

DATE: January 10, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-05334

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 October 19, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On June 12, 2006, after the hearing, Administrative Judge James A. Young denied Applicant's request for a security clearance. ⁽¹⁾ Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant submitted a current credit report with his appeal and asked the Board to review that information, showing that he is current on all his debts, and determine that he is not a credit risk. The Board cannot consider this new evidence on appeal. Directive ¶ E3.1.29. Applicant raises two other issues in his appeal. First, he asserts that the Judge erred in his factual findings concerning the one debt remaining at issue and the resulting conclusion that he did not understand his financial situation. Second Applicant asserts that he was not put on notice that his wife's financial situation and how they handle current finances were at issue; however those matters weighed heavily in the decision. Applicant's assertions have merit.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

Applicant is a 42-year-old program manager for a defense contractor. He retired after 21 years of active military service on January 1, 2003. He held a secret clearance throughout his military career. Applicant was divorced in 1994 and married his current wife in 1995. Applicant testified that the debt in question on appeal arose shortly after he married his second wife, when he deployed and left her with a general power of attorney which she used to acquire the credit cards involved.

The Judge left the record open for 15 days after the hearing to permit Applicant to produce documentation concerning this account. Applicant Exhibit (AE) D was submitted, via department counsel who had no objection to its consideration. It is a cover letter from the exchange's "Collection Assistance Department" forwarding a four page "Collection System Account Summary." The only SOR allegation the Judge found against Applicant was ¶ 1.c.: "You

are indebted to [military exchange service] on an account that has been charged off in the approximate amount of \$5,375.00. As of August 3, 2004, ⁽²⁾ this debt has not been paid." The Judge made the following findings of fact concerning this allegation:

The debt alleged in ¶ 1.c (\$5,375) is to a military exchange. Applicant asserts his wife opened two separate accounts under his name in 1996 or 1997 using a general power of attorney he had given her before he deployed with the Marines. The documents he submitted (Ex. D) show one account was opened in February 2004 for \$1,667. A dishonored check from 9 May 2003 was added to the account for a total of \$1,917. No payments were made, and finance and penalty charges raised the balance to \$2,185 by 1 June 2004. On 13 June 2004 another account was opened with a principal of \$5,375. The accounts, totaling more than \$7,500, were merged. Applicant made a voluntary payment of \$200 in July 2004. In August 2004, the creditor involuntarily collected approximately \$600 from Applicant. He has been paying \$200 a month since September 2004 to resolve this debt, which now stands at approximately \$5,600. Approximately \$60 of each \$200 payment is applied to penalties and interest on the debt. Ex. D at 5.

Decision at 2-3.

The Judge drew the following conclusions concerning ¶ 1.c. based on the foregoing findings of fact:

Applicant's lack of knowledge of his financial situation is evident. His testimony about his debt to the military exchange was not accurate. The debts to the military exchange did not result from his wife opening accounts in 1996 and 1997 while he was deployed. It resulted from purchases in 2004, more than a year after he retired from the Marine Corps. This account was delinquent because no payments were made.

Decision at 4.

During the hearing, Applicant testified that in 2004, once his post-service employment and financial situation permitted, he initiated contact with creditors to resolve two charged-off debts he had been unable to afford to pay while on active duty. ⁽³⁾ One concerned a voluntarily repossessed car and the creditor refused to accept payment, instead issuing him an IRS Form 1099-C Cancellation of Debt on which he paid tax. The Judge found in Applicant's favor concerning this debt. The other concerned the debt to the exchange service in question here. Government Exhibit (GE) 4, at page 5, shows that the exchange credit card accounts in question were opened in December 1995 and February 1996. This information is confirmed by a November 15, 2005 credit report Applicant submitted with his response to the SOR. Applicant's April 20, 2006 credit report (GE 5) and his April 26, 2006 credit report (AE C) both reflect that all of Applicant's accounts were in good standing and none were past due. Neither contained any mention of his indebtedness to the exchange service or arrangement to repay it.

B. Discussion

The Appeal Board's review of the Judge's findings of fact is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. 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, 620-21 (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 argument, that the Judge misinterpreted the meaning of the entries in the Collection System Account Summary (AE D), which reflected resurrection of the formerly charged off debt in 2004 when Applicant contacted the exchange service to arrange a payment schedule, is persuasive. The February and June 2004 dates noted in the decision reflect when the Collection Assistance Department entered the formerly charged off debts back into Applicant's "Collection System Account", and do not reflect new 2004 purchases as the Judge's decision states. Thus, these findings, and the consequent findings that Applicant did not understand his financial situation were erroneous. The error was harmful because the Judge emphasized this misinterpretation in resolving ¶ 1.c. against Applicant, and that was the only allegation in the SOR that was found against him. Contrary to the allegation in ¶ 1.c., the evidence shows that the debt

to the exchange service was no longer charged off, but had instead been regularly paid under a mutual collection agreement for almost two years by the time of the decision below.

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 or remand 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, E3.1.33. 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 [Judge] . . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Applicant asserts on appeal that he was not put on notice that his wife's financial situation and how they handle current finances were at issue. The decision emphasized Applicant's responsibility for their joint debts, his purported ignorance of their financial situation, the fact that Applicant's wife, not he, handled paying their bills, and the Judge's general assertion that Applicant was financially "overextended." None of these matters were alleged as a reason raising a security concern in the SOR. There are no sustainable findings against Applicant among the SOR allegations, and a negative decision cannot be based solely on reasons concerning which Applicant was not reasonably put on notice. Although a Judge may properly consider evidence of Applicant's circumstances beyond the specific pleadings in the SOR when weighing the relevant and material information under the whole person concept,⁽⁴⁾ both the Directive⁽⁵⁾ and the Executive Order⁽⁶⁾ on which it is based require that an Applicant be supplied with a statement of reasons for proposed clearance denial, an opportunity to respond to those concerns, and a written notice of the final decision which, if adverse, must specify whether the Judge found for or against him with respect to each allegation in the statement of reasons. The government and the Judge are free to amend the SOR at any time, but must permit the Applicant time and an opportunity to respond to the adverse reasons upon which any adverse decision is based.⁽⁷⁾

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the non-appealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded.⁽⁸⁾ Both errors noted above were harmful as they formed the basis for the denial decision. No argument has been presented to sustain the decision on other grounds. Remand would not cure the errors in this case because the only allegation of security concern found against Applicant was based on a misinterpretation of the record evidence, and that evidence shows that the factual assertions contained in SOR ¶ 1.c. were not sustainable. Accordingly, the Judge's adverse security clearance decision must be reversed. Directive E3.1.33.3.

Order

The judgment of the Administrative Judge denying Applicant a clearance is REVERSED.

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: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. The Judge found for Applicant on five of the six factual allegations in the SOR. Those findings are not at issue on appeal.
2. The Judge granted Department Counsel's motion at the hearing to amend the SOR to reflect this date vice "February 2005" as originally alleged. Transcript at 6-7.
3. Tr. at 35, 47.
4. Directive ¶¶ 6.3, E2.2.1.
5. Directive ¶¶ 4.3, E3.1.3.
6. EO 10865, Section 3. *See* Directive, Enclosure 1.
7. Directive ¶ E3.1.17.
8. ISCR Case No. 03-04927 at 2 (App. Bd. Mar. 4, 2005); ISCR Case No. 04-07714 at 7 (App. Bd. Oct 19, 2006).