

DATE: October 26, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20327

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

E. Rick Watrous, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 20, 2005, DOHA issued a statement of reasons (SOR) 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 March 31, 2006, after the hearing, Administrative Judge Roger C. Wesley denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant contends that the Administrative Judge made decisions that were arbitrary, capricious, or contrary to law regarding: (1) whether Applicant established that several SOR debts were duplicated by other SOR debts; (2) whether the Judge made a legal error by considering a non-SOR delinquent debt; and (3) whether Applicant established: (a) that he acted in good faith in the resolution of several debts, and (b) that many of the SOR debts had lapsed. Applicant also requests that the case be remanded to allow consideration of additional evidence pertaining to his debts. For the reasons that follow, the Board affirms the decision of the Judge to deny Applicant's clearance.

1. Whether Applicant established that several SOR debts were duplications of other SOR debts.

In the SOR, DOHA alleged Applicant had thirteen delinquent debts, and the Judge found against Applicant on nine SOR debts, involving six different creditors. The Judge found for Applicant in SOR ¶ 1.k (amount \$10,553--creditor "PC"). This favorable finding was based on PC's acknowledgment of satisfaction of judgment. The acknowledgment noted PC was assignee of creditor, "CH." The acknowledgment did not list an account number or amount, or even the date of the judgment. The Judge found against Applicant on the SOR debts in ¶¶ 1.f (amount \$6,476--creditor CH) and 1.h (amount \$8,863--creditor CH). Applicant asserted that the SOR debts in ¶¶ 1.f and 1.h were duplications of the SOR debt in ¶ 1.k, and therefore the satisfaction of PC resulted in the satisfaction of the two CH debts. The Judge discussed the duplication issue and decided there was insufficient evidence to establish the CH debt liquidated by PC's judgment was the same as the CH debts listed in SOR ¶¶ 1.f and 1.h. Decision at 6.

The Judge found against Applicant in SOR ¶ 1.b (amount \$3,043--creditor CI), ¶ 1.d (amount \$1,272--creditor CI), ¶ 1.g (amount \$3,827--creditor CI), and ¶ 1.i (amount \$4,435--creditor M). Applicant claims all three of CI's debts are actually one debt duplicated three times. Additionally, he said that creditor M, is an assignee for collection on behalf of

creditor CI. Applicant testified at his hearing that he had no knowledge of these three debts owed to CI.

Applicant's statements about his financial situation were relevant information that the Judge had to consider in making his findings of fact and reaching his conclusions about Applicant's security eligibility. The Judge, however, was not legally required to accept Applicant's statements at face value. "Rather, the Judge had to consider Applicant's statements in light of the record evidence as a whole. Furthermore, it was legally permissible for the Judge to take into account Applicant's failure to provide current documentation to corroborate [his] financial situation." ISCR Case No. 02-22163 at 4 (App. Bd. Mar. 12, 2004) (citation omitted).

The fact that Applicant can argue for an alternative interpretation of the evidence is alone not sufficient to demonstrate error. *See* DISCR Case No. 92-0390 at 3 (App. Bd. June 16, 1993). *Cf. American Textile Mfr. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (possibility of drawing two inconsistent conclusions from evidence does not mean agency's finding and conclusions are not supported by the substantial evidence). A Judge "has broad latitude and discretion in writing a decision to decide an applicant's case" and the "Board does not have to agree with the Administrative Judge's findings" to affirm them. ISCR Case No. 03-07075 at 5 (App. Bd. Dec. 2, 2005).

The arguments challenging the Administrative Judge's findings of fact are not persuasive. "The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In evaluating the Judge's finding, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant's credit report was sufficient to establish the government's prima facie case that Applicant had nine SOR delinquent debts that are of security concern. His credit report contained insufficient evidence, however, to support a conclusion that any of the nine SOR debts are duplicated. The amounts of the debts were all different. They were separately listed on the credit report. All debts had different origination dates. The two CI debts in SOR ¶¶ 1.b and 1.d, however, have the same account number. Nevertheless, the Judge is not required as a matter of law to conclude that SOR ¶¶ 1.b and 1.d represent the same debt because the amounts and origination dates are different.

The findings which Applicant complains about are permissible characterizations of the record evidence on the part of the Administrative Judge. The Judge's material findings with respect Applicant's conduct of security concern reflect a reasonable or plausible interpretation of the record evidence. The Board does not review a case *de novo*. Considering the record evidence as a whole, the Board does not find that the Judge erred in his findings as to Applicant's debts.

2. Whether the Judge made a legal error by considering a non-SOR delinquent debt.

Applicant fell behind in making his payments on his second mortgage. At the time of his hearing the second mortgage amounted to between about \$8,000 and \$13,000. On appeal, Applicant objects to consideration of the second mortgage because it was not listed in the SOR. At Applicant's hearing, Applicant offered into evidence documents and presented testimony concerning his second mortgage to explain why Applicant's first mortgage became delinquent and went into foreclosure. Applicant provided a letter to the Judge asking the creditor to cancel the second mortgage because the second mortgage lender was culpably responsible for the foreclosure, and he argued the debt to the second mortgage creditor was disputed.

"An applicant is entitled to receive reasonable notice of the allegations being made against him so that the applicant can have a meaningful opportunity to respond to the allegations." ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004) (citing ISCR Case No. 99-0710 at 2 (App. Bd. Mar. 19, 2001)). A SOR is not required to allege every piece of evidence that is relevant and material to evaluating an applicant's security eligibility. ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003); *see* ISCR Case No. 01-07360 at 5 (App. Bd. Apr. 10, 2002). "Furthermore, as long as there is fair notice to an applicant about the matters that are at issue in his case, and the applicant has a reasonable opportunity to respond, a security clearance case should be adjudicated on the merits of the relevant issues and should not be overly concerned with pleading niceties." ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004) (citing ISCR Case No. 99-0710 at 2

(App. Bd. Mar. 19, 2001)).

Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3. *Id.*; ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003).

Applicant has not alleged that he was prejudiced by a lack of notice concerning the delinquent second mortgage, or that he did not have a full opportunity to present evidence concerning this debt. In this instance, the Applicant's failure to remain current on his payments to the holder of the second mortgage is relevant information that the Administrative Judge could consider for the purpose of determining: (1) whether Applicant's financial delinquencies are recent and ongoing; (2) whether Applicant established that he is financially rehabilitated; and (3) whether his financial problems will continue or recur in the future. *See* Directive Section 6.3.

3. Whether Applicant established: (a) that he acted in good faith in the resolution of several debts, and (b) that many of the SOR debts had lapsed.

With respect to the Judge's conclusions, Applicant argued that the Judge should have found for Applicant on SOR debt ¶ 1.m because his mortgage was paid, and that other debts may have lapsed, or Applicant may not have had a legal obligation to pay them.

Applicant's \$62,978 first mortgage went into foreclosure. Ultimately, Applicant's Counsel redeemed Applicant's first mortgage in lieu of judicial foreclosure. Applicant used the excess from the sale to pay three judgments. Applicant rented his former residence with an option to buy, and he is current on his rent payments.

The Administrative Judge declined to apply Financial Considerations Mitigating Condition 6, [\(1\)](#) noting that Applicant's mortgage was paid as a result of a foreclosure proceeding. The Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)). There was little evidence that Applicant showed "good faith" with respect to his first mortgage. Applicant's mortgage was paid after entering foreclosure proceedings. There was no record evidence showing Applicant acted reasonably, prudently, or that he adhered to his obligations throughout his involvement with this creditor. After review of all the record evidence, the Board concludes, "it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to repay or otherwise resolve the debt had been made in 'good-faith'." ISCR Case No. 01-21243 at 3 (App. Bd. Sept. 30, 2003).

As Applicant notes, all the information about the resolution of Applicant's responsibility to pay his first mortgage was relevant to Applicant's financial situation. Applicant does not object to the Judge's discussion of his first mortgage. He only objects to the Judge's final conclusion against Applicant on this debt. The Judge properly considered Applicant's actions in paying his first mortgage debt, and ultimately how Applicant obtained a release from this debt.

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." ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006) (citing 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*." ISCR Case No. 04-11381 at 2 (App. Bd. Aug. 23, 2006). "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." ISCR Case No. 05-03939 at 2 (App. Bd. Sep. 1, 2006). "In this case, the Administrative Judge reasonably weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and circumstances, and considered the possible application of relevant mitigating conditions." ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006). The Judge "reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns." ISCR Case No. 04-11381 at 2 (App. Bd. Aug. 23, 2006).

Applicant challenges the continued vitality of Applicant's SOR debts because he has not received bills from creditors CI, M, CH or the two other creditors for the SOR debts in ¶¶ 1.e and 1.j. The SOR indicates that several debts are "charged off." Applicant contends that he has acted responsibly in attempting to determine the origin and status of debts on his credit report. Applicant's Counsel sent letters to the credit report company on November 11, 2005, and in December 2005, asking for proof that Applicant was responsible for the debts on his credit report. He also asked for information about how to contact creditors on his credit report. But Applicant's Counsel did not receive any reply from the credit report company.

The Judge granted Applicant six additional weeks to submit documentation concerning his debts. Applicant did not submit any correspondence sent to or received from the six creditors pertaining to the nine debts. Applicant failed to establish reasonable diligence to obtain evidence to contradict his credit report, to establish the origin and status of debts, the extent of any duplication, or how his debts were liquidated. It was not error for the Judge to hold Applicant to his burden. *See* ISCR Case No. 98-0349 at 2 (App. Bd. Feb. 3, 1999) (stating "the security significance of Applicant's financial history does not turn on whether his delinquent debts are now legally uncollectible because of the failure of creditors to take timely, affirmative steps to collect overdue debts."); ISCR 98-0111 at 2-3 (App. Bd. Nov. 13, 1998) (recognizing relevance of debts for security purposes even if they could not "be legally listed on a credit report after the passage of seven years."). Applicant did not provide a reasonable explanation of any disputes with creditors, and his progress in resolving them. He did not provide a detailed explanation of his efforts to correct or resolve his debts. The Judge's decision to find against Applicant on his mortgage or whether his debts lapsed or were otherwise resolved was not an abuse of his discretion.

4. Whether the Appeal Board should remand Applicant's case to permit the Administrative Judge to consider additional evidence concerning Applicant's debts.

On June 20, 2005, the SOR was issued. On September 4, 2005, Applicant responded to the SOR. On November 17, 2005, the Judge held Applicant's hearing. After the hearing, Applicant was provided six more weeks to submit evidence. In total, Applicant had six months to collect evidence. Applicant received a full and fair hearing with ample opportunity to present his case. *See generally 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 to be able to reopen the record).

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

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. Financial Considerations Mitigating Condition 6 is applicable when an Applicant has initiated a good faith effort to repay his debts, *see* Directive ¶ E2.A6.1.3.6.