

DATE: February 3, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0349

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Albert S.C. Millar, Esq.

Administrative Judge John R. Erck issued a decision, dated November 5, 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 issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated May 8, 1998 to Applicant. The SOR was based on Criterion F (Financial Considerations).

A hearing was held on August 25, 1998. The Administrative Judge subsequently issued a written decision. The Administrative Judge found that Applicant had debts totaling more than \$40,000 that became delinquent during 1991-1992. The Judge also found that Applicant had a period of unemployment for five months during that time, and that Applicant's unemployment contributed to his failure to pay those debts. The Judge concluded Applicant's failure to try to resolve his delinquent debts after he regained employment constituted neglect of his financial obligations that covered the period January 1992-August 1998. The Judge finally concluded that, given the overall history of Applicant's financial problems, 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 decision.

Appeal Issue

Applicant does not challenge the Administrative Judge's findings about his history of delinquent debts. However,

Applicant contends the Judge's adverse decision should be reversed because: (1) the Department of Defense did not advise Applicant that he should file bankruptcy to discharge his delinquent debts; (2) Applicant did not satisfy his delinquent debts on the advice of counsel that the debts were uncollectible; (3) after the hearing, Applicant filed a bankruptcy petition in which the delinquent debts are listed; (4) Applicant is current on all his debts incurred after 1991; and (5) there is no nexus between Applicant's delinquent debts and his suitability for a security clearance. Applicant's arguments raise the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

The fact that the Department of Defense did not advise Applicant to file for bankruptcy is irrelevant. The Department of Defense has no legal duty to provide financial counseling or advice to applicants. The question is whether Applicant acted in a reasonable manner with respect to dealing with his delinquent debts. *See, e.g.*, ISCR Case No. 98-0257 (January 22, 1999) at p. 3 (noting applicant had obligation to deal with her financial problems in a responsible and reasonable manner). Considering the record as a whole, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant did not deal with his delinquent debts in a reasonable manner.

Applicant's advice of counsel argument does not demonstrate the Administrative Judge erred. Applicant's debts became delinquent during the 1991-1992 period. In January 1996, Applicant told a government investigator that he "found it economically prudent to not address, and or contact these creditors" in connection with his delinquent debts (Government Exhibit 3). After the January 1996 interview, Applicant took no steps to address his delinquent debts (Hearing Transcript at p. 29). In April 1998, Applicant told a government investigator that he did not intend to pay his delinquent debts because the "creditors have not bothered me about them" (Government Exhibit 2). After Applicant received the SOR, he told the government that he had obtained legal counsel and a lawyer assured him the delinquent debts were not legally collectible (Answer to SOR; Hearing Transcript at pp. 22-24). Considering the record as a whole, Applicant's failure to address his delinquent debts during the period 1992-1998 cannot fairly be characterized as conduct based on advice of counsel. Applicant's receipt of legal advice in mid-1998 about the legal status of his delinquent debts does not extenuate or mitigate his failure to address those delinquent debts in the preceding period of approximately six-and-a-half years. In any event, the security significance of Applicant's financial history does not turn on whether his delinquent debts are now legally uncollectible because of the failure of creditors to take timely, affirmative steps to collect the overdue debts. *See, e.g.*, ISCR Case No. 98-0111 (November 13, 1998) at p. 3 ("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.").

Applicant's actions after the hearing cannot be considered by the Board. The Administrative Judge must base his decision on the record evidence. Furthermore, the Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. Furthermore, even if Applicant had filed a bankruptcy petition by the time of the hearing and presented evidence of that filing for the Judge to consider, such evidence would not have required the Judge to make a favorable security clearance decision. First, the mere filing of a bankruptcy petition does not prove that a discharge in bankruptcy will be granted. Second, the automatic stay provisions under 11 U.S.C. 362 cited by Applicant do not apply to Department of Defense security clearance adjudications by operation of 11 U.S.C. 362(b)(4). Third, even if an applicant were granted a discharge in bankruptcy, such a discharge would not preclude a Judge from considering the overall history of the applicant's financial problems in determining its security significance. *See, e.g.*, ISCR Case No. 97-0016 (December 31, 1997) at p. 4.

The evidence that Applicant is current with his debts incurred after 1991 does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. When evaluating the evidence, the Judge must consider whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. In doing so, the Judge has discretion in weighing the record evidence, and the weight the Judge gives to the evidence will not be disturbed on appeal unless there is a showing that the Judge acted in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0055 (December 31, 1998) at p. 3. The Board need not agree with a Judge's findings to conclude those findings are not arbitrary, capricious, or contrary to law. Applicant's argument about his debts incurred after 1991 fails to demonstrate the Judge erred.

Applicant's nexus argument lacks merit. The federal government 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. 508, 511 n. 6 (1980);

Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). 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). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). All that is necessary is proof of facts and circumstances that indicate that an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3.

Under Criterion F, the security eligibility of an applicant is placed into question when that applicant has a history of excessive indebtedness or recurring financial difficulties. *See, e.g.*, ISCR Case No. 98-0156 (November 12, 1998) at p. 2; ISCR Case No. 98-0004 (June 19, 1998) at p. 3. Applicant's delinquent debts in excess of \$40,000 provide a rational basis for the Administrative Judge to have doubts about Applicant's suitability for access to classified information. The question remains whether Applicant presented evidence of extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item 15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."). As discussed above, none of Applicant's appeal arguments demonstrate the Judge erred in his weighing of the evidence, or that his analysis of Applicant's overall history of financial problems is arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate the Administrative Judge erred. Accordingly, the Board affirms the Judge's November 5, 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