

DATE: July 9, 1997

In Re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 96-0226

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

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FOR APPLICANT

Pro se

Administrative Judge Paul J. Mason issued a decision, dated February 10, 1997, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge made errors with respect to certain factual findings; (2) whether the Administrative Judge misapplied pertinent Adjudicative Guidelines; (3) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law; and (4) whether Applicant can be granted a provisional security clearance subject to monitoring every year or two.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated May 22, 1996 to Applicant. The SOR was based on Criterion F (Financial Considerations) and Criterion J (Criminal Conduct).

A hearing was held on September 12, 1996. The Administrative Judge later issued a written decision in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from that adverse decision.

Appeal Issues

1. Whether the Administrative Judge made errors with respect to certain factual findings. ⁽¹⁾ Applicant challenges the following factual findings by the Administrative Judge: (a) Applicant satisfied a worthless check on November 14,

1996; (b) Applicant incorrectly included in his bankruptcy petition delinquent federal income taxes for years 1990, 1991, and 1992; (c) Applicant is indebted to the Internal Revenue Service (IRS) for tax years 1990, 1991, and 1994; and (d) Applicant acknowledged the criminal but unintentional nature of his conduct.

(a) Applicant's claim that the debt arising from a worthless check was satisfied by him on November 4, 1996 instead of November 14, 1996 is new evidence that cannot be considered on appeal. *See* Directive, Additional Procedural Guidance, Item 29. However, the Board notes that Applicant Exhibit B is dated November 14, 1996, but it does not indicate the date on which Applicant satisfied the debt. Even if the Board assumes solely for the sake of argument that the Judge erred by finding the debt was satisfied on November 14, 1996, that error would be harmless. Reading the decision as a whole, it was irrelevant to the Judge's analysis whether Applicant satisfied the worthless check debt on November 4, 1996 or November 14, 1996 or some other date between those two dates. The Judge specifically noted that Applicant's repayment of the worthless check in November 1996 weighed in Applicant's favor.

(b) The Administrative Judge specifically noted in the decision that Applicant blamed his attorney for including in the bankruptcy petition Applicant's delinquent federal income taxes for years 1990, 1991, and 1992. Thus, the Judge specifically acknowledged the point Applicant raises in his appeal brief. Accordingly, Applicant's appeal argument on this point fails to demonstrate any error by the Judge.

(c) The record evidence supports the Administrative Judge's finding that Applicant was indebted to the IRS for tax years 1990, 1991 and 1994. Applicant's argument to the contrary fails to demonstrate the Judge erred.

(d) Applicant has consistently argued throughout the DOHA process that he had no criminal intent with respect to the worthless check incident covered by SOR ¶1.a. However, regardless of Applicant's personal belief and current position about that incident, his 1994 guilty plea and misdemeanor conviction for worthless check establishes that his conduct was adjudged by a court to be criminal in nature and that he acknowledged it in 1994. In any case, whether Applicant admits currently the criminality of his conduct in connection with that incident is irrelevant to the overall reasoning and conclusions of the Judge's decision. Applicant's brief argues in several places that the Administrative Judge was attacking his character by addressing the pertinent issues raised by the guilty plea and misdemeanor conviction. The Administrative Judge stayed within the bounds of his responsibilities in addressing the issue raised by the SOR. Also, the Administrative Judge noted several matters in Applicant's favor as to his general character.

2. Whether the Administrative Judge misapplied pertinent Adjudicative Guidelines. Applicant contends the Administrative Judge erred by applying Financial Considerations Disqualifying Guidelines 1, ⁽²⁾ 2⁽³⁾ and 3⁽⁴⁾ and Criminal Conduct Disqualifying Guideline 1.⁽⁵⁾ Applicant's contention lacks merit.

Given the record evidence of Applicant's overall history of financial problems, the Administrative Judge's application of Financial Considerations Disqualifying Guidelines 1 and 3 is reasonable. The fact that Applicant satisfied some of his financial obligations does not preclude the Judge from concluding Applicant's failure to satisfy other financial obligations in a timely or reasonable manner warranted application of these Disqualifying Guidelines. Applicant's arguments to the contrary are unpersuasive and fail to demonstrate the Judge erred.

Given Applicant's 1994 conviction for worthless check, the Administrative Judge had a rational basis to apply Financial Considerations Disqualifying Guideline 2 and Criminal Conduct Disqualifying Guideline 1. Applicant's arguments to the contrary are unpersuasive and fail to demonstrate the Judge erred.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. In addition to the arguments already discussed, Applicant asserts the following: he needs a security clearance to work in his industry; he has acknowledged his mistakes; and he will not allow himself to be placed in similar circumstances in the future. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Whether an applicant needs a security clearance to work in a particular industry is irrelevant to the issue of whether it is clearly consistent with the national interest to grant or continue a security clearance for that applicant. An applicant's need to have a security clearance in order to work in a particular job or industry is factually and logically separate from

the issue of whether that applicant is a suitable person to be granted access to classified information. Applicant's personal desire to pursue a career that requires a security clearance does not render the Administrative Judge's decision in this case arbitrary, capricious, or contrary to law.

Whether Applicant has acknowledged his mistakes and intends to avoid similar problems in the future is relevant under Section F.3. of the Directive. However, the Administrative Judge specifically considered the favorable evidence presented by Applicant and concluded it weighed in his favor, but was not sufficient to warrant a favorable decision in light of Applicant's overall history of financial problems, the worthless check incident, and Applicant's failure to file tax returns for 1992 and 1993. The Judge's sustainable findings and conclusions about the SOR allegations provide a rational basis for the Judge's adverse security clearance decision. *See, e.g.*, ISCR Case No. 96-0544 (May 12, 1997) at pp. 5-6 (discussing security concerns raised by history of excessive indebtedness or recurring financial difficulties). Moreover, nothing in Applicant's brief persuades the Board that the Judge acted in an arbitrary or capricious manner when weighing the favorable evidence presented by Applicant in light of the record evidence as a whole.

4. Whether Applicant can be granted a provisional security clearance subject to monitoring every year or two. Applicant asks to be granted a provisional security clearance with monitoring every year or two to ensure that he has resolved all the concerns that gave rise to the SOR. Neither the Administrative Judge nor the Board has the authority to establish or administer such a monitoring program.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's February 10, 1997 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. Applicant challenges the Administrative Judge's statement that one document received from Applicant after the hearing was not submitted in a timely manner. Because the Judge accepted all the posthearing documentation submitted by Applicant, Applicant's challenge raises an immaterial issue that the Board need not address. *See* Directive, Additional Procedural Guidance, Item 32 ("The Appeal Board shall address the *material* issues raised by the parties to determine whether harmful error occurred.")(emphasis added).

2. "[A] history of not meeting financial obligations."

3. "[D]eceptive or illegal financial practices such as . . . check fraud"

4. "[I]nability or unwillingness to satisfy debts."

5. "[A]ny criminal conduct, regardless of whether the person was formally charged."