

DATE: February 19, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-27371

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John R. Erck issued a decision, dated August 12, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge reached favorable conclusions that are not supported by the record evidence; and (2) whether the Administrative Judge erred in his application of the Adjudicative Guidelines. 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 March 4, 2002. The SOR was based on Guideline F (Financial Considerations). A hearing was held on July 8, 2002. The Administrative Judge issued a written decision, dated August 12, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from the Judge's favorable 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 reached favorable conclusions that are not supported by the record evidence.

Department Counsel contends the Administrative Judge's decision is arbitrary and capricious because he reached favorable conclusions about Applicant's history of financial difficulties that are not supported by the record evidence.

The Board's appellate authority is constrained by the provisions of Directive, Additional Procedural Guidance, Item E3.1.32. When an Administrative Judge's conclusions are challenged, the question before the Board is not whether the Board agrees with the Judge's conclusions, but rather whether the Judge's challenged conclusions "are arbitrary, capricious, or contrary to law." Directive, Additional Procedural Guidance, Item E3.1.32.3.

Department Counsel's appeal arguments present a plausible interpretation of the record evidence in this case that runs contrary to the Administrative Judge's interpretation of the evidence. However, the ability of an appealing party to argue for an alternate interpretation of the record evidence, standing alone, is not enough to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. Considering the record evidence as a whole, the Board concludes that the Judge's conclusions reflect a legally permissible interpretation of the record evidence in this case and do not warrant reversal.

2. Whether the Administrative Judge erred in his application of the Adjudicative Guidelines. The Administrative Judge applied Financial Considerations Mitigating Condition 3⁽²⁾ and Financial Considerations Mitigating Condition 6.⁽³⁾ Department Counsel contends the Judge's application of those mitigating conditions reflects "a piecemeal analysis of the facts." Although Department Counsel's arguments in support of this contention are plausible, they fall short of demonstrating the Judge's application of Financial Considerations Mitigating Conditions 3 and 6 was arbitrary, capricious, or contrary to law.

Under the Directive, an Administrative Judge must consider and apply pertinent provisions of the Adjudicative Guidelines. *See* Directive, Section 6.3; Enclosure 2, Item E2.1; Additional Procedural Guidance, Item E3.1.25. But,

"nothing in the Adjudicative Guidelines specifies how an adjudicator is to decide what mitigating conditions may be applied in a given case to mitigate the negative security implications of disqualifying conditions applicable to the facts and circumstances of an applicant's case. However, the absence of such a specific rule does not leave an adjudicator unfettered discretion in applying the Adjudicative Guidelines for or against clearance. Rather, an adjudicator must:

- (a) evaluate the possible applicability of disqualifying and mitigating conditions under the pertinent Adjudicative Guidelines according to their plain meaning;
- (b) assess the applicability of particular disqualifying and mitigating conditions under the pertinent Adjudicative Guidelines in terms of other relevant provisions of the Directive;
- (c) apply provisions of the Adjudicative Guidelines in a manner that is consistent with the adjudicator's obligation to render an overall commonsense decision based on consideration of an applicant's security eligibility under the whole person concept; and
- (d) construe and apply provisions of the Adjudicative Guidelines in a manner consonant with the 'clearly consistent with the national interest' standard.

Accordingly, the application of Adjudicative Guidelines for or against clearance is not reducible to a simple formula, but rather requires an adjudicator to exercise sound judgment within the parameters set by the Directive when deciding which Adjudicative Guidelines for or against clearance are applicable to a given case." ISCR Case No. 01-20906 (January 10, 2003) at pp. 6-7 (footnotes omitted)

The same reasoning is applicable to Department Counsel's arguments in this case. The Judge's application of the Adjudicative Guidelines was, in light of the record evidence as a whole, within the bounds of his discretion and not arbitrary, capricious, or contrary to law.⁽⁴⁾

In challenging the Administrative Judge's reasoning, Department Counsel also contends that "Guideline F of the Directive does not distinguish between debts which are frivolous and debts which are for daily living expenses." Strictly speaking, Department Counsel is correct. It would have been arbitrary and capricious for the Judge to conclude that nonfrivolous debts can never raise security concerns under Guideline F. However, that is not what the Judge did in this case. Rather, the Judge took into account the nature of Applicant's debts as part of his analysis of the case. The Board need not agree with the Judge's weighing of the evidence concerning the nature of Applicant's debts to conclude his analysis on this point was not arbitrary, capricious, or contrary to law in light of the specific record evidence in this case. *See* Directive, Section 6.3; Enclosure 2, Item E2.2.1.

On appeal, Department Counsel cites some Board decisions in support of its appeal arguments. Department Counsel's reliance on those decisions is not frivolous. However, the Board has considered the applicability of those prior decisions to this appeal and concludes they are not dispositive because they can be distinguished on their facts.

Conclusion

Department Counsel has failed to meet its burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's favorable 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. Applicant's reply brief contains some factual assertions about her case that go beyond the record evidence below. Because such factual assertions constitute new evidence, the Board cannot consider them when deciding this appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

2. "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)."

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

4. In challenging the Administrative Judge's application of Financial Considerations Mitigating Condition 3, Department Counsel focuses on the evidence pertaining to Applicant's 1995 divorce and its aftermath. The Administrative Judge did not specifically refer to the record evidence about Applicant's more recent efforts (with her siblings) to care for her terminally ill mother when he applied Financial Considerations Mitigating Condition 3. However, given the rebuttable presumption that a Judge considered all the record evidence, the Board will not assume the Judge failed to take that evidence into account when deciding to apply Financial Considerations Mitigating Condition 3.