

DATE: April 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20403

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Jeffrey W. Bruce, Esq.

Applicant has appealed the December 10, 2002 decision of Administrative Judge Joseph Testan, 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 generally contends that the Administrative Judge's findings of fact are not supported by substantial and competent record evidence, and that his findings and decision are arbitrary, capricious, or contrary to law. Specifically, Applicant's appeal presents the following issues: (1) whether the Administrative Judge gave undue weight to Applicant's 1995 financial misconduct; (2) whether the Administrative Judge failed to give due weight to Applicant's efforts to address and resolve her unsatisfied debts; and (3) whether Applicant's case should be remanded to permit her an opportunity to supplement the record evidence. 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 September 12, 2002. The SOR was based on Guideline F (Financial Considerations). A hearing was held on November 13, 2002. The Administrative Judge issued a written decision, dated December 10, 2002, in which he concluded it is not clearly consistent with the national interest to grant 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 gave undue weight to Applicant's 1995 financial misconduct. On appeal, Applicant does not challenge the Administrative Judge's finding that in 1995 she used her position in an accounting department of a company to fraudulently post \$500 to \$800 in credits to her personal credit card account. However, Applicant contends the Judge "grossly overstated the significance and effect of this incident" because: (a) it was "an isolated employment incident"; (b) there is no record evidence that Applicant has a history of dishonesty; (c) Applicant "promptly admitted her wrongful actions when confronted about the transaction and made restitution"; (d) no criminal charges were filed against Applicant; and (e) Applicant took responsibility for her misconduct and resolved to never make the same mistake again. Applicant's arguments fail to demonstrate the Judge erred.

Applicant's conduct in 1995 was not made less serious or less dishonest by the fact that criminal charges were not brought against her, by the fact that Applicant admitted her conduct after being confronted about it, or by the fact that Applicant made later restitution. The record evidence is ambiguous as to whether Applicant made a single fraudulent posting of credits to her personal credit card account or whether she made more than one such fraudulent posting.⁽¹⁾ Regardless of whether Applicant fraudulently posted \$500 to \$800 in credits to her personal credit card account on a single occasion or through a series of smaller postings, it was not arbitrary or capricious for the Administrative Judge to conclude Applicant's conduct was deliberate, dishonest in nature, and a violation of the trust reposed in her by her then-employer. Furthermore, given the record evidence, it was not arbitrary or capricious for the Judge to draw adverse inferences about Applicant's judgment, reliability, and trustworthiness based on her testimony that at the time of her fraudulent credit card conduct (when she was 30 years of age) she did not realize her conduct was improper.

The Administrative Judge was not bound to accept at face value Applicant's statements that she had reformed and rehabilitated herself since the 1995 incident. As the trier of fact, the Judge had to consider and weigh Applicant's statements in light of his assessment of the credibility of her hearing testimony and the record evidence as a whole. Considering the record as a whole, the Judge was not compelled, as a matter of law, to conclude Applicant had successfully demonstrated reform and rehabilitation.

2. Whether the Administrative Judge failed to give due weight to Applicant's efforts to address and resolve her unsatisfied debts. The Administrative Judge found that: (i) Applicant was not indebted to the creditor for the debt alleged in SOR subparagraph 1.d; (ii) Applicant had satisfied the debts covered by SOR subparagraphs 1.e, 1.f, and 1.g; and (iii) Applicant had not satisfied the delinquent debts covered by SOR subparagraphs 1.b, 1.c, and 1.h. On appeal, Applicant: (a) disputes the Judge's finding about the amount of the debt covered by SOR subparagraph 1.c; and (b) asserts the Judge failed to give due weight to Applicant's efforts to address and resolve her unsatisfied debts.

(a) The Administrative Judge's finding concerning Applicant's responsibility for the debt covered by SOR subparagraph 1.c is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. The Judge specifically recognized that Applicant acknowledged responsibility for this debt, but disputed the amount she owed. Considering the record evidence as a whole, the Judge was not compelled, as a matter of law, to conclude that Applicant's disputing of the precise amount of this debt mitigated the fact that it is a delinquent debt that has not been satisfied by Applicant. The Judge had discretion to consider whether Applicant's conduct with respect to this debt was a reasonable, good-faith effort on her part.

(b) The Administrative Judge did not conclude Applicant's efforts to deal with her delinquent debts were sufficiently mitigating under Guideline F. Considering the record evidence as a whole, the Judge was not compelled, as a matter of law, to conclude that Applicant's efforts to deal with her delinquent debts warranted a favorable security clearance decision. As the trier of fact, the Judge had to weigh the favorable and unfavorable evidence and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Applicant's appeal arguments do not persuade the Board that the Judge weighed the record evidence in an arbitrary or capricious manner or that the Judge's analysis and adverse conclusions under Guideline F are arbitrary, capricious, or contrary to law.

3. Whether Applicant's case should be remanded to permit her an opportunity to supplement the record evidence. On appeal, asks the Board to remand the case to the Administrative Judge so that she can supplement the record by presenting evidence to show she recently has paid off the debts covered by SOR subparagraphs 1.b and 1.h. Applicant seeks relief that she is not entitled to.

Nothing in Executive Order 10865, the Directive, or general principles of due process entitles Applicant to have multiple opportunities to present evidence for consideration in her case. Absent a showing that Applicant was denied a reasonable opportunity to prepare for her hearing or denied a reasonable opportunity to present evidence on her behalf during the proceedings below, Applicant is not entitled to a remand simply to give her an opportunity to present additional evidence for consideration in her case. *See, e.g.*, ISCR Case No. 00-0429 (July 9, 2001) at p. 3 ("Absent a showing of factual or legal error that affects a party's right to present evidence in the proceedings below, a party does not have the right to have a second chance at presenting its case before an Administrative Judge."); ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (citing Supreme Court decision on the need for administrative finality to support conclusion that a party is not entitled to have the case reopened to allow the introduction of evidence that comes into existence after the close of the record). Applicant has not claimed, or made any colorable showing, that she was denied a reasonable opportunity to prepare for her hearing or denied a reasonable opportunity to present evidence on her behalf. Under the circumstances, the Board has no legitimate basis to remand the case as requested by Applicant.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. On appeal Applicant's attorney admits "[o]n a couple of occasions, [Applicant] posted credits from [her employer's]

account to her own personal credit card account"