

DATE: September 20, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20597

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Leigh W. Davis, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 8, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guidelines F (financial considerations), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 23, 2006, after the hearing, Administrative Judge James A. Young 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: A. one factual finding; B. three conclusions; C. three legal issues; and D. his whole person analysis. For the reasons that follow, the Board affirms the decision of the Administrative Judge to deny Applicant's clearance.

I. The Administrative Judge's Findings and Conclusions

A. The Judge made the following findings of fact:

Applicant is a 46-year-old flight control engineer for a defense contractor. She was married from 1980-94. Applicant has held a security clearance, with a small break in service, since 1983. This proceeding was initiated after Applicant applied to upgrade her clearance from secret to top secret.

In 1995, Applicant left her job with a defense contractor to open a restaurant. The restaurant did not succeed and, in February 1997, Applicant found employment with a defense contractor. Her secret clearance was reinstated. In 1998, she was forced to close the restaurant.

Because of the restaurant failure, Applicant had a loss and carried that loss forward on her taxes. In 1998, the IRS audited Applicant on her 1996 tax return. The IRS claims she owes the Government more than \$28,000. Applicant asserts the IRS insists she carry losses back before she can carry them forward. Applicant does not dispute this, but claims the IRS miscalculated her liability. She believes the IRS owes her \$12,000 with ten years of interest. Tr. 23. She is still arguing with the IRS about this.

In addition to the tax debt, Applicant incurred other debts as a result of expenses from her restaurant. One of the banks to which she was indebted obtained a judgment against her in 1999 for \$16,893. SOR ¶ 1.b. The judgment has not been paid. Tr. 28. Applicant admits the judgment, but denies she owes the amount stated in the judgment.

The debt alleged in ¶ 1.c of more than \$40,000 is from a line of credit she established for her business. Tr. 28. She expects the debt will come off her credit report soon due to the passage of time. She has not paid the debt and does not intend to do so.

The debt alleged in ¶ 1.d is from a bank for \$6,899. Applicant is not sure how she acquired this debt, but claims she reduced it to \$3,000 before "a policy change caused the debt to fall back into collections." She accused the creditor of not acting in good faith. She has not paid this debt but it has been "retired" because it no longer appears on her credit reports. Answer at 7.

Applicant's mother and father are deceased. She now owns ten acres of real estate and houses outright valued at approximately \$250,000. She owns four vehicles and a tractor, all paid for. She has a pension plan with two defense contractors, more than \$100,000 in a bank account, and more than one-half million dollars in investments. Tr. 20. Although she has the money to pay these debts, she has chosen not to do so. Tr. 31-32. She was willing to work with these creditors, but they refused to accept partial payments of the debts. She pays her bills. She is not going back to "grovel" to people who she took abuse from in the past. Tr. 37.

B. The Administrative Judge made the following conclusions:

In the SOR, DOHA alleged Applicant is indebted to the IRS for more than \$28,950 from tax year 1998 (¶ 1.a); has an unpaid judgment of more than \$16,890 (¶ 1.b); has a bad debt of more than \$40,750 (¶ 1.c); and has an account that is 120 days past due for more than \$6,890 (¶ 1.d). Applicant admits the existence of debts, but denies the amounts and asserts that the debt alleged in ¶ 1.c is actually the same debt alleged in ¶ 1.b. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The Government's evidence establishes potentially disqualifying conditions under Guideline F. Applicant has a history of not meeting her financial obligations (Directive ¶ E2.A6.1.2.1) and has been unwilling to satisfy these debts (Directive ¶ E2.A6.1.2.3). An applicant may mitigate the security concerns by establishing that the debt was an isolated incident (Directive ¶ E2.A6.1.3.2), the debts resulted from conditions that were largely beyond the applicant's control (Directive ¶ E2.A6.1.3.3) or the applicant initiated a good-faith effort to repay the overdue creditors or otherwise resolve her debts (Directive ¶ E2.A6.1.3.6).

Applicant's delinquent debts arose from the failure of her restaurant, a condition beyond her control. Thus, Directive ¶ E2.A6.1.3.2 and ¶ E2.A6.1.3.3 apply. And Applicant testified that she had paid off some of her delinquent debts from the restaurant failure. So ¶ E2.A6.1.3.6 applies, at least to a limited extent. Nevertheless, [the Judge found] against Applicant. The restaurant failed more than seven years ago, Applicant obviously has the means to pay the outstanding delinquent debts, but has refused to do so. She is upset that creditors expect to be paid in full and have not made concessions to her. She is waiting for these debts to drop off her credit report.

Although Applicant has been disputing her debt to the IRS some seven years, as it is still actively disputed, [the Judge] granted her the benefit of the doubt. [The Judge] found for Applicant on ¶ 1.a.

II. Issues. Whether the Administrative Judge's decisions were arbitrary, capricious, or contrary to law regarding: A. one factual finding; B. three conclusions; C. three legal issues; and D. his whole person analysis.

A. Applicant asserts that the Administrative Judge was arbitrary, capricious, or contrary to law in his finding, "In 1995, Applicant left her job with a defense contractor to open a restaurant." Applicant objects because she was laid off from her defense contractor position. The Judge did not draw any negative conclusions about Applicant's departure from her job with a defense contractor, and Applicant has not cited to any prejudicial inference or conclusion. The fact that Applicant can argue for an alternative interpretation of the evidence alone is not sufficient to demonstrate error. *See* DISCR Case No. 92-0390 at 3 (App. Bd. June 16, 1993)

The arguments challenging the Administrative Judge's finding 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.

The findings which Applicant complains about are permissible characterizations of the record evidence by the Judge. 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 Judge's material findings with respect Applicant's conduct of security concern reflect a reasonable or plausible interpretation of the record evidence and are sustainable.

B. Applicant asserts that the Administrative Judge was arbitrary, capricious, or contrary to law in his conclusions that Applicant: (1) has a history of not meeting her financial obligations; (2) is unwilling to satisfy her debts; and (3) is financially overextended.

Applicant contends that the Administrative Judge's adverse conclusions are not supported by substantial evidence. The Judge found that Applicant has a history of not meeting her financial obligations. That is, she had three large debts that she did not pay for several years. She had a judgment for \$16,890 that remained unpaid. She received a significant inheritance in 2004, but was unwilling to use part of her windfall to pay her three large debts. Applicant objects to the Judge's including the following quotation from Guideline F, Financial Considerations, "[*The Concern:*] An individual who is financially over extended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. This observation is the crux of the security consideration pertaining to bad debts and financial problems, and it was not error for the Judge to include this sentence in his conclusions. There is some merit to the contention that after Applicant's inheritance in 2004 she is no longer "financially overextended." That is, her financial assets substantially exceeded her liabilities. The Judge's decision, however, recognizes the improvement in Applicant's financial circumstances, but also describes the years in which she failed to pay her debts, and most importantly her current failure to resolve her financial problems.

The Administrative Judge partially or fully applied three Mitigating Conditions on Applicant's behalf: Applicant's delinquent debts were an isolated incident, *see* Directive ¶ E2.A6.1.3.2, her debts arose from a condition beyond her control, *see* Directive ¶ E2.A6.1.3.3; and she initiated a good faith effort to repay her debts, *see* Directive ¶ E2.A6.1.3.6. However, 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).

C. Applicant urges the Board to find that the Judge made three legal errors. First, because the government had previously granted Applicant a clearance, the government was estopped from denying a clearance without new evidence of misconduct. Second, collection of two of Applicant's debts was barred over five years ago due to the statute of limitations; therefore they were not of security significance. Third, the Judge gave inconsistent treatment to different

debts by deciding favorably on the IRS debt, and unfavorably on the other debts.

Applicant argues that the government should be estopped from denying Applicant's clearance after approving a secret clearance in 1997 because Applicant's financial situation improved after 1997. A judgment for \$16,890 was executed against Applicant in 1999, after her security clearance was granted in 1997. "The government is not estopped from making an adverse clearance decision where there have been prior favorable adjudications. This is especially true when the most recent adjudication takes into account facts and circumstances that were not necessarily present or as significant at the time of the earlier investigation." ISCR Case No. 01-24507 at 3 (App. Bd. Feb. 11, 2003) (citing ISCR Case No. 97-0191 at 3-4 (App. Bd. Apr. 28, 1998)). A favorable security clearance does not give Applicant a right to retain a clearance regardless of subsequent events or changed circumstances. *See* ISCR Case No. 97-0191 at 3-4 (App. Bd. Apr. 28, 1998). The estoppel claim is not meritorious.

Applicant argues that the Texas statute of limitations bars collection of the \$40,000 debt (SOR ¶ 1.c) and the \$6,899 debt (SOR ¶ 1.c) and she has no legal duty to pay them. They were in charged off status on her credit report and she thought they would be dropped from her credit report. The Judge properly considered Applicant's actions in acquiring her debts and her actions to pay them off. This includes her awareness that she had ample funds to pay her debts, including the judgment, and chose not to either pay her debts, or to otherwise resolve them in a timely manner. *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 objects to inconsistent treatment of her debts. The Judge decided on Applicant's behalf with respect to the IRS debt because it is "still actively disputed." Applicant's dispute with the IRS was discussed in detail at her hearing. She provided a reasonable explanation of the dispute, and her progress in resolving it. She did not provide a detailed explanation of her efforts to correct or resolve her other three debts. The Judge's decision to find against Applicant on three debts was not an abuse of his discretion. The three allegations of legal error are without merit.

D. Applicant contends that the Administrative Judge was arbitrary, capricious, or contrary to law in his conclusion that Applicant's whole person analysis did not support approval of Applicant's clearance. Applicant emphasizes that the negative information pertained to only three debts that originated almost ten years ago.

To the extent any record evidence existed, the Judge's decision discussed the adjudicative factors listed in Directive ¶¶ E2.2.1.1 to E2.2.1.9. In addition, the Judge addressed mitigating facts such as the Applicant's debts arose from her restaurant business, "a condition beyond her control," and that she had paid some of the debts resulting from her business' failure. He also addressed the impact of her 2004 inheritance on her financial situation.

The analysis of an applicant's security eligibility includes numerous potential facts, factors and conditions-the lists provided in the Directive are not meant to preclude Judge's from finding other additional facts and circumstances to be relevant. A Judge must consider applicable Adjudicative Guidelines disqualifying or mitigating condition(s), if any, along with the record evidence as a whole and any pertinent general factors. ISCR Case No. 02-21927 at 7 (App. Bd. Dec. 30, 2005) (citing Directive, Section 6.3 and ¶ E2.2.1)). Then the Judge must decide what weight can reasonably be given to the applicable disqualifying or mitigating condition.⁽¹⁾ When a Judge reasonably concludes that no particular Adjudicative Guidelines disqualifying or mitigating conditions apply to the specific facts of a case, "the Judge still must evaluate the applicant's security eligibility under the general factors of Directive, Section 6.3 and [¶] E2.2.1 (which refers to the 'whole person' concept)." *Id.* (citing ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004)). The Judge completed the correct analysis, commenting positively and negatively on various aspects of Applicant's situation. The Judge's decision articulated a rational basis for his conclusions, consistent with his whole person analysis. His analysis, conclusions, and decision are not arbitrary, arbitrary, capricious, or contrary to law.

Order

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

Separate Opinion of Member William S. Fields

I concur in the Board's conclusion that the Administrative Judge's findings and conclusions are sustainable, and that his adverse security clearance decision can be affirmed.

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. *Id.* (citing ISCR Case No. 02-05110 4-6 (App. Bd. Mar. 22, 2004); ISCR Case No. 01-08565 at 5 (App. Bd. Mar. 7, 2003)).