavior that has security significance under the Financial Considerations Guideline regardless of whether their derelictions result from an inability to pay. Applicant has failed to demonstrate error with regard to the Judge's adverse conclusion under subparagraph 1.f of the SOR.

Regarding SOR subparagraph 1.g, Applicant asserts that the tax elements in the allegation are "surplusage" and have nothing to do with the allegation itself, the thrust of which is that Applicant is a security concern because he continues to gamble on a high-stakes basis. He further argues that because the Administrative Judge disagreed with Department Counsel's characterization of Applicant as a "high-stakes" gambler and ultimately resolved the gambling issue in Applicant's favor, her adverse conclusion in subparagraph 1.g was error.

Although not worded with great precision, the language in SOR subparagraph 1.g gave Applicant adequate notice of the government's concern regarding a connection between Applicant's gambling habits and his failure to pay his income taxes in a timely manner from 1995 to 2000. Applicant had an opportunity to seek amendment of the SOR at the hearing. Having waived the opportunity it is too late to complain that the Administrative Judge erred by working with the SOR language.

The Administrative Judge's resolution of SOR subparagraph 1.g is more problematic. A reading of her decision convinces the Board that her conclusions are inconsistent. At one point in her decision, the Judge states, "The record does not support that Applicant fell behind in his income tax obligations or failed to timely pay his income tax obligations because of his gambling."⁽⁷⁾ She goes on to conclude that Applicant's failure to pay taxes resulted from his deliberate decision to limit his tax withholding by claiming an excessive number of dependents and his failure to file and pay taxes because of political motivations.⁽⁸⁾ She continues her analysis of Applicant's unpaid taxes by stating, "Since Applicant did not pay his income tax obligations in a timely manner, there is a demonstrated disregard of his financial obligations which falls within E2.A6.1.2.3. (inability or unwillingness to satisfy debts), but it is not attributable to gambling losses."⁽⁹⁾ The Judge ultimately concluded that because of the lack of evidence that gambling caused him to fall behind in his financial obligations, favorable findings were warranted as to subparagraphs 1.a,⁽¹⁰⁾ 1.b,⁽¹¹⁾ 1.c,⁽¹²⁾ and 1.d⁽¹³⁾ of the SOR.⁽¹⁴⁾ All of these subparagraphs make reference to Applicant's gambling.

These conclusions are difficult to square with another conclusion the Judge sets forth in her decision and with her ultimate disposition of SOR subparagraph 1.g. She states that "His expenditures of funds on gambling, when he had these tax debts outstanding, is particularly troubling."⁽¹⁵⁾ She goes on to state that "adverse findings are returned with respect to subparagraphs 1.e., 1.f., and 1.g., because of his deliberate disregard of his obligation to timely pay federal

and state taxes." (16) By contrast to subparagraph 1.g, subparagraphs 1.e and 1.f make no reference to Applicant's gambling. The Administrative Judge's statement that she finds his expenditures of funds on gambling troubling is inconsistent with her prior finding that Applicant's gambling did not cause him to fall behind in his financial obligations, including taxes. This inconsistency is not discussed or reconciled by the Judge. Likewise, her adverse finding under subparagraph 1.g is inconsistent with her disposition of the other SOR subparagraphs where the government alleged a connection between gambling and financial delinquencies.

The Judge's adverse finding under subparagraph 1.g is inconsistent with other factual findings, conclusions and formal findings in her decision, and therefore is not sustainable. However, inasmuch as a favorable formal finding under subparagraph 1.g does not mandate an overall favorable security clearance decision and there are several other bases for the Judge's ultimate adverse decision, the Judge's error concerning subparagraph 1.g was harmless in light of the record as a whole. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

3. Whether the Administrative Judge's adverse conclusions regarding Applicant's gambling and unpaid taxes under the Personal Conduct Guideline (Guideline E) are sustainable. Subparagraph 2.a of the SOR is a derivative allegation wherein subparagraphs 1.a, 1.b, 1.f and 1.g from the paragraph dealing with financial considerations are raised under the Personal Conduct Guideline (Guideline E). Applicant argues: (i) that the Judge's adverse finding with respect to subparagraph 2.a is erroneous to the extent it is based on subparagraphs 1.a, 1.b and 1.g inasmuch as the Judge made favorable findings with regard to 1.a and 1.b and found generally that Applicant's gambling was not a concern because it did not relate to his financial problems; and (ii) an evaluation of the severity of Applicant's failure to pay taxes as alleged in subparagraph 1.f should take into consideration the fact that this nation was founded on a tax protest.

A review of the Judge's decision indicates that she cited only subparagraphs 1.f and 1.g when making her adverse finding under subparagraph 2.a. Therefore, Applicant's arguments with regard to subparagraphs 1.a and 1.b need not be discussed. Since the Judge's adverse finding under subparagraph 1.g was error (for the reasons given earlier in this decision), it could not properly provide a basis for her adverse finding under subparagraph 2.a. However, as indicated earlier in this decision, the Judge's adverse finding under subparagraph 1.f is sustainable. Accordingly, that adverse finding provides a sufficient basis for the Judge's adverse finding under subparagraph 2.a.

Applicant asserts that his conduct in failing to file income tax returns alleged under subparagraph 1.f is "difficult to assess" under the Personal Conduct Guideline (Guideline E). He goes on to say that, "This reviewing body (referring to the Appeal Board) is no less capable than the ALJ of discerning whether Applicant's behavior warrants revocation of his clearance." He then makes the suggestion that his conduct can be likened to an historical tax protest upon which the nation was founded.

Applicant's argument concerning subparagraph 1.f (to the extent it was incorporated under SOR subparagraph 2.a) appears to request that the Board independently evaluate the severity of Applicant's decision not to file and pay income taxes because he was disgruntled with the federal government. The Appeal Board does not engage in *de novo* review of the cases that come before it. Instead, in response to specific issues raised on appeal, it must determine whether an 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 (Directive, Additional Procedural Guidance, Item E3.1.32.1), or whether the Administrative Judge's conclusions or rulings are arbitrary, capricious or contrary to law (Directive, Additional Procedural Guidance, Item E3.1.32.3). Moreover, a DOHA proceeding is not a proper forum to entertain tax protester arguments. *See, e.g.*, ISCR Case No. 01-05340 (December 20, 2002) at p. 3. It was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's failure to file and pay income taxes reflected poor judgment, unreliability or untrustworthiness under Guideline E. Applicant's argument fails to demonstrate error on the part of the Administrative Judge.

The Administrative Judge made a formal finding adverse to Applicant under subparagraph 2.b of the SOR, which alleged that between 1996 and 2000, Applicant under-reported his income by claiming an excessive number of dependents on his W-4 payroll tax forms. On appeal, Applicant concedes he engaged in such conduct, but asks the Board to evaluate its seriousness in terms of security concerns by reiterating that the Board is as capable as the Administrative Judge of deciding whether the alleged actions make him a security risk. Again, the Board does not review cases *de novo*. To the extent that Applicant's argument can be construed as asserting the Judge's adverse formal

finding under subparagraph 2.b is error, the Board concludes the Judge's adverse formal finding is not arbitrary, capricious, or contrary to law.

4. Whether the Administrative Judge's findings that Applicant falsified two of his answers regarding his finances on a 1999 security clearance questionnaire are sustainable. Applicant answered two questions about financial delinquencies on his security clearance questionnaire in the affirmative but failed to include the fact that he had income tax payment delinquencies. He failed to list one tax delinquency and referred to another as "all paid up." The Administrative Judge explained why, in her view, Applicant's misrepresentations were deliberate. She cited his responses on a 1998 security clearance questionnaire where Applicant indicated he was in the process of paying off his tax delinquencies. The Administrative Judge reasoned that the subsequent 1999 responses created the false impression that the tax delinquencies had been taken care of. On appeal, Applicant argues that if Applicant had truly intended to deceive the government, he would not have answered the questions in the affirmative (which attracted scrutiny of his financial situation). He also states that because of his tax protests, he was proud of his decision to withhold tax payments, and therefore had no motive to conceal the nonpayment.

Applicant's arguments fail to demonstrate error by the Administrative Judge. The fact of the omissions from the security clearance questionnaire is undisputed. The Administrative Judge was then left with the task of assessing Applicant's state of mind at the time of his completion of the questionnaire. Her finding of falsification reflects a reasonable interpretation of the record evidence. Applicant's ability to argue for an alternative interpretation of that evidence does not undermine the legal sufficiency of the Judge's finding of falsification.

5. Whether the Administrative Judge's adverse conclusions regarding Applicant's work-related misconduct are sustainable given the record evidence. The Administrative Judge made a finding adverse to Applicant under SOR subparagraph 2.e, (17) which alleged work-related misconduct. On appeal, Applicant argues that because he received reprimands for unsatisfactory attendance as a result of caring for a dying relative, his actions did not have security significance. The Administrative Judge found that some of Applicant's unexcused absences did result from his decision to stay with an ill father or co-worker. However, the Judge also concluded that Applicant displayed a cavalier attitude toward his employer's attendance policies. The Judge explained, that while Applicant's absences from work alone would not provide a sufficient basis on which to deny him a security clearance, she found that his actions and attitudes with regard to his absenteeism reflected an unacceptable tendency to act in his own self-interest without regard to regulation or propriety. The Judge articulated a sustainable rationale for her adverse conclusions under SOR subparagraph 2.e. Applicant's argument to the contrary is not persuasive.

Conclusion

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

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

Separate opinion of Chairman Emilio Jaksetic, concurring:

With one exception, I fully concur with my colleagues' discussion and resolution of Applicant's claims of error. Given the record evidence in this case, the Administrative Judge's analysis of Applicant's gambling conduct is problematic and troubling. However, constrained by the limits of the Board's appellate authority under the Directive, I am forced to agree with my colleagues' analysis and resolution of Applicant's claim of error concerning subparagraph 1.g.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Administrative Judge made findings and reached conclusions favorable to Applicant on four specific allegations (subparagraphs 1.a, 1.b, 1.c, and 1.d of the SOR) under Guideline F (Financial Considerations). Those findings and conclusions are not at issue on appeal, except to the extent they relate to the disposition of the second and third appeal issues.

2. "Despite paying off the income tax debt referenced in subparagraph 1(d.), you promptly fell behind again on your income taxes, beginning in 1995. You did not pay any state income taxes in a timely manner from 1995 to 2000. You currently owe approximately \$4,540 in back state income taxes from this period."

3. "The conditions that resulted in the behavior were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)."

4. "You failed to file federal income taxes from 1996 to 2000."

5. "Despite failing to pay your income taxes in a timely manner from 1995 to 2000, you have continued to gamble. You are a high stakes gambler who has posted annual winnings as high as approximately \$30,600 and annual losses as high as approximately [sic] 29,859."

6. *See* Financial Considerations Disqualifying Condition E2.A6.1.2.1 ("A history of not meeting financial obligations") and Financial Considerations Disqualifying Condition E2.A6.1.2.3 ("Inability or unwillingness to satisfy debts").

7. Decision at p. 10.

8. Decision at pp. 10-11.

9. Decision at p. 11.

10. "You have been gambling at casinos up to five days a week for approximately the past ten years."

11. "You use your gambling winnings to pay for necessities such as rent, food, and expenses, yet you cannot keep track of how much you win or lose."

12. "Your gambling habits led to financial problems which resulted in you filing for bankruptcy on or about June 7, 1996. At the time of the filing, you were approximately \$11,400 dollars in debt. Your bankruptcy was discharged on or about October 1, 1996."

13. "Your gambling habits also caused you to fall behind on your income taxes. Your tax debt prompted the IRS to file a lien against you in 1994 for approximately \$3000."

14. Decision at p. 11.

15. Decision at p. 11.

16. Decision at p. 11.

17. "Between June 1985 and March 9, 2001, you were formerly reprimanded by your employer for unsatisfactory conduct nine times."