

DATE: July 15, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26436

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Delilia Ledwith, Esq.

Applicant has appealed the March 7, 2003 decision of Administrative Judge Roger C. Wesley, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 decision is erroneous because it is contrary to other Hearing Office decisions; (2) whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions; and (3) whether the Board should conclude that the record evidence as a whole warrants a favorable security clearance decision. 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 27, 2002. The SOR was based on Guideline F (Financial Considerations). A hearing was held on January 13, 2003. The Administrative Judge issued a written decision, dated March 7, 2003, 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. Whether the Administrative Judge's decision is erroneous because it is contrary to other Hearing Office decisions. Applicant challenges the Administrative Judge's decision based on two related arguments: (a) it is contrary to decisions by Hearing Office Administrative Judges in other Guideline F cases; and (b) it is contrary to other decisions by the same Judge in other Guideline F cases. We will address each argument in turn.

(a) A decision by a Hearing Office Administrative Judge is not legally binding precedent on other Hearing Office Judges or the Board. Just as the decision of one trial-level judge is not legally binding precedent on a fellow trial-level judge, the decision of one Hearing Office Judge is not legally binding precedent on another Hearing Office Judge. Similarly, just as the decision of a trial-level tribunal is not legally binding precedent on an appellate tribunal, the decisions of Hearing Office Judges are not legally binding precedent on the Board.⁽¹⁾ Accordingly, Applicant's ability to cite Hearing Office decisions in other cases that appear to support her position does not demonstrate the Judge's decision in this case is arbitrary, capricious, or contrary to law. Furthermore, the Board has no obligation to follow the Hearing Office decisions cited by Applicant, and no obligation to reconcile the Judge's decision below with the Hearing Office decisions cited by Applicant.

(b) If a comparison of different decisions by the same Hearing Office Administrative Judge indicates possible inconsistencies, then an appealing party might have a basis for claiming that such inconsistencies reflect factual or legal error by the Judge. However, such a claim poses some practical and conceptual difficulties. First, the existence of inconsistencies does not necessarily demonstrate factual or legal error in either case. It is possible that there are factual or legal differences between the cases that warrant or justify different conclusions or results. Second, without access to the entire record in an earlier case, the Board will be at a distinct disadvantage in reaching a reasoned conclusion as to whether the Judge's decision in an earlier case was correctly decided. Third, even if the Board were to conclude that the Judge's decision in an earlier case cannot be distinguished (factually or legally) from the Judge's decision on appeal, it does not follow that the Board must conclude the Judge's decision on appeal was wrongly decided. After all, it is possible that the earlier case was decided wrongly. Fourth, it is possible that the Judge has changed or modified his or her thinking about some issue after issuing an earlier decision and simply failed to explicitly articulate the reason(s) for such a change or modification in a later decision that has been appealed. Fifth, the doctrine of administrative finality⁽²⁾ militates against the Board taking time to conduct the functional equivalent of postmortems on Judges' decisions that were not appealed.

In view of the foregoing, the Board concludes that although Applicant's argument is not a frivolous one, it raises practical and conceptual difficulties that warrant caution and adherence to the traditional approach of reviewing a case on appeal without comparing it to other decisions by the same Administrative Judge. Accordingly, the Board need not consider whether the Judge's decision in this case can be reconciled with earlier decisions by the Judge in other Guideline F cases.

2. Whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions. On appeal, Applicant does not dispute the Administrative Judge's findings that: (a) Applicant owed the debts alleged in the SOR; and (b) Applicant did not satisfy those debts. However, Applicant contends the Judge should have concluded those debts were mitigated by application of Financial Considerations Mitigating Condition 3⁽³⁾ and 6.⁽⁴⁾ With respect to Financial Considerations Mitigating Condition 3, Applicant argues that the Administrative Judge properly concluded that she satisfied Mitigating Condition 3, but the Judge failed to give sufficient weight to it. With respect to Financial Considerations Mitigating Condition 6, Applicant argues the Judge erred by not applying it to her case. We will address

these claims in turn.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7 (discussing various considerations that must be taken into account by an adjudicator when applying Adjudicative Guidelines disqualifying or mitigating conditions). Accordingly, the Administrative Judge's conclusion that Financial Considerations Mitigating Condition 3 was applicable to Applicant's case did not compel the Judge to make a favorable security clearance decision. Even if Applicant's financial difficulties initially arose due to circumstances outside her control, the Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with her financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4 ("Even if an applicant gets into financial difficulties because of circumstances beyond the applicant's control, the Judge must consider whether the applicant dealt with his or her financial difficulties in a reasonable manner."); ISCR Case No. 99-0012 (December 1, 1999) at p. 4 ("It was not arbitrary or capricious for the Judge to consider whether Applicant made timely, reasonable efforts to deal with the financial setbacks that resulted from conditions beyond his control."). In this case, it was not arbitrary or capricious for the Judge to consider Applicant's failure to resolve the debts after the conditions which had contributed to them becoming delinquent had passed and her financial situation had improved.

As to Financial Considerations Mitigating Condition 6, the question before the Administrative Judge was whether the record evidence showed Applicant had made a good-faith effort to address or otherwise resolve the debts covered by the SOR. The Board has discussed what constitutes a "good-faith" effort under Financial Considerations Mitigating Condition 6:

"In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' ISCR Case No. 99-0201 (October 12, 1999) at p. 4 (discussing concept of good-faith in connection with another provision of the Adjudicative Guidelines). Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6. [Footnote 12]" ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6.

In footnote 12 of that decision, the Board stated the following: "For example, a person who decides not to honor his or her debts may be able to avoid paying those debts until they are legally uncollectible because the statute of limitations has run. Reliance on the running of a statute of limitations would be a legally permissible course of action. However, it would not demonstrate a good-faith effort to resolve one's debts that would fall under the meaning of Financial Considerations Mitigating Condition 6."⁽⁵⁾ Given the record evidence in this case, it was not arbitrary or capricious for the Judge to decline to apply Financial Considerations Mitigating Condition 6.

3. Whether the Board should conclude that the record evidence as a whole warrants a favorable security clearance decision. Applicant contends that the Board should render a favorable security clearance decision based on its review of the record evidence as a whole. As noted earlier in this decision, the Board does not review security clearance decisions *de novo*. Under the Directive, the Board is limited to considering whether a party's claims of factual or legal error by an Administrative Judge have merit. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Given the limits of the Board's appellate authority, we decline Applicant's invitation to make a *de novo* decision as to her security eligibility.

Applicant asserts that she has always been forthcoming with the federal government about her financial difficulties. Applicant's honesty and candor with the government about her financial situation did not preclude the Administrative Judge from considering the security significance of Applicant's history of financial difficulties. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 6 ("Applicant's candor with the government about his history of financial difficulties did not preclude the Judge from considering the security implications of the overall facts and circumstances of Applicant's history of financial difficulties.").

The favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

The Administrative Judge made findings of fact and reached conclusions about Applicant's history of financial difficulties that reflect a plausible, legally permissible interpretation of the record evidence. Given the Judge's findings and conclusions, he had a rational basis to conclude Applicant's overall history of financial difficulties raised security concerns under Guideline F, and to conclude that Applicant had failed to present sufficient evidence to overcome those security concerns.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. Recently, the Board elaborated on the precedential value of Hearing Office decisions. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp.3-5.
2. *See* ISCR Case No. 00-0250 (February 13, 2001) at p. 4 (Board noting "there must be some reasonable degree of administrative finality in DOHA adjudications").
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)" (Directive, Enclosure 2, E2.A6.1.3.3)
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." (Directive, Enclosure 2, E2.A6.1.3.6)
5. *See also* ISCR Case No. 01-09691 (March 27, 2003) at p. 3 ("[E]ven if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's

conduct in incurring and failing to satisfy the debt in a timely manner."); ISCR Case No. 98-0349 (February 3, 1999) at pp. 2-3 (even though an applicant's delinquent debts were not legally collectible because of the statute of limitations, that fact did not preclude the Administrative Judge from considering the applicant's failure to resolve the delinquent debts before the statute of limitations ran). *Cf.* ISCR Case No. 01-04425 (May 17, 2002) at pp. 3-4 (it was not arbitrary or capricious for Administrative Judge to draw adverse conclusions under Guideline F when the record evidence showed the applicant chose to not pay her delinquent debts and waited until her creditors ceased trying to collect those delinquent debts and they were eventually dropped from her credit report).