

DATE: February 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06806

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Joseph Testan issued a decision dated November 4, 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.

The Board has jurisdiction 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 of fact regarding Applicant's debts are reasonable in light of the contrary record evidence; 2. Whether SOR paragraph 1.j regarding Applicant's 1998 bankruptcy filing should have been found mitigated; and 3. Whether it is arbitrary and capricious for the Judge to conclude Applicant's failure to pay unsecured creditors by liquidating assets is disqualifying. For the reasons that follow, the Board affirms the Judge's adverse decision.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) dated April 1, 2002, to Applicant. The SOR was based on Criterion F (Financial Considerations). Applicant did not request a hearing. Department Counsel presented a File of Relevant Material (FORM) dated June 21, 2002. Applicant submitted a response to the FORM dated July 25, 2002. The Administrative Judge issued an unfavorable decision dated November 4, 2002. Applicant appealed the Judge's unfavorable 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 findings of fact regarding Applicant's debts are reasonable in light of the contrary record evidence. Applicant asserts that his accounts which the Judge found to be unresolved debts have been in fact resolved even though he had not paid those accounts. Applicant reasons that he is no longer responsible for those debts since they have been discharged because: (a) with respect to SOR paragraphs 1.a through 1.e, his accounts have been discharged under provisions of the Uniform Commercial Code, as codified by applicable state law; and (b) with respect to the debts covered by SOR paragraphs 1.f and 1.g, his creditors have failed to contact him about paying them, and they have failed to update credit reports to show those accounts are still unresolved. Applicant's argument fails to show the Judge's findings about the debts covered by SOR paragraphs 1.a through 1.g are erroneous.

As a preliminary matter, the Board notes that the provisions of the Uniform Commercial Code cited by Applicant pertain to the law of negotiable instruments, not debts. And in any event, Applicant's argument is based on a misunderstanding of the security significance of his financial conduct. An applicant's failure to pay lawfully incurred debts is a proper subject for consideration under Guideline F. The fact that a creditor writes off a debt as uncollectible, for accounting or tax purposes, does not change the security significance of Applicant's failure to satisfy that debt. The accounting practices of Applicant's creditors did not preclude the Administrative Judge from considering the security significance of the record evidence of Applicant's failure to satisfy various debts that he had incurred. Applicant's arguments fail to demonstrate the Judge erred by finding that Applicant owed various debts and failed to satisfy them.

Applicant also argues the Administrative Judge's findings about the debts covered by SOR paragraphs 1.h and 1.i are erroneous because he has made good faith efforts to address and pay those two debts. In the findings of fact section of the decision below, the Judge found that Applicant had shown he had negotiated settlements with his creditors concerning the debts covered by SOR paragraphs 1.h and 1.i. In the conclusion section of the decision below, the Judge acknowledges Applicant's negotiated settlements with some of his creditors. Although the Judge's discussion is not a model of clarity, reading it in light of the decision as a whole, the Board concludes the Judge was reaching favorable conclusions under Guideline F with respect to the debts covered by SOR paragraph 1.h and 1.i (in contrast to his explicitly negative conclusions about the rest of Applicant's debts). Therefore, the Board concludes Applicant fails to demonstrate any error by the Judge on this aspect of the case.

2. Whether SOR paragraph 1.j regarding Applicant's 1998 bankruptcy filing should have been found mitigated. Applicant argues on appeal that his 1998 bankruptcy filing (SOR paragraph 1.j) should have been found mitigated. Applicant's argument cannot be addressed without noting an error by the Judge. Although the Judge made findings of fact concerning SOR paragraph 1.j, he reached no specific conclusion about that paragraph. The Board therefore cannot address Applicant's argument. However, even if for the purposes of deciding this appeal we assume that the Judge's decision erroneously found against Applicant on SOR paragraph 1.j, the error would be harmless. Applicant's unresolved debts are sufficient reason to sustain the Judge's adverse decision.

3. Whether it is arbitrary and capricious for the Judge to conclude Applicant's failure to pay unsecured creditors by liquidating assets is disqualifying. Applicant argues that it is arbitrary and capricious for the Administrative Judge to conclude that Applicant's failure to pay unsecured creditors is disqualifying. Applicant argues that effectively he is being forced to treat these debts as secured debts, which is not what he bargained for. Applicant's argument is unpersuasive. The nature of a decision in this case has to do with Applicant's eligibility for a security clearance. Contrary to Applicant's argument, the Administrative Judge is not demanding that Applicant make certain choices regarding his economic situation. Rather he is making a determination as to Applicant's suitability to hold a security

clearance based on his evaluation of Applicant's past conduct and present circumstances. Applicant's failure to pay his just debts when he had assets available to apply toward debt retirement is pertinent disqualifying information for the Judge to consider under Guideline F. Applicant fails to demonstrate error.

Conclusion

Applicant has failed to demonstrate error which warrants remand or reversal. The Judge's November 4, 2002 decision is affirmed.

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