

DATE: March 28, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05585

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Michael H. Leonard issued a decision, dated December 11, 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 issue: whether the Administrative Judge's adverse 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 May 9, 2002. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). A hearing was held on July 30, 2002. The Administrative Judge issued a written decision, dated December 11, 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 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 Issue⁽¹⁾

The Administrative Judge found that Applicant and his spouse owe more than \$90,000 in unpaid federal income taxes for several recent tax years, and concluded that the unpaid tax debt raised security concerns under Guideline F that were not extenuated or mitigated. On appeal, Applicant does not challenge the Judge's factual findings about the unpaid federal income tax debt. Rather, Applicant argues: (1) he has acknowledged responsibility for the tax debt and has undertaken efforts to resolve it; (2) he does not have a history of not meeting financial obligations, or an inability or unwillingness to satisfy his debts; (3) the Judge's favorable findings and conclusions under Guideline E reflect favorably on Applicant's character and conduct under Guideline F; (4) the Judge made favorable findings and reached favorable conclusions under Guideline J; (5) the Judge entered formal findings in favor of Applicant with respect to five SOR subparagraphs under Guideline F; and (6) Applicant offers a proposed plan of action involving transfer of final decision-making authority in his company from him to another person pending a final ruling on Applicant's security clearance case. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

(1) The Administrative Judge found that Applicant acknowledged responsibility for the federal tax debt and had undertaken efforts to resolve it. Although Applicant's acknowledgment of responsibility for the tax debt reflects favorably on his judgment and reliability, it did not compel the Judge to make a favorable security clearance decision. The Judge acted reasonably by concluding that Applicant's acceptance of responsibility for the tax debt did not outweigh the negative security significance of the fact that the tax debt was still unresolved. *See, e.g.*, ISCR Case No. 00-0365 (May 16, 2001) at p. 3 (a promise to take remedial steps in the future concerning unresolved debts does not constitute evidence of reform and rehabilitation that requires a Judge to make a favorable security clearance decision).

(2) Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to apply Financial Considerations Disqualifying Conditions 1⁽²⁾ and 3.⁽³⁾ The Judge's findings about Applicant's unresolved federal tax debt provide a rational basis for the Judge's application of these two disqualifying conditions.

(3) The Administrative Judge's favorable findings and conclusions under Guideline E did not compel the Judge to enter favorable findings and conclusions under Guideline F. The Judge's finding that Applicant had not engaged in falsification (as alleged under SOR paragraph 2) did not preclude the Judge from considering the significance of the record evidence concerning Applicant's unresolved tax debt under Guideline F. A Judge's finding that an applicant has been truthful and honest with the federal government about his or her conduct and circumstances does not preclude the Judge from considering the security significance of an applicant's conduct and circumstances. Even an honest applicant may pose a security risk based on conduct and circumstances unrelated to the applicant's truthfulness and veracity.

(4) The Administrative Judge's favorable findings and conclusions under Guideline J did not compel the Judge to enter favorable findings and conclusions under Guideline F. Paragraph 3 of the SOR alleged that Applicant's alleged falsifications (under SOR paragraph 2) constituted a violation of 18 U.S.C. 1001, a federal felony. Accordingly, SOR paragraph 3 depended factually and logically on the Judge's findings and conclusions under SOR paragraph 2. Once the Judge found that Applicant did not engage in falsification (as alleged under SOR paragraph 2), the only reasonable option for the Judge was to enter a formal finding in favor of Applicant with respect to SOR paragraph 3. For the reasons discussed in the preceding paragraph of this decision, the Judge's favorable findings and conclusions under Guideline J did not compel the Judge to enter favorable findings and conclusions under Guideline F.

(5) Applicant correctly notes that the Administrative Judge entered favorable formal findings with respect to five SOR subparagraphs under Guideline F. However, such favorable formal findings did not render the Judge's adverse security clearance decision arbitrary, capricious, or contrary to law. The Judge's findings and conclusions with respect to the six

other SOR subparagraphs under Guideline F provide a sufficient basis for the Judge's adverse security clearance decision.

(6) The Board's jurisdiction and authority are limited by the provisions of the Directive. The Directive does not give the Board general or supervisory jurisdiction over the industrial security program. Accordingly, the Board has no jurisdiction or authority to consider Applicant's proposed plan of action involving transfer of final decision-making authority in his company from him to another person pending a final ruling on Applicant's security clearance case. Furthermore, Applicant's proposed plan of action raises no challenge to the Judge's findings or conclusions under Guideline F or the Judge's adverse security clearance decision. Whatever the merits of Applicant's proposed plan of action, it does not demonstrate any factual or legal error by the Judge.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, 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.d, 1.e, 1.f, 1.g, 1.k (Guideline F), SOR paragraph 2 (Guideline E) and paragraph 3 (Guideline J). Those favorable formal findings are not at issue on appeal.

2. "A history of not meeting financial obligations."

3. "Inability or unwillingness to satisfy debts."