

DATE: May 12, 1997

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 96-0544

## **APPEAL BOARD DECISION**

### Appearances

#### FOR GOVERNMENT

Teresa A. Kolb, Esq.

Department Counsel

#### FOR APPLICANT

Michael T. Telep, Jr., Esq.

Administrative Judge Joseph Testan issued a decision, dated November 21, 1996, 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 Appellant was denied a reasonable opportunity to present evidence on his behalf; (2) whether the Administrative Judge failed to consider certain record evidence; (3) whether the Administrative Judge misapplied pertinent Adjudicative Guidelines; and (4) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 6, 1996 to Applicant. The SOR was based on Criterion F (Financial Considerations).

A hearing was held on November 5, 1996. The Administrative Judge subsequently 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 now before the Board on Applicant's appeal from the Administrative Judge's adverse security clearance decision.

### **Appeal Issues**

1. Whether Applicant was denied a reasonable opportunity to present evidence on his behalf. Applicant argues he was

ineffective in representing himself during the proceedings below, and as a result, he failed to present important evidence that should have been made part of the record for consideration by the Administrative Judge. Applicant contends that because he represented himself ineffectively: (a) he was denied the assistance of counsel allowed by the Directive; and (b) he was denied the opportunity to make a full presentation of evidence on his behalf. These contentions lack merit.

There is no dispute that Applicant has the right to seek the assistance of counsel in these proceedings. *See* Directive, Additional Procedural Guidance, Item 8. However, Applicant appeared at the hearing and indicated that he would be representing himself (Hearing Transcript at pp. 6, 8-9). Having chosen to proceed without the benefit of counsel, Applicant cannot complain now that he was ineffective in representing himself in the proceedings below. *See Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). *Accord* ISCR Case No. 95-0300 (February 1, 1996) at p. 4.

A review of the transcript shows that the Administrative Judge provided Applicant with ample opportunity to present evidence. Indeed, Applicant took advantage of the hearing to testify himself, present the testimony of others on his behalf, and submit several exhibits. Merely because Applicant has decided, with the benefit of hindsight, that he could have offered more evidence, it does not follow that he was denied a reasonable opportunity to present his case to the Administrative Judge. *See Dusanek v. Hannon*, 677 F.2d 538, 542-43 (7th Cir. 1982) ("The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure."), *cert. denied*, 459 U.S. 1017 (1982). Absent harmful error that interfered with Applicant's right to present evidence, he is not entitled to have the case remanded to permit him a second chance to present his case. *See, e.g.*, ISCR Case No. 96-0681 (April 14, 1997) at p. 3.

2. Whether the Administrative Judge failed to consider certain record evidence. Applicant contends the Administrative Judge failed to consider the following record evidence: (a) Applicant's current financial expenses; (b) Applicant's proposed plan to repay his delinquent debts; (c) the evidence that Applicant satisfied several of his smaller debts by the time of the hearing; and (d) the evidence that Applicant had sessions with financial counselors. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 (April 3, 1997) at p. 3. Apart from that presumption, a reading of the decision shows the Judge considered the evidence presented by Applicant. The mere fact that the Judge did not find Applicant's evidence to be persuasive does not demonstrate the Judge failed to consider it. *See, e.g.*, ISCR Case 95-0818 (January 31, 1997) at p. 5. The ability of Applicant to cite to favorable record evidence does not demonstrate the Judge erred. The mere presence of favorable evidence does not mandate a favorable security clearance decision. Rather, the Judge must weigh the evidence and decide whether the favorable evidence outweighs the unfavorable evidence. *See* Directive, Section F.3. *Cf. Carosella v. U.S. Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987) (agency has discretion to balance seriousness of employee's conduct against applicable mitigating factors). Accordingly, the Judge did not act in an arbitrary or capricious manner by considering the evidence as a whole, both favorable and unfavorable, in making his decision instead of viewing the evidence in a piecemeal fashion.

Finally, absent a showing of arbitrary and capricious action, the Board will not disturb an Administrative Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 95-0731 (September 13, 1996) at p. 2. Nothing in the record or Applicant's appeal brief persuades the Board that the Judge weighed the evidence in an arbitrary or capricious manner. Applicant's ability to argue for an alternate interpretation of the record evidence does not, standing alone, demonstrate the Judge erred. *Cf. American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 523 (1981) (possibility of drawing two inconsistent conclusions from evidence does not mean agency's findings and conclusions are not supported by substantial evidence).

3. Whether the Administrative Judge misapplied pertinent Adjudicative Guidelines. Applicant contends the Administrative Judge erred by: (a) applying Financial Considerations Disqualifying Guidelines 1 and 3; and (b) not applying Financial Considerations Mitigating Guidelines 1, 2, 3, 4, and 6. For the reasons that follow, we do not find Applicant's contention persuasive.

Applicant argues that the Administrative Judge should not have applied Disqualifying Guidelines 1<sup>(1)</sup> and 3<sup>(2)</sup> because his history of unsatisfied debts only covered the period 1991-1995, he has satisfied his debts prior to 1991, and he has

satisfied debts incurred after 1995. Applicant's argument ignores the record evidence, which supports the Judge's finding that Applicant failed to meet his financial obligations during the period 1991-1995. Moreover, Applicant's argument ignores the record evidence that, as of the hearing date, he still had delinquent debts that were unsatisfied. Considering the record as a whole, the Judge properly applied Disqualifying Guidelines 1 and 3 to Applicant's case.

With respect to Mitigating Guideline 1, <sup>(3)</sup> Applicant cites to his current financial situation and notes he continues to satisfy his current debts. However, Applicant's argument ignores the record evidence that, as of the hearing date, he still had delinquent debts that were unsatisfied. Considering the record evidence as a whole, the Judge's decision to not apply Mitigating Guideline 1 was not arbitrary, capricious, or contrary to law.

Applicant cites to a statement made by Department Counsel during closing argument, in which Department Counsel opined that "[Applicant's situation] is probably an isolated incident caused by his unemployment some years ago" (Hearing Transcript at p. 166), to support his argument concerning Mitigating Guideline 2. <sup>(4)</sup> Applicant's reliance on that statement is misplaced. As a general rule, statements by counsel during argument are not evidence. Moreover, an Administrative Judge is not bound by counsel's characterization of a case during closing argument. If a Judge's findings and conclusions are supported by record evidence and are not arbitrary, capricious, or contrary to law, then it is legally irrelevant whether those findings and conclusions are supported by counsel's arguments. In this case, given the record evidence of Applicant's overall history of financial problems during the period 1991-1995 (including Applicant's failure to resolve several delinquent debts since 1995), the Judge's decision to not apply Mitigating Guideline 2 is not arbitrary, capricious, or contrary to law.

Applicant cites to page 4 of the Administrative Judge's decision, but does not quote the particular language he is relying on in making his argument about Mitigating Guideline 3. <sup>(5)</sup> On that page, the Judge stated

"There is no doubt that applicant's financial difficulties were caused, in large part, by his several years of unemployment and underemployment. For this reason, the fact that he fell behind in his debt payments is understandable, *and had he taken real and substantial steps to resolve his debts after he and his wife were hired by their current employer eighteen months ago, his financial difficulties might not now be a security concern. However, to date, applicant has not taken any meaningful action to satisfy four of his long-standing debts, which represent the bulk of the indebtedness alleged in the SOR.*" (Emphasis added)

Applicant's conclusory argument about Mitigating Guideline 3 seeks to fault the Judge for not viewing the record evidence in a piecemeal fashion to benefit Applicant. The italicized portion of the cited passage provides an explanation for why the Judge did not apply Mitigating Guideline 3, an explanation that is rational and not arbitrary, capricious, or contrary to law.

The Board also finds no merit in Applicant's contentions concerning Mitigating Guidelines 4 <sup>(6)</sup> and 6. <sup>(7)</sup> The Administrative Judge specifically considered and discussed Applicant's efforts at dealing with his delinquent debts and concluded those efforts did not demonstrate Applicant was "willing and able to effectively deal with his financial problems." Considering the record as a whole, the Judge's findings and conclusions on this point reflect an entirely plausible and reasonable interpretation of the evidence. The Judge is not required to accept Applicant's promises to resolve his financial problems in the face of record evidence that Applicant has failed to follow through on his financial commitments in the past. <sup>(8)</sup> Cf. ISCR Case No. 95-0680 (October 16, 1996) at p. 3 ("The Administrative Judge correctly noted that an applicant's promise to take remedial action in the future, however credible, is not evidence of actual rehabilitation."). Applicant's arguments to the contrary are not simply not well-founded. Accordingly, the Judge acted properly by not applying Mitigating Guidelines 4 and 6 in this case.

4. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant contends the evidence is "insufficient as a matter of rule, regulation, or law, to find the [applicant] a risk to national security." The Board construes this contention as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The United States must be able to repose a high degree of trust and confidence in persons granted access to classified

information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Furthermore, the federal government need not wait until an applicant actually mishandles or fails to properly safeguard classified information before it can deny or revoke that person's access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate a particular applicant is at risk for mishandling classified information, or does not demonstrate the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information.

Under Criterion F, the security eligibility of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties. *See* ISCR Case No. 96-0454 (February 7, 1997) at p. 2. "Furthermore, '[f]inancial difficulties, financial irresponsibility and greed have proven to be significant motivating forces for espionage or attempted espionage. It is clear that the United States must consider whether individuals granted access to classified information are, through financial irresponsibility, greed or financial misfortune, in a position where they may be more susceptible to mishandling or compromising classified information or material for financial gain.'" ISCR Case No. 95-0611 (May 2, 1996) at pp. 2-3 (quoting earlier Board decision).

Given Applicant's overall history of financial problems, including several delinquent debts that were still unsatisfied as of the hearing date, the Administrative Judge had a rational basis for his doubts about Applicant's current security eligibility. The Judge's findings and conclusions about Applicant's history of financial problems are supported by substantial record evidence and provide a rational basis for the Judge's adverse security clearance decision. Applicant's argument to the contrary is not well-founded.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's November 21, 1996 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. "[A] history of not meeting financial obligations."
2. "[I]nability or unwillingness to satisfy debts."
3. "[T]he behavior was not recent."

4. "[I]t was an isolated incident."
5. "[T]he conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment . . . .)"
6. "[T]he person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control."
7. "[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."
8. For example, Applicant negotiated a settlement of two large debts with one creditor in 1996 and then failed to follow through on his commitment to the creditor.