

DATE: October 28, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0123

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Fulton S. Hamilton, Esq.

Administrative Judge Kathryn M. Braeman issued a decision, dated June 8, 1998, 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's factual findings are not supported by the record evidence; and (2) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated February 9, 1998 to Applicant. The SOR was based on Criterion F (Financial Considerations).

A hearing was held on April 9, 1998. 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's factual findings are not supported by the record evidence. The Administrative Judge found that Applicant was responsible for most of the debts alleged in the SOR. (1) Applicant contends the Judge erred in making those findings because: (a) the Judge improperly relied on four credit reports (Government Exhibits 3, 4, 5 and 6) that lacked a proper foundation; (b) the absence of objection by Applicant to the admissibility of those credit reports did not justify the Judge in assuming the information contained in those reports was reliable or accurate; (c) even if the Judge did not err in admitting the credit reports, the Judge should have given them little weight because they were prepared for purposes of litigation; and (d) the Judge ignored unrebutted evidence that Applicant was personally

responsible for incurring only a small percentage of the outstanding debts. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge erred.

(a) At the hearing, Applicant did not object to the admissibility of Government Exhibits 3, 4, 5 and 6. By doing so, Applicant waived any objection to their admissibility and relieved Department Counsel of any obligation to present evidence to establish any foundation for those four exhibits. It is too late for Applicant to raise foundation objections to those four exhibits on appeal. *See, e.g.*, ISCR Case No. 95-0817 (February 21, 1997) at p. 6 n.6; ISCR Case No. 96-0299 (December 31, 1996) at p. 2.

(b) The admission of Government Exhibits 3, 4, 5 and 6 without objection from Applicant did not relieve the Administrative Judge from the obligation to evaluate those documents and consider what weight, if any, they reasonably could be given in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 97-0676 (September 29, 1998) at p. 4. At the hearing, Applicant had the opportunity to present evidence about his financial situation, including the opportunity to present any evidence showing that the credit reports were not reliable or accurate. To the extent that Applicant did not present evidence to challenge the accuracy or reliability of the credit reports, the Judge did not act in an arbitrary or capricious manner or contrary to law by considering those reports in making her findings about Applicant's financial history. Furthermore, a review of the record shows that the Judge's findings about Applicant's financial history are supported by Applicant's admissions to the SOR and evidence in addition to Government Exhibits 3, 4, 5 and 6, including Applicant's hearing testimony.

(c) The Administrative Judge has discretion to weigh the evidence. The Board will not disturb a Judge's weighing of the evidence unless there is a showing the Judge acted in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 97-0676 (September 29, 1998) at pp. 3-4. Considering the record as a whole, the Board concludes Applicant has failed to demonstrate the Judge erred in her weighing of the four credit reports.

(d) There is a rebuttable presumption that an Administrative Judge considers all the evidence, unless the Judge expressly states otherwise. *See, e.g.*, ISCR Case No. 97-0783 (August 7, 1998) at p. 4. Furthermore, a Judge is not required to give full weight to evidence merely because it is un rebutted. *See, e.g.*, DISCR Case No. 90-2069 (March 25, 1992) at p. 10. While the Judge could not simply ignore Applicant's testimony, she was not required, as a matter of law, to accept it uncritically or view it in isolation from the record evidence as a whole. Applicant presented evidence to show that many of the debts were not personally incurred by him. However, it is irrelevant that Applicant did not personally incur those debts if the record evidence shows that he is legally responsible for them. A review of the record shows that the Judge had a rational basis for finding Applicant is legally responsible for the debts that he did not personally incur.

(2) Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant makes several arguments to support his contention that the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law: (a) the Judge relied on Applicant's admissions to the SOR allegations while ignoring Applicant's evidence in explanation and mitigation of his debts; (b) the Judge failed to give sufficient weight to the favorable testimony of Applicant's witness; (c) the Judge gave undue weight to the four credit reports (Government Exhibits 3, 4, 5, and 6); (d) the Judge failed to take into account pertinent mitigating factors; (e) other Judges have made favorable decisions in Criterion F cases involving financial situations worse than Applicant's; (f) the Judge's decision does not reflect a reasonable application of pertinent Adjudicative Guidelines; (g) the Judge's decision does not reflect a fair and impartial, commonsense decision as required by Section F.3.; and (h) the Judge's adverse decision is not supported by the weight of the record evidence. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

As discussed earlier, there is a rebuttable presumption that the Administrative Judge considered all the record evidence. That presumption is not rebutted merely because the Judge weighed the evidence differently than Applicant would have liked. Even when an applicant presents favorable evidence, the Judge has to decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at pp. 4-5. None of Applicant's arguments persuades the Board that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law. The Judge's findings reflect a reasonable, plausible interpretation of the record evidence. Applicant's ability to argue for an alternate interpretation of the evidence, standing alone, does not demonstrate the Judge's findings are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 97-0625 (August 17, 1998) at p. 3.

An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines. *See* Directive, Section F.3. *See also* ISCR Case No. 98-0066 (August 28, 1998) at p. 2. In this case, the Judge cited pertinent provisions of the Financial Considerations Adjudicative Guidelines (Decision at p. 5), explained why she gave reduced weight to Financial Considerations Mitigating Guideline 3, and gave reasons for why she did not apply Financial Considerations Mitigating Guidelines 4 and 6 (Decision at p. 6). The Board does not have to agree with the Judge's analysis under the Adjudicative Guidelines to conclude it was not arbitrary, capricious, or contrary to law.

Applicant's reliance on decisions by other Administrative Judges in other Criterion F cases is misplaced. Just as a trial judge is not bound to follow decisions made by other trial judges, the Judge in this case is not bound to follow decisions made by her colleagues in other cases. Furthermore, decisions made by Judges of the Hearing Office are not binding on the Board. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at p. 2 n.1. Accordingly, the Board need not discuss or distinguish decisions by Judges made in other Criterion F cases to decide whether the Judge's decision in this case is sustainable.

Finally, the Administrative Judge's decision falls within the bounds of her discretion under Section F.3. The Judge discussed both the favorable and unfavorable evidence. The Judge took into account the evidence that Applicant did not personally incur most of the debts alleged in the SOR, as well as the evidence that Applicant was legally responsible for those debts. The Judge also considered Applicant's efforts at addressing the debts once he returned from duty overseas and explained why she concluded, on balance, that those efforts were not sufficient to overcome the negative implications of Applicant's financial situation. And, as discussed earlier, the Judge applied pertinent provisions of the Adjudicative Guidelines. Considering the record as a whole, the Board concludes the Judge complied with the requirements of Section F.3.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's June 8, 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. The Administrative Judge made favorable findings with respect to SOR ¶ 1.g. and SOR ¶ 1.l. Those favorable findings are not at issue on appeal.