

DATE: March 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05686

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested the case be decided on the administrative record. On December 7, 2005, after considering the record, Administrative Judge Darlene Lokey Anderson denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of financial difficulties had not been mitigated; whether the Administrative Judge erred in concluding that Applicant had falsified responses to questions in his security clearance application; and whether the Administrative Judge erred in concluding that the incident alleged in SOR paragraph 3.a was an arrest for criminal conduct.

Applicant contends the Judge should have concluded that the security concerns raised by his history of financial difficulties and criminal conduct, as well as the falsification of his security clearance application, had either not been established or were mitigated because: (1) Applicant is contesting or attempting to settle many of the debts listed in the SOR and has paid off several debts not listed in the SOR, (2) Applicant did not intend to falsify his security clearance application, (3) Applicant has never been convicted of a crime, and (4) the incident alleged in SOR paragraph 3.a was not criminal because Applicant was released at the scene of the incident and never booked. In support of the first contention, Applicant essentially reargues his case with respect to the limited evidence he presented below and presents new evidence in the form of letters showing what efforts he has taken to contest or settle his outstanding debts. The Board does not find Applicant's contentions persuasive.

The Judge obviously could not consider the new documentary evidence that Applicant submitted for the first time on appeal in making her findings. The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider Applicant's new evidence and its submission does not demonstrate error on the part of the Judge.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the financial considerations allegations had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case, the Administrative Judge found that Applicant had a history of not meeting financial obligations which ran over many years. At the time the case was submitted for decision, Applicant still had significant outstanding debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and still ongoing. Moreover, the Board has previously noted that it is reasonable to expect applicants to have documentation about efforts to satisfy specific debts. *See* ISCR Case No. 03-23511 at 2 (App. Bd. Feb. 15, 2006). The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings and conclusions about Applicant's history of indebtedness are sustainable.

Applicant's statements about his intent and state of mind when he executed his security clearance application were relevant evidence, but they were not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 at 6-7 (App. Bd. Apr. 22, 2003). As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's denial of any intent to falsify his application did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. Moreover, it was permissible for the Judge to find that the Applicant engaged in criminal conduct when reviewing the allegation under subparagraph 3.a of the SOR, even though the Applicant had not been formally charged with a criminal offense. *See, e.g.*, ISCR Case No. 02-00500 at 4 n. 2 (App. Bd. Jan. 16, 2004).

Finally, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines F, E, and J is sustainable. Thus, the Administrative Judge did not err in denying Applicant a clearance.

Order

The decision of the Administrative Judge denying Applicant a clearance is **AFFIRMED**.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic:

I agree with my colleagues' statement of the issues raised on appeal. Although Department Counsel's reply brief argues that Applicant's appeal brief only challenges the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations), that argument is not persuasive. Applicant's appeal brief reasonably can be construed as raising the appeal issues as set forth by my colleagues.

I agree with my colleagues that consideration of Applicant's proffered new evidence is precluded by Directive, Additional Procedural Guidance, Item E3.1.29. Apart from the prohibition set forth in Item E3.1.29, Applicant's effort to

supplement the record evidence on appeal runs afoul of the general legal principle that a party does not have a right to have the record reopened on appeal so that the party can continually offer further evidence for consideration in the case. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978) (discussing the need for finality in administrative proceedings, and explaining why a party cannot expect it has a right to reopen the record on appeal). Furthermore, a review of the case record shows the following: (1) Applicant was provided a copy of the File of Relevant Material (FORM) and given the opportunity to respond to the FORM, including the opportunity to present additional evidence for the Administrative Judge to consider in his case; (2) Applicant was placed on adequate notice that if he did not respond to the FORM or submit additional evidence for the Judge to consider, the decision in his case would be based solely on the evidence contained in the FORM; and (3) Applicant did not submit a response to the FORM. Applicant cannot fairly challenge the Judge's findings and conclusions based on a proffer of evidence that he did not submit in response to the FORM for the Judge's consideration.

Apart from Applicant's proffer of new evidence, his challenge to the Administrative Judge's findings and conclusions about his history of financial difficulties is based on his disagreement with

those findings and conclusions. Standing alone, an appealing party's disagreement with a Judge's findings and conclusions is not sufficient to demonstrate the Judge erred. If an appealing party's disagreement with a Judge's findings and conclusions, standing alone, were deemed to be sufficient to demonstrate error, then no Judge's decision could be affirmed whenever an appealing party expressed such a disagreement. A party's claim of factual error must be evaluated under the terms of Directive, Additional Procedural Guidance, Item E3.1.32.1,⁽¹⁾ and a party's claim of error in a Judge's conclusions must be evaluated under the terms of Directive, Additional Procedural Guidance, Item E3.1.32.3.⁽²⁾ Considered under the terms of Item E3.1.32.1, the Judge's findings of fact are sustainable in light of the record evidence as a whole. The Judge's findings of fact reflect a reasonable interpretation of the record evidence available to her. Considered under the terms of Item E3.1.32.3, the Judge's conclusions have not been shown to be arbitrary, capricious, or contrary to law. The Judge's conclusions follow rationally from her findings of fact and do not reflect reasoning that is arbitrary, capricious, or contrary to law.

Applicant's appeal brief also asks that he be given a chance to fix his financial problems. Making allowances for Applicant's *pro se* status, I construe Applicant's request as asking that he be allowed to have a security clearance so he can address his delinquent debts. There is no authority under the Directive to grant Applicant a conditional security clearance,⁽³⁾ or to defer or suspend adjudication of his security eligibility while he deals with his delinquent debts.⁽⁴⁾

For all these reasons, I agree with my colleagues that the Administrative Judge's decision should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. "[Whether or not] [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."

2. "[Whether or not] [t]he Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law."

3. *See, e.g.*, ISCR Case No. 02-32842 at 4 (App. Bd. Nov. 29, 2004).

4. *See, e.g.*, ISCR Case No. 94-1220 at 3 (App. Bd. Dec. 29, 1995).