

DATE: June 22, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0620

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated March 31, 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 erred by finding that Applicant knowingly and willfully omitted information about her criminal record and delinquent debts from a security questionnaire in September 1996; 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 September 18, 1998 to Applicant. The SOR was based on Criterion F (Financial Considerations), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which she declined to have a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, who submitted a response to it. The case was then assigned to the Administrative Judge for disposition.

The Administrative Judge 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⁾

1. Whether the Administrative Judge erred by finding that Applicant knowingly and willfully omitted information about

her criminal record and delinquent debts from a security questionnaire in September 1996. The Administrative Judge found that in September 1996 Applicant acted in a knowing and willful manner when she did not list in a security questionnaire: (a) bad check incidents that occurred in October 1990, February 1993, November 1993, April 1995, and July 1995; and (b) the fact that she had delinquent debts. Applicant contends she did not intend to deceive the government about those matters. In support of that contention, Applicant argues: (i) she was under the impression that the bad check incidents were not serious crimes; (ii) she was not aware that such incidents had to be reported in the security questionnaire; and (iii) she voluntarily completed an Authorization for Release of Information form. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's findings about her falsifications are erroneous.

There is no dispute that Applicant omitted information about five bad check incidents and her delinquent debts from a security questionnaire she executed in September 1996. The question remains whether the Administrative Judge had a rational basis to find that those omissions were knowing and deliberate in nature.

Applicant's denials of any intent to conceal that information were relevant and material evidence, but they were not conclusive or binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999) at pp. 6-7 (applicant's statements about his intentions constitute relevant and material evidence, but they are not conclusive). The Judge had to consider Applicant's denials in light of the record evidence as a whole and make findings about whether Applicant's omissions were knowing and willful or not. The Judge gave an explanation for why he concluded Applicant's omissions were knowing and willful in nature. That explanation reflects a reasonable and plausible interpretation of the record evidence. Applicant's ability to argue for an alternate explanation of the record evidence is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 98-0685 (May 20, 1999) at p. 3; ISCR Case No. 98-0445 (April 2, 1999) at p. 2. *See also United States v. Int'l Brotherhood of Teamsters*, 170 F.3d 136, 143 (2d Cir. 1999)(possibility of drawing two inconsistent conclusions from evidence does not mean agency findings are not supported by substantial evidence); *Penobscot Air Services, Ltd. v. Federal Aviation Administration*, 164 F.3d 713, 718 (1st Cir. 1999)(same).

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) the bad checks have been paid and satisfied; (b) she has not been involved in any other similar misconduct; (c) she has been working on her remaining delinquent debts; (d) she is married, has changed her lifestyle, and is more financially responsible; (e) she has no current financial problems; and (f) she is in good standing in her current position. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Applicant's appeal brief refers to actions she has taken after the close of the record below to satisfy her outstanding delinquent debts. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. Furthermore, because review of an Administrative Judge's decision is limited to the record before the Judge, the Judge cannot be found to have committed error based on appellate consideration of matters that occurred after the close of the record below. *See, e.g., Wilderness Society v. Dombeck*, 168 F.3d 367, 377 (9th Cir. 1999) ("Review of agency action is limited to the record considered and relied upon by the agency at the time a decision is made."); ISCR Case No. 98-0392 (February 4, 1999) at p. 2 ("The Board reviews a Judge's decision based on the record evidence before the Judge, and it will not find the Judge erred based on consideration of matters or events that occur after the close of the record.").

Applicant's job performance, however favorable, did not preclude the Administrative Judge from making an adverse security clearance decision. Security clearance decisions are not limited to consideration of an applicant's job performance. *See, e.g.*, ISCR Case No. 98-0685 (May 20, 1999) at p. 3. In this case, Applicant's history of bad check incidents, her history of financial difficulties, and her falsifications in September 1996 raise questions as to her security eligibility that the Judge properly considered in making his decision.

The favorable evidence cited by Applicant on appeal does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Judge must consider all the evidence, both favorable and unfavorable in making a decision. Directive, Section F.3. The Judge must weigh the evidence and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0394 (June 10, 1999) at p. 6. A

review of the decision persuades the Board that the Judge weighed the record evidence in a manner that is not arbitrary, capricious, or contrary to law.

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). The Administrative Judge's findings and conclusions about Applicant's history of financial difficulties, her bad check incidents, and her September 1996 falsifications provide a rational basis for his negative conclusions about her security eligibility.

Conclusion

Applicant has failed to meet her burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's March 31, 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

1. The Administrative Judge entered formal findings for Applicant with respect to SOR 1.e., SOR 1.f., SOR 1.g., SOR 1.h., SOR 1.m., SOR 1.n., SOR 1.q., SOR 1.t., SOR 2.a., and SOR 3.b. Those favorable formal findings are not at issue on appeal. Because the Judge entered a formal finding in favor of Applicant with respect to SOR 2.a. (alleged falsification of mental health history), the Board need not address Applicant's argument about that matter.