

DATE: August 24, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23573

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 7, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 8, 2006, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 issue on appeal: whether the Administrative Judge's adverse clearance decision under Guideline F is arbitrary, capricious, or contrary to law.

Applicant argues that the Administrative Judge's adverse clearance decision should be reversed because the Judge erred with respect to several material findings, denied Applicant an opportunity to present evidence in her behalf, and should have found, as a matter of law, that Applicant's conduct had been mitigated. The Board does not find Applicant's arguments persuasive.

(1) The Administrative Judge predicated her adverse decision in large measure on the fact that Applicant's debts had still not been discharged in bankruptcy and Applicant had incurred a debt for telephone services subsequent to the business related debts included in her petition for bankruptcy. Applicant argues that those two findings are erroneous. In support of her argument, she encloses two documentary exhibits: an order showing a discharge in bankruptcy, dated approximately three months after the close of the record in this case, and a copy of her telephone bill for \$312, not including collection charges and interest, dated in 2003. Applicant explained in her cover letter that the telephone number on the 2003 bill pertained to her business that closed in 2000. Applicant contends, and we agree, that the Judge gave significant weight to the fact that Applicant had unpaid telephone charges totaling \$1,144 that occurred in 2002 and 2003 after her business closed. The Judge based her findings on the contents of the bankruptcy filing, which indicates a listing for a telephone creditor owed \$312 for services incurred in 2002, and a telephone creditor owed \$832 for services incurred in 2003. Applicant did not submit any new evidence addressing the \$832 bill for telephone services incurred in 2003.

The Board may not consider Applicant's new evidence on appeal. *See* Directive ¶ E3.1.29. Moreover, its submission

does not demonstrate error on the part of the Administrative Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005). The findings which Applicant challenges are permissible characterizations by the Judge of the record evidence that was before her. The Judge's material findings with respect to Applicant's conduct 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 Judge's material findings of security concern are sustainable.

(2) Applicant argues that she was denied due process because she did not have an opportunity to prove that all her debts had been discharged and to rebut the assumption that her telephone bill had been incurred after the debts included in her bankruptcy petition. Applicant's arguments in this regard lack merit.

A review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. This included the right to offer as evidence any financial records, such as her telephone bill, that were in existence at the time of the hearing. Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). Accordingly, Applicant was not denied due process under the Directive or the Executive Order.

(3) Applicant argues that the Administrative Judge should have found that Applicant's conduct was mitigated because her indebtedness was due to business circumstances beyond her control. Applicant's argument in this regard lacks merit.

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 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. The Judge found in favor of the Applicant with respect to one of the SOR allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guideline F is not arbitrary, capricious, or contrary to law.

Order

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

Signed: Michael D. Hipple

Michael D. Hipple

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