

DATE: March 9, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17150

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Richard S. DeBro, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 8, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On September 7, 2005, after the hearing, Administrative Judge Joseph Testan 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 in concluding the government had produced sufficient evidence to support a *prima facie* case with respect to certain allegations under Guideline F; whether the Administrative Judge erred in concluding that Applicant had falsified two of the responses to questions in his security clearance application; and whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of financial difficulties and his criminal conduct had not been mitigated.

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) the Administrative Judge found that most of Applicant's debts had been paid off, discharged in bankruptcy, or were not established by the government's evidence, (2) Applicant did not intend to falsify his security clearance application, (3) Applicant has never been convicted of a crime, and (4) Applicant has had a clearance for many years with no security violations or compromise of classified information. The Board does not find Applicant's contentions persuasive.

The record indicates that the Administrative Judge considered each paragraph of the SOR, and made some findings that were favorable to the Applicant, and others that were unfavorable to the Applicant. Those findings 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. The Judge's conclusions that Applicant falsified two responses to the security clearance application are also supportable given the record evidence and giving due deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

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, it was not arbitrary or capricious for the Judge to it consider such factors as: (a) the length of Applicant's history of financial difficulties, (b) the extent and nature of his indebtedness, (c) the extent and effectiveness of his efforts to deal with that indebtedness, (d) the resolution of indebtedness subsequent to the invocation of the security clearance process, (e) the presence of some unpaid debts, and (f) the presence of a prior discharge in bankruptcy, in reaching his adverse security clearance decision. The Judge found in Applicant's favor with respect to most of the individual factual allegations under Guideline F. However, given the record evidence, the Judge was not required to conclude, as a matter of law, that Applicant's history of financial difficulties was fully mitigated. The Judge considered the possible application of relevant mitigating conditions and "whole person" factors, articulated a sustainable rationale for not applying them in this case, and explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns.

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 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).

Applicant's argument that he has held a security clearance for many years without any problems does not demonstrate the Judge erred. The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Applicant's overall history of financial difficulties and his falsification of a security clearance application provide a sufficient rational basis for the Judge's unfavorable security clearance decision.

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 him, the Judge's ultimate unfavorable clearance decision under Guidelines F, J, and E 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board