

DATE: March 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10951

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 3, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On October 6, 2005, after considering the record, Administrative Judge Noreen A. Lynch 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: (a) whether the Administrative Judge erred in finding that Applicant failed to demonstrate that he was making satisfactory progress in fulfilling the requirements of his bankruptcy plan; (b) whether the Administrative Judge erred in finding that Applicant had refused counseling; (c) whether the Administrative Judge erred in applying mitigating conditions under Guidelines E and F; and (d) whether the Administrative Judge erred in concluding that Applicant had not mitigated security concerns under the "whole person" concept.

The dispositive findings of fact by the Administrative Judge that are relevant to this appeal are as follows:

In 1985 Applicant befriended a married, female co-worker, and between 1992 and 2002, he lent her a total of approximately \$436,250.00 at no interest. Applicant understood that he would not be repaid for some time, if ever. At times, the loan represented approximately 59 percent of his annual income. He used money from an inheritance, investments, personal accounts, a home equity loan, and other personal loans to lend money to his friend. Eventually, Applicant depleted his personal funds to give financial assistance to her. To date, Applicant has received \$1,000.00 as payment on the loans.

In 2002 Applicant's employer submitted an adverse information report detailing the loan amounts given to Applicant's friend. At that time, Applicant disclosed to his employer the loans and explained the platonic nature of the relationship with his married co-worker. He refused counseling. He admitted his spending was excessive in the period 2001-2003, and his behavior might be considered irrational to some people.

Applicant's desire to help his friends and family financially continued in 2003. He made loans to his sister and her husband. His mother and brother needed financial assistance, and Applicant provided aid to them. His mother and

brother died in late 2003. His loans and financial aid to them helped deplete his finances. In addition, the value of his investments in the stock market fell. Moreover, Applicant was renovating a second home at the same time, which he ultimately sold at a loss. His expenses exceeded his available funds. Between 2002-2004, Applicant accumulated delinquent debt to unsecured creditors totaling \$125,512.00.

On April 16, 2004, Applicant petitioned for Chapter 13 bankruptcy. The petition lists total assets of \$393,530.00 and nearly \$125,000.00 in delinquent credit card debt and personal loans. He did not include the loans made to his former co-worker. The bankruptcy court requires Applicant to obtain permission for any new debt in excess of \$500.00. Applicant's monthly payments under the Chapter 13 plan are \$2,440.00. There is no evidence in the record concerning the current status of Applicant's payments on the bankruptcy plan.

Based on these findings, the Administrative Judge concluded that Applicant's spending was excessive and beyond his means. His exorbitant loans to his co-worker and family, without expectation of repayment, depleted his finances and led to his bankruptcy. The Judge concluded that Department Counsel had satisfied Financial Considerations Disqualifying Conditions 1 ⁽¹⁾ and 3 ⁽²⁾ Further, Applicant's excessive spending and loans to his friend reveal a pattern of recurring poor judgment because he was in serious debt with depleted personal funds and did not address this problem until it resulted in a Chapter 13 bankruptcy. The Judge concluded that Department Counsel had satisfied Personal Conduct Disqualifying Condition 1 ⁽³⁾ The Judge concluded that other disqualifying conditions are inapplicable.

The Board cannot consider the portions of Applicant's brief that attempt to supplement the record with additional evidence (*e.g.*, Applicant's payments on the bankruptcy plan) or explanation. No new evidence shall be received or considered by the Appeal Board. Directive ¶ E3.1.29. However, the Board will consider Applicant's brief to the extent that it alleges errors by the Administrative Judge.

When an Administrative Judge's factual findings are challenged, the Board must determine whether the Judge's findings are supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion in light of all the contrary evidence in the same record. Directive ¶ E3.1.32.1. Applicant's claim that the Judge erred in finding that Applicant refused counseling is unpersuasive as it is supported by direct record evidence (File of Relevant material, Item 6).

The Board is not persuaded by Applicant's claim that the Administrative Judge erred in finding that there is no evidence in the record concerning the current status of Applicant's payments under the bankruptcy plan. Decision at 4. This aspect of the case is related to extenuation and mitigation. Applicant was responsible for presenting witness statements and other evidence to rebut, explain, extenuate or mitigate the government's security concerns, and had the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15. In his response to the SOR, and his response to the government's file of relevant material, Applicant had the opportunity to offer the type of additional evidence he now offers with his appeal brief. Applicant has failed to demonstrate error on the part of the Administrative Judge.

Applicant states that he accepts responsibility for his "overextended" financial situation, a situation that, as explained above, falls under the disqualifying conditions of Guidelines F and E. The remaining claims of error in Applicant's appeal essentially involve Applicant's disagreement with the Administrative Judge's application of mitigating conditions under Guidelines F and E, and the application of the "whole person" concept.

Applicant contends that his appeal is based on the fact that he accepted responsibility for his actions. He contends that his decision not to schedule the loans to his friend as a debt owed to him in the bankruptcy was made in good faith because there is now no likelihood of recovery, and he disagrees with the Administrative Judge's drawing of a negative security concern based on it. Likewise Applicant contends that the Judge erroneously concluded that his financial situation was not under control based on her misinterpretation of his statement, as late as June 2005, that he would help his friend financially in the future. Applicant disagrees with the Judge's conclusion that she was not persuaded that Applicant had substantiated his claim that the financial aid to his mother and other family members, the death of his brother and mother, the property renovation, and stock devaluation were the cause of his financial problems, rather than the loans to his friend. Finally, under the "whole person" concept, Applicant stresses that he was single and without

children and was well-compensated; therefore, he could afford to help friends and family until the downturn in stocks and loss of his stock options suddenly had a severe negative impact on his financial status. He contends that he does not engage in 'reckless spending,' drive new cars, or take expensive trips.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Administrative Judge considered all mitigating conditions under Guidelines F and E, and specifically considered Financial Considerations itigating Conditions 3-(4) and 4.-(5) She concluded that none apply. Given the record evidence before her, including Applicant's statement about his intent to continue to help his friend financially, the Judge could reasonably conclude that Applicant failed to meet his burden with respect to Mitigating Conditions 3 and 4, and that, overall, he failed to mitigate the government's security concerns. The Judge was especially troubled by: (a) Applicant's failure to reasonably balance the more than \$436,000 in loans to his friend against his own debts and expenses; and (b) Applicant's failure to demonstrate that his financial situation is under control, noting his intent to continue to help his friend financially, expressed as recently as June 2005, in light of Applicant's history of generous loans that placed him into Chapter 13 bankruptcy.

The Administrative Judge states that she considered Applicant's case from a "whole person" perspective, and described the various factors that are considered in the adjudicative process. Decision at 4. The Board's review of the Decision convinces us that the Judge considered the Adjudicative Process factors and, given the record evidence, could reasonably conclude that it was not clearly consistent with the national interest to grant or continue a security 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "A history of not meeting financial obligations" Directive ¶ E2.A6.1.2.1.
2. "Inability or unwillingness to satisfy debts" Directive ¶ E2.A6.1.2.3.
3. "Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances" Directive ¶ E2.A5.1.2.1.
4. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" Directive ¶ E2.A6.1.3.3.
5. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" Directive ¶ E2.A6.1.3.4.