

DATE: August 17, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11888

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 5, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 25, 2005, after the hearing, Administrative Judge Phillip S. Howe granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge's findings of fact that certain debts had been paid were contrary to the record evidence; whether the Judge's favorable security clearance decision was arbitrary, capricious, and contrary to law; and whether the Judge's whole-person analysis is unsustainable because the considerations

relied upon were unsupported by the record evidence and their application was arbitrary, capricious, and contrary to law. We affirm the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

The Administrative Judge made the following relevant findings of fact:

Applicant is a widower with one child. Applicant retired from the Air Force in 1995. His retirement was due, in part, to his desire to care for his wife, who was battling cancer at that time. In 1987, Applicant's wife had won a million dollar judgment based on her medical condition. Part of that money was used to help pay for her care in a nursing home. Applicant's wife also used part of the money for a house and a car that she bequeathed to her parents. At the time of her death in 1997, the judgment fund had been reduced to \$200,000, which Applicant's wife bequeathed to her parents. Applicant sued to take against the will, but received only \$30,000 in cash and \$7,000 in securities.

Applicant began having financial difficulties in 1995. He began looking for work when his wife died. He did not find steady, well-paid employment until 2002. He filed for bankruptcy in July 2003, but was not satisfied with the amount of the monthly payment required of him. The bankruptcy was dismissed, and Applicant filed for bankruptcy again in July

2004. Applicant began making the required monthly payment of \$2,504 to the bankruptcy trustee and continued to do so as of the date of the hearing.

At the time of the hearing, Applicant had no credit cards and was paying his current debts in a timely manner. Applicant owes two debts totaling over \$7,300 for state income tax which he continues to dispute. Some of Applicant's remaining debts were medical in nature. He had expected at least one of those to be paid from his wife's estate, but it was not. He paid that debt, a total of \$745, in July and August 2005. He paid one medical debt of \$77 on July 1, 2005 and made one payment of \$500 toward another medical debt in September 2005. One medical debt of \$642 remains unpaid. On July 1, 2005, Applicant paid another debt of \$121, although it was listed in his bankruptcy petition. Applicant claimed to have paid a debt of \$143, but had no proof. Debts of \$394 and \$51 remain unpaid, and Applicant disputes a debt of \$187.

Discussion

The Administrative Judge's findings of fact will be discussed along with his ultimate conclusions.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency. . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel argues that the Administrative Judge's findings of fact that certain debts had been paid were contrary to the record evidence. That argument is not persuasive. Applicant testified that he had taken steps to reduce his indebtedness and was continuing to do so. When given extra time to provide documentation, Applicant submitted some evidence to support his testimony. The Judge accepted Applicant's testimony and additional evidence. The factual errors of the Judge pertaining to two minor debts are too insubstantial to warrant overturning the Judge. In accordance with the Directive, the Board defers to the Judge's credibility determinations in this case. *See* Directive ¶ E3.1.32.1.

Department Counsel next argues that the Administrative Judge's favorable security clearance decision was arbitrary, capricious, and contrary to law. Specifically, Department Counsel restates his argument regarding the Judge's findings of fact discussed above and contends that the Judge erred in applying Financial Considerations Mitigating Conditions 1 (1) and 6. (2) That argument is not persuasive. Applicant testified that he is paying his current obligations in a timely manner, and he presented testimony in mitigation of his past financial difficulties. It was not arbitrary, capricious, or contrary to law for the Judge to give Applicant some credit for that mitigating testimony. The Judge believed that Applicant had taken significant steps to improve his financial situation and was making payments under his bankruptcy plan. Applicant was not required, as a matter of law, to establish that he had completely paid off his indebtedness. Department Counsel has not shown that the Judge's favorable decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 04-09684 at 2-3 (App. Bd. July 6, 2006).

Finally, Department Counsel argues that the Judge's whole-person analysis is unsustainable because the considerations relied on were unsupported by the record evidence and their application was arbitrary, capricious, and contrary to law. The discussion above applies to this argument as well. Department Counsel is essentially arguing that the record evidence shows that Applicant was not as diligent about dealing with his financial problems as he could have been. However, the unfavorable record evidence cited by Department Counsel is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. Department Counsel's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. In this case, Applicant had filed

for bankruptcy to settle debts which had accumulated for reasons beyond his control. Apart from unpaid state income tax obligations which he disputes, Applicant's outstanding debts are minor in amount, and there is evidence he initiated a good-faith effort to settle the remaining debts. Also he demonstrated a substantial improvement in his financial position. The Board need not agree with the Judge's decision under Guideline F to conclude that it is sustainable.

Order

The Administrative Judge's favorable security clearance decision is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. "The behavior was not recent" Directive ¶ E2.A6.1.3.

2. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" Directive ¶ E2.A6.1.3.6.