

DATE: December 31, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0016

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Craig M. Rappel, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated July 31, 1997, in which she 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 erred by finding that Applicant was still trying to live as he had during his marriage; and (2) whether the Administrative Judge's adverse decision was arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated January 24, 1997 to Applicant. The SOR was based on Criterion F (Financial Considerations).

A hearing was held on May 23, 1997. The Administrative Judge subsequently issued a written decision in which she 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 erred by finding that Applicant was still trying to live as he had during his marriage. The Administrative Judge made detailed findings of fact concerning Applicant's history of financial problems, including findings favorable to Applicant with respect to several SOR allegations. Applicant only challenges one of the Judge's factual findings, contending that the record evidence does not support the Judge's finding that Applicant was still trying to live as he had during his marriage. Applicant contends the Judge's finding is contradicted by record evidence that Applicant made an effort to become debt-free by moving twice to less expensive apartments over the last two years. Applicant also argues the Judge's finding is inconsistent with her finding that Applicant had reduced his living expenses.

Applicant's contention lacks merit because it takes the Administrative Judge's finding out of context. The Judge's complete finding reads: "*As recently as two years ago (circa 1995)*, Applicant was still trying to live as he had during his marriage." (Decision at page 7)(italics added). Moreover, the Judge specifically noted Applicant's efforts to reduce his living expenses by moving twice to less expensive apartments. The Judge's challenged finding reflects a plausible, sustainable interpretation of the record evidence and is sustainable under Item 32.a. of the Additional Procedural Guidance.

Because the rest of the Administrative Judge's factual findings are not challenged on appeal, the Board need not address them. There is no presumption of error below and the appealing party has the burden of raising and demonstrating error on appeal.

2. Whether the Administrative Judge's adverse decision was arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law because: (a) the SOR issued to Applicant was flawed; (b) Applicant is the victim of disparate treatment; (c) there is no basis for concluding Applicant would ever be in a position to pose a security threat to DoD missions; (d) the Judge failed to give sufficient weight to the mitigating evidence of Applicant's recent efforts at financial reform; (e) Applicant's filing for bankruptcy has eliminated any security threat; and (f) the Judge ignored Applicant's work record. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

(a) SOR. Under the Directive, the Board does not review SORs. Rather, the Board reviews the decisions of Administrative Judges to determine whether there has been factual or legal error. *See* Directive, Additional Procedural Guidance, Item 32. Moreover, Applicant has failed to demonstrate that he suffered any prejudicial harm.

At the hearing, Department Counsel had the burden of proving controverted SOR allegations. *See* Directive, Additional Procedural Guidance, Item 14. If Department Counsel failed to prove controverted SOR allegations, the Judge would have been obligated to enter findings in favor of Applicant with respect to such unproven allegations. *See, e.g.,* DISCR Case No. 87-1983 (August 29, 1989) at p. 3 (absent evidence supporting controverted SOR allegation, Examiner could not find against applicant with respect to that allegation). Furthermore, the record shows Applicant had the opportunity to respond to the SOR, request a hearing in his case, challenge the evidence presented against him, and offer evidence on his own behalf. Accordingly, Applicant received the due process to which he was entitled under various provisions of the Directive. In addition, the Administrative Judge made factual and formal findings in favor of Applicant with respect to several SOR allegations based on her acceptance of Applicant's claim that certain debts alleged in the SOR were not his responsibility. Therefore, even if those SOR allegations were flawed as Applicant claims, he suffered no prejudicial harm.

(b) Disparate treatment. Applicant contends he is the victim of disparate treatment because no one in his geographical area has had a security clearance denied or revoked solely based on financial problems. In support of this contention, Applicant relies on an affidavit (Exhibit A) in which the former president and general manager of Applicant's employer stated that he was unaware of any employee who had received an SOR based solely on financial problems, and further stated that he was aware of unnamed employees who retained security clearances after filing bankruptcy or having judgments/garnishments entered against them.

Nothing in the Directive precludes an adverse security clearance decision from being based on a single Criterion. It is factually and legally irrelevant to Applicant's case whether other industrial security cases involving different applicants are based on a single Criterion or multiple Criteria. Moreover, the Administrative Judge properly limited her consideration to Applicant's security eligibility. The Judge must consider, whether under the facts and circumstances of a given case, it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant. DOHA hearings are not a proper forum for applicants to seek to challenge the legitimacy or propriety of the industrial security program.

Even if we assumed solely for the sake of argument that Applicant's claim of disparate treatment were properly before the Board, Exhibit A falls far short of raising a colorable claim that he was the victim of disparate treatment. *See Chesna v. U.S. Department of Defense*, 850 F.Supp. 110, 117-18 (D. Conn. 1994). The Board also notes that Applicant's case is not the only one that it has seen that was based solely on Criterion F. *See, e.g.,* ISCR Case No. 96-0544 (May 12, 1997);

ISCR Case No. 96-0861 (April 14, 1997); ISCR Case No. 96-0454 (February 7, 1997).

(c) Security threat. Applicant contends the Administrative Judge's decision is arbitrary and capricious since there is no evidence that he could pose a security threat because he does not have access to sensitive areas or classified DoD projects. This contention lacks merit for two reasons. First, neither the Judge nor the Board has the authority to adjudicate whether a particular applicant needs a security clearance, or what level of clearance a particular applicant needs. Those matters are the responsibility of other components of DoD. DISCR Case No. 92-0164 (October 7, 1992) at p. 3 n.2. Second, even if this matter could be adjudicated by the Judge or this Board, Applicant waived the issue by never raising it during the proceeding below.

(d) Mitigating evidence/bankruptcy filing. Applicant contends the Administrative Judge failed to consider the mitigating evidence he presented to show he had engaged in financial reform. Applicant also contends the Judge's decision cannot be affirmed because his bankruptcy filing has eliminated any risk that he could jeopardize national security based on financial difficulties. These contentions are unpersuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge expressly states otherwise. Apart from that presumption, a reading of the Judge's decision in this case shows the Judge considered the record evidence, both favorable and unfavorable, and made sustainable findings about Applicant's history of financial problems, including some findings in favor of Applicant. The Judge was responsible for weighing the evidence and did not err by weighing the favorable evidence presented by Applicant in light of the record evidence as a whole. *See* Directive, Section F.3. (decision must be based on consideration of all relevant and material information). Error is not demonstrated merely because the Judge did not conclude the mitigating evidence presented by Applicant was sufficient to overcome the negative evidence in the case. *See, e.g.*, ISCR Case No. 96-0371 (June 3, 1997) at p. 5 ("When considering the record evidence, the Judge has to decide whether the favorable evidence outweighs the unfavorable evidence, or vice versa.")(citing federal case).

Applicant's filing for bankruptcy did not preclude the Administrative Judge from making an adverse security clearance decision. Security clearance decisions are not an exact science, but rather involve predictive judgments about a person's security eligibility based on consideration of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Applicant's act of filing for bankruptcy did not preclude the Judge from considering Applicant's overall history of financial problems, including evidence indicating that he had been less than diligent in addressing his longstanding financial problems. While a discharge in bankruptcy is intended to provide a person with a fresh start financially, it does not immunize an applicant's history of financial problems from being considered for its security significance. *See, e.g.*, DISCR Case No. 87-1800 (February 14, 1989) at p. 3 n.2 ("Although bankruptcy may be a legal and legitimate way for an applicant to handle his financial problems, the Examiner must consider the possible security implications of the history of financial debts and problems that led to the filing of bankruptcy. Furthermore, a discharge in bankruptcy does not, in itself, prove that an applicant has changed the financial habits that led to the debts discharged in bankruptcy or that his past financial difficulties are not likely to recur."). *Cf. Marshall v. District of Columbia Government*, 559 F.2d 726, 729-30 (D.C. Cir. 1977)(discharge in bankruptcy does not preclude city from considering whether past financial problems disqualify person for position as police officer). Accordingly, the Board concludes the Administrative Judge did not declare one standard at the hearing and apply another standard in her written decision.

(e) Work record. Applicant also contends the Administrative Judge failed to address whether his work history would support a favorable security clearance decision. This contention fails to demonstrate the Judge erred. Security clearance decisions are not limited to consideration of an applicant's job performance. *See, e.g.*, ISCR Case No. 96-0825 (November 18, 1997) at pp. 2-3. Accordingly, a Judge may consider whether an applicant's off-duty conduct has security significance. *See, e.g.*, ISCR Case No. 96-0608 (August 28, 1997) at p. 6. The Judge found Applicant was considered to be an "exemplary employee." However, that finding did not preclude the Judge from concluding Applicant's overall history of financial problems warranted an adverse security clearance decision. *See, e.g.*, ISCR Case No. 96-0454 (February 7, 1997) at p. 2 (noting security significance of history of excessive indebtedness or recurring financial difficulties).

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's July 31, 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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board