

DATE: August 5, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-27082

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the May 7, 2003 decision of Administrative Judge James A. Young, 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 findings and conclusions under Guideline F (Financial Considerations) are erroneous; (2) whether the Administrative Judge erred by not concluding Applicant's 1999 firearm-related incident was mitigated under Guideline E; and (3) whether the Administrative Judge erred by finding Applicant falsified a security clearance application in December 1998. 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 January 16, 2003. The SOR was based on Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), Guideline F (Financial Considerations), and Guideline E (Personal Conduct).

Applicant submitted an answer to the SOR, in which he stated he wanted a decision made without a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant. After Applicant's response to the FORM was received, the case was assigned to the Administrative Judge for determination.

The Administrative Judge issued a written decision, dated May 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 Administrative Judge's adverse security clearance 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 findings and conclusions under Guideline F (Financial Considerations) are erroneous. Applicant makes the following claims of error with respect to the Administrative Judge's findings and conclusions under Guideline F:

- (a) the Judge erred by holding Applicant's 1992 bankruptcy against him;
- (b) the Judge erred by finding that Applicant's student loan was not discharged in his 1992 bankruptcy;
- (c) the Judge erred by finding Applicant was responsible for the debts covered by SOR subparagraphs 3.d through 3.f; and
- (c) the Judge erred by concluding Applicant is responsible for a debt involving overcharges to a company credit card.

For the reasons that follow, the Board concludes Applicant's first, third, and fourth claims of error lack merit, and that his second claim of error does not demonstrate harmful error by the Judge.

Although filing for bankruptcy was a legally available option for Applicant to exercise in 1992, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to take into account Applicant's 1992 bankruptcy when evaluating Applicant's conduct and circumstances under Guideline F. The government is not precluded from considering the negative security implications of an applicant's overall history of financial difficulties merely because the applicant exercises the right to seek a discharge of debts in bankruptcy. *See ISCR Case No. 97-0016 (December 31, 1997) at p. 4.* Moreover, the Judge was not basing his adverse conclusions under Guideline F solely on Applicant's 1992 bankruptcy. Rather, the Judge noted that the discharge of debts by the 1992 bankruptcy did not end Applicant's history of financial difficulties and that Applicant still had unresolved delinquent debts as of the close of the record evidence. The Judge's analysis on this aspect of the case was not arbitrary, capricious, or contrary to law.

While the Administrative Judge erred by finding that Applicant did not ask for the student loan to be discharged in bankruptcy, given the record evidence in this case Applicant has failed to demonstrate the Judge erred by concluding Applicant's student loan was not discharged in bankruptcy.⁽²⁾

There is conflicting record evidence as to whether Applicant owes the debts alleged in SOR subparagraphs 3.d through 3.f. Considering the record evidence as a whole, there is sufficient record evidence to sustain the Administrative Judge's findings that Applicant owes those debts. *See ISCR Case No. 98-0761 (December 27, 1999) at p. 2 (Administrative Judge's findings of fact must be based on more than a scintilla of evidence, but can be based on less than the preponderance of the evidence).*

The Board affirms the Administrative Judge's finding that Applicant is responsible for a debt involving overcharges to a

company credit card (SOR subparagraph 3.g). There is ample record evidence for that finding. Applicant correctly notes that his former employer dropped its civil suit against him to recover the amount of money he improperly charged to the company credit card. However, that action by Applicant's former employer did not preclude the Judge from considering the record evidence of Applicant's improper use of the company credit card to make personal purchases and his failure to pay the credit card company when the bill came due. Applicant's misuse of the company credit card and his failure to pay for the purchases he improperly made with it were not extenuated or mitigated by the fact that his former employer decided not to press ahead with its civil suit against him. Applicant's argument to the contrary lacks merit.

2. Whether the Administrative Judge erred by not concluding Applicant's 1999 firearm-related incident was mitigated under Guideline E. Applicant does not challenge the Administrative Judge's findings of fact about a 1999 incident involving a firearm. However, Applicant contends the Judge should have concluded the incident was mitigated under Guideline E.

The Administrative Judge concluded the 1999 incident was mitigated under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct), but that it was not mitigated under Guideline E (Personal Conduct) with respect to one aspect of that incident --- that is, Applicant deliberately provided false and misleading information to the state police when he was arrested by denying that he had a gun and denying that a gun had been fired. The Judge concluded that Applicant's false statements to the state police on that occasion were part of a pattern of dishonesty by Applicant that falls under the scope of Guideline E. Given the record evidence in this case, the Judge's reasoning is not arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application in December 1998. The Administrative Judge found that Applicant falsified a security clearance application in December 1998 by failing to disclose that he had various delinquent debts. On appeal, Applicant argues he did not falsify or misrepresent his financial situation when he completed the security clearance application.

Given the record evidence in this case, the Administrative Judge could have accepted or rejected Applicant's denials of any intent to falsify the security clearance application. The Judge elected to reject Applicant's denials. Considering the record evidence as a whole, the Board does not have to agree with the specifics of the Judge's reasoning to conclude it was not arbitrary, capricious, or contrary to law for him to reject Applicant's denials. Accordingly, the Judge's finding of falsification is sustainable.

Conclusion

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline J (SOR subparagraphs 1.a through 1.e), Guideline G (SOR subparagraphs 2.a through 2.c), and subparagraph 3.c. Those formal findings are not at issue on appeal.

2. Student loans may be discharged in bankruptcy under some circumstances. *See generally* Andrew M. Campbell, "Bankruptcy discharge of student loan on grounds of undue hardship under §523(a)(8)(B) of Bankruptcy Code of 1978," 144 A.L.R. Fed. 1 (1998). However, there is no record evidence that the bankruptcy court addressed or adjudicated Applicant's eligibility for having his student loan discharged in bankruptcy.