

DATE: September 16, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0435

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Robert L. Huskey, Esq.

Administrative Judge John R. Erck issued a decision, dated June 9, 1999, 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's adverse decision is arbitrary, capricious, or contrary to law; and (2) whether Applicant can be granted a security clearance on a probationary basis.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 28, 1998 to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion F (Financial Considerations).

A hearing was held on March 30, 1999. 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 that adverse decision.

Appeal Issues

1. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The Administrative Judge found Applicant: (a) had a history of financial difficulties; (b) borrowed money (totaling approximately \$8980) from various coworkers and friends to try to deal with financial problems faced by her and her husband; (c) concealed from her husband her borrowing money from others; (d) on three separate occasions, misappropriated money (totaling \$140) from a Boy Scout troop for which she served as treasurer to cover a shortfall in her personal bank account; (e) made restitution of the misappropriated money after she was confronted about it; and (f) was making efforts to improve her financial situation. Applicant does not challenge the Judge's findings. Indeed, Applicant essentially concedes the Judge had a rational basis for his findings.

However, Applicant argues that a favorable security clearance decision is warranted because: (i) an adverse security clearance decision would have devastating adverse effects on Applicant and her family, and would result in loss of a valuable employee by her employer; (ii) Applicant is an exceptional, dedicated employee with a 12-year history with her current employer; (iii) a favorable decision would not create a security risk because of the limited access to classified information required for her position; (iv) Applicant has been taking various steps to eliminate her financial difficulties; and (v) the national interest would be better served by not strictly applying the technical requirements of the Directive in this case. These arguments raise the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant's arguments are not persuasive.

In many cases, an adverse security clearance decision can be expected to have an adverse effect on an applicant directly, and thereby indirectly affect an applicant's family. Such adverse effects are not relevant determining whether an applicant is a suitable person to be granted a security clearance. An applicant is not made more or less suitable for a security clearance based on how a security clearance decision might affect the applicant or the applicant's family. *See, e.g.*, ISCR Case No. 91-0322 (March 9, 1993) at p. 4; DISCR Case No. 90-0124 (August 6, 1992) at p. 4.

Similarly, Applicant's value to her employer is not a relevant consideration. It is possible for an applicant to be an asset to his or her employer, yet at the same time fail to demonstrate the high degree of judgment, reliability, and trustworthiness that must be expected of persons granted a security clearance. *See, e.g.*, ISCR Case No. 98-0392 (February 4, 1999) at p. 3. Applicant's value to her employer does not reduce or diminish the negative security implications of her conduct.

The favorable evidence cited by Applicant (her job performance and her efforts to eliminate her financial difficulties) does not demonstrate the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The presence of favorable evidence does not require a Judge to make a favorable security clearance decision. Rather, a Judge must consider the record as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Unless there has been a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the evidence. *See, e.g.*, ISCR Case No. 98-0621 (August 19, 1999) at p. 3. Applicant's arguments about the cited favorable evidence fail to demonstrate the Judge acted in an arbitrary or capricious manner or contrary to law when he weighed the evidence in this case.

The Administrative Judge did not err by failing to take into consideration the fact that Applicant's position requires only limited access to classified information. The degree of access an applicant requires for a particular position is based on the need-to-know principle, not any calculation as to the degree of trust and confidence that can be reposed in the applicant. *Cf.* DISCR Case No. 88-0999 (March 3, 1989) at p. 4 ("Security clearance determinations under the Directive are all or nothing propositions. Once it is determined that it is not clearly consistent with the national interest to grant or continue a security clearance for an applicant, there is no basis under Executive Order 10865 or the Directive for the Examiner or this Board to permit him to retain any level of security clearance. The reasons that render Applicant ineligible for a SECRET level clearance also render him ineligible for a CONFIDENTIAL level clearance."). To use an analogy, a bank is not required to hire or retain a person of questionable reliability merely because the person seeks a position that provides access to a teller's cash drawer, but not the bank vault.

Applicant's plea to avoid strict application of the Directive's requirements is not well-taken. An Administrative Judge does not have the discretion to waive or ignore application of pertinent provisions of the Directive. Indeed, any action by a Judge to do so would be appealable under Items 32.b. and 32.c. of the Directive and subject to remand or reversal on appeal. The national security interests of the United States and the rights of applicants to a fair and impartial security clearance decision under the rule of law require that each case be adjudicated in a dispassionate manner, free of the influence of irrelevant emotional considerations that would lead to arbitrary and capricious decision-making.

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. 507, 511 n.6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Applicant's history of financial problems provides a rational basis for the Administrative Judge's adverse conclusions under Criterion F. *See, e.g.*, ISCR Case No.

98-0751 (July 21, 1999) at p. 2. Furthermore, Applicant's concealment of her financial problems from her husband and her misappropriation of Boy Scout money entrusted to her fiduciary care provide a rational basis for the Judge's adverse conclusions under Criterion E. Considering the record as a whole, the Judge's findings provide a rational basis for his adverse conclusions about Applicant's judgment and reliability, as well as his adverse security clearance decision.

2. Whether Applicant can be granted a security clearance on a probationary basis. Applicant asks that she be granted a security clearance on a probationary basis so that she can retain her job and demonstrate to the federal government that she can be entrusted with a security clearance. There is no authority for the Administrative Judge or the Board to grant Applicant the relief she seeks. *See, e.g.*, ISCR Case No. 97-0630 (May 28, 1998) at p. 3; DOHA Case No. 96-0152 (January 14, 1997) at p. 5.

Conclusion

Applicant has failed to meet her burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's June 9, 1999 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