

DATE: November 13, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0111

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone. Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated June 22, 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 following issues: (1) whether the Administrative Judge erred with respect to certain factual findings; 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 4, 1998 to Applicant. The SOR was based on Criterion F (Financial Considerations).

Applicant submitted an answer to the SOR, in which he indicated he wanted a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared, and a copy given to Applicant. After Applicant's response to the FORM was received, the case was assigned to the Administrative Judge for consideration.

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 before the Board on Applicant's appeal from the Judge's adverse decision.

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge erred with respect to certain factual findings. Applicant challenges various factual findings made by the Judge. Specifically, Applicant contends the Judge erred by finding: (a) Applicant has been employed by a defense contractor since September 1976; (b) Applicant incurred the debts alleged in the SOR over a period of seven years; (c) Applicant did not deny "the creation and non-payment of the specific debts covered in the

SOR"; (d) Applicant admitted to debts alleged in the SOR; (e) Applicant's "currently amassed debt listed in his older January 1997 credit report (ex. 5) aggregates approximately \$14,726.00"; and (f) Applicant "manifests no current intention to pay any of his covered debts in the foreseeable future." Applicant also argues the Judge erred in making his findings by relying on a 1997 credit report and ignoring a 1998 credit report. For the reasons that follow, the Board concludes that, with one exception that constitutes harmless error, Applicant has failed to demonstrate the Judge's factual findings are erroneous.

The Administrative Judge erred by finding that Applicant has been employed by a defense contractor since September 1976. The record evidence indicates Applicant did not begin working for a defense contractor until several years after he left military service in 1990. The Judge's erroneous finding is harmless, however. A reading of the decision as a whole indicates that the Judge's findings and conclusions about Applicant's financial history were not affected or altered by the Judge's erroneous finding about when Applicant began working for a defense contractor.

Contrary to Applicant's contention, the Administrative Judge did not find that Applicant incurred the debts alleged in the SOR over a seven-year period. The passage from the decision below that Applicant challenges on appeal refers to the Judge's characterization of the SOR allegations, not to his factual findings. Furthermore, the Judge specifically found that Applicant's financial problems arose when he was unable to pay various debts because of his unemployment after he left military service in 1990. Applicant's contention on this point is merely a disagreement with a sentence in the Judge's decision taken out of context.

The Administrative Judge's characterizations of what Applicant admitted or denied about the debts in the SOR are not a model of clarity. However, Applicant has not demonstrated the Judge made factual errors concerning Applicant's responsibility for those debts. A Judge must consider all the record evidence (Directive, Section F.3.) and is not bound by an applicant's characterization of the facts in the answer to the SOR. In answering the SOR, Applicant denied the debts alleged in the SOR were valid, claiming that those debts should not have appeared on his credit record because the Fair Credit Reporting Act requires credit reporting agencies to not list debts more than seven years old. However, there is record evidence showing that Applicant admitted the debts were his, but disputed their continuing validity once seven years had passed. Even if Applicant's reading of the Fair Credit Reporting Act were correct, the removal of those debts from his credit report does not make them disappear as if they never existed, nor does it preclude the Judge from considering other record evidence that shows those debts exist and are Applicant's responsibility.⁽²⁾ The security significance of Applicant's financial history does not turn on whether Applicant's debts could or could not be legally listed on a credit report after the passage of seven years. *Cf.* ISCR Case No. 97-0016 (December 31, 1997) at p. 4 (although a discharge of debts in bankruptcy provides an applicant with a fresh start financially, it does not immunize the applicant's history of financial problems from scrutiny for its security significance).

Contrary to Applicant's contention, the Administrative Judge did not ignore Applicant's 1998 credit report. Rather, the Judge noted the difference between the financial pictures of Applicant presented by the 1997 and 1998 credit reports respectively and gave a reasoned explanation for concluding that Applicant was responsible for the debts listed in the 1997 credit report. The Judge's findings and conclusions on this point are supported by the record evidence and are not arbitrary, capricious, or contrary to law.

It was not arbitrary, capricious, or contrary to law for the Administrative Judge to find that Applicant did not demonstrate any intention of paying the debts listed on the 1997 credit report. The Judge's finding on this point reflects a reasonable interpretation of the record evidence. Indeed, the record evidence shows Applicant did not address those debts in the expectation that they would be dropped from his credit report after the passage of seven years.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant makes several other arguments in challenging the Judge's adverse security clearance decision: (a) the Judge erred by applying Financial Considerations Disqualifying Guidelines 1⁽³⁾ and 3⁽⁴⁾; (b) the Judge failed to give sufficient weight to Financial Considerations Mitigating Guideline 1⁽⁵⁾; (c) the Judge failed to consider Financial Considerations Mitigating Guidelines 3⁽⁶⁾ and 4⁽⁷⁾; and (d) the Judge erred by entering formal findings against Applicant with respect to all the SOR allegations. For the reasons that follow, the Board concludes that Applicant has failed to demonstrate the Judge erred.

Given the record evidence in this case, the Administrative Judge did not err by applying Financial Considerations Disqualifying Guidelines 1 and 3. Although Applicant's delinquent debts were incurred about seven years ago, Applicant's failure to resolve those debts in the intervening years provided a rational basis for the Judge to apply Disqualifying Guidelines 1 and 3. The fact that Applicant has satisfied other debts in a timely manner does not negate the record evidence that he has delinquent debts that he has not satisfied and still does not intend to satisfy. As noted earlier, the Judge must consider all the record evidence. The presence of some favorable evidence about Applicant's financial conduct is not dispositive. Rather, the Judge must consider whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. See, e.g., ISCR Case No. 97-0783 (August 7, 1998) at p. 5.

The Administrative Judge noted that Applicant's delinquent debts originated about seven years earlier. Although Applicant's initial financial difficulties occurred about seven years ago, his failure to resolve the delinquent debts from that time continued up to the close of the record evidence. Accordingly, even though the Judge noted the applicability of Financial Considerations Mitigating Guideline 1, he was not required to give great or decisive weight to that mitigating guideline. See, e.g., ISCR Case No. 98-0088 (July 20, 1998) at p. 3 (Administrative Judge not required to apply pertinent Adjudicative Guidelines in isolation without regard to record evidence as a whole).

The record evidence in this case did not require the Administrative Judge to apply Financial Considerations Mitigating Guideline 3. The Judge recognized that Applicant's period of unemployment after he left military service contributed to Applicant's financial problems. However, the Judge also noted that Applicant did not resolve those debts over the years and merely sought to avoid their effect by having them removed from his credit history. Although Mitigating Guideline 3 may be applicable to the origin of his delinquent debts, that mitigating guideline does not apply to Applicant's later conduct, particularly his failure to satisfy those debts after he gained employment. Therefore, the Judge was not required to apply that mitigating guideline to Applicant's case.

Applicant's reliance on Financial Considerations Mitigating Guideline 4 is misplaced. On appeal, Applicant claims that there were no financial counseling services available to him in 1990. Even if the Board accepts that claim at face value, the absence of financial counseling services in 1990 does not explain, justify or excuse Applicant's failure to seek the assistance of financial counseling in more recent years to deal with his delinquent debts. And, given Applicant's failure to resolve his delinquent debts since 1990, it is difficult to see what legitimate basis there would be for the Judge to conclude Applicant's "problem is being resolved or is under control."

The Board finds Applicant's challenge to the Administrative Judge's adverse formal findings unpersuasive. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. A history of excessive indebtedness or recurring financial problems raises legitimate concerns about an applicant's security eligibility. See, e.g., ISCR Case No. 98-0004 (June 19, 1998) at p. 3. Applicant's history of delinquent debts, including his failure to satisfy them even after he obtained employment, provides a rational basis for the Judge's adverse formal findings under Criterion F and his overall adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's June 22, 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 appeal brief contains some factual assertions that go beyond the record evidence. Such assertions constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item 29.

2. By way of analogy, expunction of an arrest record does not nullify the fact that an arrest occurred. Nor would expunction of an arrest record preclude an Administrative Judge from considering whether there is record evidence (other than the arrest itself) that an applicant engaged in criminal conduct.

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

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

5. "[T]he behavior was not recent."

6. "[T]he conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)."

7. "[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."