

DATE: August 7, 1998

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0783

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Carol A. Marchant, Esq., Department Counsel

**FOR APPLICANT**

Robert Aaron Greenberg, Esq.

Administrative Judge Robert R. Gales issued a decision, dated April 14, 1998, 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 issues of whether the Administrative Judge was biased, made certain errors in his findings of fact and conclusions, and misapplied the Financial Considerations Adjudicative Guidelines such that remand or reversal is warranted.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated January 2, 1998 to Applicant. The SOR was based on Criterion F (Financial Considerations).

Applicant submitted an answer to the SOR in which he indicated his desire for a hearing before an administrative judge. A hearing was conducted on March 31, 1998. The Administrative Judge subsequently issued a 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<sup>(1)</sup>**

On appeal Applicant contends that (1) the Administrative Judge is biased; (2) the Administrative Judge made various findings of fact that are not supported by the record evidence; (3) the Judge erred by finding that a single debt constituted a history of not meeting financial obligations within the meaning of Financial Considerations Disqualifying Guideline 1; and (4) the Administrative Judge failed to adequately consider the "whole person" concept and did not give sufficient weight to record evidence that mitigated Applicant's indebtedness.

1. Whether the Administrative Judge was biased. Applicant contends the Administrative Judge based his conclusions in the case on his personal biases and beliefs and that his conclusions bear no rational relationship to the Directive criteria. To support this contention, Applicant cites a passage from the Judge's decision (at p. 7) where the Judge states he has "come away with the feeling (emphasis included in Applicant's brief) that Applicant is committed to the avoidance" of a debt.

An allegation of bias on the part of an Administrative Judge must be analyzed according to a rigorous legal standard, including the rebuttable presumption that an Administrative Judge is impartial and unbiased. *See, e.g.*, DISCR Case No. 92-0809 (June 16, 1993) at p. 3.; DISCR Case No. 91-1531 (May 25, 1993) at p. 4. On appeal, a party alleging bias by an Administrative Judge bears a heavy burden of persuasion. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 4; DISCR Case No. 91-0457 (June 30, 1992) at p. 4. After a careful review of the record and the Judge's decision the Board concludes that Applicant's claim of bias is without merit. The Judge's decision bears a rational relationship to the applicable Disqualifying Guidelines and does not demonstrate bias.

Viewed in isolation, the Judge's use of the word "feeling" when stating his conclusions about this case is potentially problematic. However, the Board does not review a Judge's decision against a standard of perfection. Rather, the Board reviews the decision as a whole to discern the Judge's findings and conclusions and to consider whether the Judge's ultimate clearance decision is sustainable. *See, e.g.*, ISCR Case No. 95-0705 (May 16, 1997) at p. 2; ISCR Case No. 95-0319 (March 18, 1996) at p. 3. Considering the entirety of the Administrative Judge's decision, the Board concludes the isolated passage cited by Applicant does not establish bias and thus does not undermine the Judge's adverse clearance decision. At most, the passage constitutes harmless error that does not warrant remand or reversal. *See, e.g., N.L.R.B. v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983).

2. Whether certain factual findings of the Administrative Judge are not supported by substantial record evidence.

Applicant contends the Administrative Judge erred by making the following factual findings: (a) Applicant spent money during 1997 on entertainment; (b) Applicant's spending habits can be characterized as "frivolous or avoidance"; (c) Applicant intended to "walk away" from his mortgage debt through bankruptcy regardless of his ability to pay; and (d) Applicant did not take reasonable efforts to address his mortgage debt.

Contrary to Applicant's contention, the Administrative Judge did not find that Applicant spent monies in 1997 on entertainment exclusively. The Judge's actual finding is considerably broader and specifically describes a variety of items that Applicant used his resources for in 1997. The Judge's actual finding is a plausible interpretation of the record evidence.

Although the Administrative Judge did not use the word "frivolous" to describe Applicant's spending habits, he did find that Applicant had wasted his money during the 1980s and there is ample record evidence to support such a finding. Concerning the Judge's finding that Applicant engaged in avoidance of the mortgage debt, there is ample record evidence to support the Judge's conclusion that Applicant was fully aware of the debt and chose to ignore it as indicated by his available resources and his spending habits.

The Judge concluded that Applicant chose to resolve the outstanding debt through the bankruptcy process when he had the ability to repay it in whole or part. He also concluded that Applicant's chosen course of action was not reasonable given the circumstances of the case. Given the totality of the evidence in the case, the Judge's interpretation of events is plausible. The record indicates that Applicant had significant income and assets (including stocks and a motorcycle) during the period when the mortgage debt was foreclosed upon. The evidence also indicates that Applicant was satisfying the mortgage debt of his fiancée during the same period that he allowed his own mortgage debt to become delinquent. On appeal, Applicant counters the Judge's conclusions by stating that he responsibly satisfied all of his debts save the one in question. This argument is not sufficient to demonstrate the Judge erred. Although Applicant may interpret the record differently, he has not demonstrated error in the Judge's decision.

3. Whether the Judge erred by finding that one debt constituted a history of not meeting financial obligations within the meaning of Financial Considerations Disqualifying Guideline 1.

Applicant notes that Financial Considerations Disqualifying Guideline 1 speaks in terms of a history of not meeting financial obligations. He argues that the Judge's position that the mortgage indebtedness constitutes one old debt is

inconsistent with the language of the Disqualifying Guideline and thus, the Guideline is not properly applied to this case. While Applicant is correct in pointing out that the Judge's characterization of the debt places it outside the precise language of the Disqualifying Guideline, Applicant has failed to demonstrate error.

An Administrative Judge must apply pertinent Adjudicative Guidelines for and against clearance. *See, e.g.*, ISCR Case No. 95-0731 (September 13, 1996) at p. 4. Likewise a Judge does not have unfettered discretion in applying Adjudicative Guidelines. *See, e.g.*, ISCR Case No. 95-0578 (October 2, 1996) at p. 6. In this case, it would have been useful for the Judge to specifically acknowledge that the one large debt did not precisely fit the facial language of the Disqualifying Guideline and to discuss why he applied a Guideline that appears to contemplate only multiple debts. Nevertheless, the Judge's application of the Guideline comports with common sense and is in keeping with the overall goals of the industrial security program. Interpreting Disqualifying Guideline 1 to include only multiple debts could result in a situation where the Government would be hindered in considering the security significance of one large debt, which, depending on the particular circumstances of a case, could be as significant from a security standpoint as a number of smaller debts. The Board declines to interpret the Guideline in a manner that would operate to the detriment of the industrial security program or the national security.<sup>(2)</sup> *See, e.g.*, DISCR Case No. 87-2107 (October 25, 1990) at p. 7 (Directive should be construed in manner that effectuates its essential purpose of protecting classified information). Additionally, the Judge was not precluded from finding that Applicant had a history of not meeting financial obligations since the mortgage debt, as is typical, was due and payable in periodic installments many of which were missed by Applicant. Each payment represents a separate obligation under the mortgage debt.

4. Whether the Administrative Judge erred by failing to apply the "whole person" concept to the facts of this case. On appeal, Applicant makes reference to a body of favorable evidence that was presented by Applicant and essentially argues that the Judge did not adequately take these matters into consideration. Applicant argues that four of the Financial Considerations Mitigating Guidelines<sup>(3)</sup> apply in this case. Additionally, Applicant sets forth the following facts of record: (1) he has appropriately handled all his other debts; (2) he has a thirteen-year work history as a trusted employee; (3) he has held a security clearance for thirteen years without incident; and (4) he has been honest and forthright with the Government and fully disclosed the extent of his indebtedness. After a review of the evidence in this case, both favorable and unfavorable, the Board concludes that the Applicant has failed to demonstrate error on the part of the Judge.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 (April 3, 1997) at p. 3; DISCR Case No. 93-1186 (January 5, 1995) at p. 5. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 5. A reading of the decision shows the Judge refers to some of the favorable evidence cited by Applicant, primarily the evidence revealing his status as a valued employee. The Judge was not limited to consideration of Applicant's work performance or conduct during duty hours in assessing Applicant's security suitability. Similarly, the absence of security violations on the part of Applicant and his honesty and candor during the Government investigation into his background does not preclude consideration of other aspects of Applicant's conduct, in this instance financial habits, to evaluate its security significance. *See, e.g.*, ISCR Case No. 97-0176 (January 22, 1998) at pp. 2 and 3. Regarding the fact that Applicant kept his other debts current, a reading of the decision indicates that the Judge was well aware of this fact. The Judge's failure to view Applicant's treatment of his other debts as mitigating does not constitute error.

The test on appeal is whether the Administrative Judge's findings and conclusions are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contradictory evidence in the same record and whether his conclusions are not arbitrary, capricious, or contrary to law. *See* Directive, Additional Procedural Guidance, Items 32.a. and 32.c. The Administrative Judge's analysis is a plausible interpretation of the record evidence. Although Applicant may view the record differently, he has not demonstrated that the Judge's decision is arbitrary, capricious or contrary to law. A reading of the decision below shows the Judge considered the record evidence, both favorable and unfavorable, as he was required to do under the Directive. In weighing the record evidence, the Judge had to decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 96-0871 (January 29, 1998) at p. 3. Absent a showing that the Judge weighed the evidence in an arbitrary and capricious manner, Applicant's ability to cite favorable record evidence does not demonstrate the Judge committed error.

## Conclusion

Applicant has failed to demonstrate error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's April 14, 1998 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

1. Applicant's argument on appeal includes assertions based on purported facts not included in the record. Specifically, Applicant points to a May 1998 discharge in bankruptcy to counter the Administrative Judge's finding that Applicant had the ability to repay an outstanding mortgage debt. Applicant also references a 1992 meeting with an attorney where Applicant was advised not to file for bankruptcy. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. Accordingly, the specific appeal arguments based on the above cited facts will not be addressed by the Board.

2. Reference to general principles of statutory construction may be of benefit on this point. *See, e.g.*, DISCR Case No. 93-1050 (December 20, 1994) at p. 6 (canons of statutory construction can be applied to interpret provisions of Directive). A recognized rule of construction states that textual reference to the plural of a subject includes the singular where such construction is necessary to give effect to the legislative intent. 82 C.J.S. "Statutes," sec. 337. The preambulatory language under the Financial Considerations Criterion speaks of financial overextension. As such overextension could clearly result from a single debt, interpreting Disqualifying Guideline 1 as including a single debt appears logical and would be in keeping with the overall intent of the drafters.

3. The Mitigating Guidelines cited by Applicant include (1) the behavior was not recent; (2) it was an isolated incident; (4) ....there are clear indications that the problem is being resolved or is under control; and (6) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.