

DATE: July 14, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0617

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 February 11, 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 factual findings are supported by substantial evidence; and (2) 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 September 18, 1998 to Applicant. The SOR was based on Criterion F (Financial Considerations).

Applicant submitted an answer to the SOR, in which she stated she was not requesting a hearing. A File of Relevant arial (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 determination.

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

Applicant's appeal brief contains many statements and assertions that go beyond the record below and constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item 29. Furthermore, Applicant cannot fairly contend the Judge erred based on statements, explanations, and proffered clarifications of the

record she now offers on appeal. Applicant had the opportunity to respond to the SOR and the FORM and represent additional information for consideration by the Administrative Judge. She took advantage of those opportunities when she responded to the SOR and the FORM. To the extent Applicant did not make, during the proceedings below, the statements, explanations, and proffered clarifications of her situation that she now offers on appeal, she waived the right to have them considered in her case.

1. Whether the Administrative Judge's factual findings are supported by substantial evidence. Applicant vigorously challenges various factual findings by the Administrative Judge. With some exceptions discussed later in this section, the Judge's factual findings reflect a reasonable, plausible interpretation of the record evidence. Applicant's ability to argue for an alternate interpretation of the record evidence does not demonstrate the Judge's findings are erroneous. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 3. Furthermore, many of Applicant's challenges to the Judge's factual findings lack merit because they are based on new evidence.

Applicant persuasively argues that the Administrative Judge erred by finding: (a) Applicant is 48 years of age; (b) Applicant was "discouraged" on the two occasions she sought assistance from a consumer credit counseling service; and (c) Applicant was employed by a defense contractor (different from her current employer) for 14 months. Those findings are not sustainable because the record evidence does not support them.

Applicant also contends the Administrative Judge erred in characterizing various debts of hers as personal debts instead of business debts. There is not much record evidence with respect to whether the debt covered by SOR 1.f. was a personal debt or a business debt, and with respect to whether the majority of Applicant's delinquent debts were personal debts or business debts. Considering the record as a whole, the Board concludes the Judge's characterizations of Applicant's debts are sustainable. However, even if the Board were to conclude, solely for the purpose of deciding this appeal, that the Judge erred by characterizing the SOR 1.f. debt as a personal debt and characterizing Applicant's other delinquent debts as primarily personal debts, such errors would be harmless in light of the record as a whole. Furthermore, considering the Judge's decision in its entirety, it is not likely that the Judge would have made a favorable security clearance decision if he had concluded Applicant's debts were primarily business debts rather than personal debts. The Judge's analysis of the security significance of Applicant's history of financial difficulties did not turn on whether Applicant's delinquent debts were primarily personal debts or business debts.

Contrary to Applicant's contention, it was proper for the Administrative Judge to note the record evidence does not contain a copy of Applicant's bankruptcy petition or the schedules filed in support of it. Furthermore, it was not error for the Judge to note that the record evidence was insufficient to support a finding that Applicant's debts would be discharged in bankruptcy. However, the Judge erred by going further and indulging in speculation as to what Applicant might do in the future if all her debts were not discharged through bankruptcy. The Judge's speculation went beyond any inferences that reasonably could be drawn from the record evidence in this case. *Cf. White v. Apfel*, 167 F.3d 369, 375 (7th Cir. 1999) ("Speculation is, of course, no substitute for evidence, and a decision based on speculation is not supported by substantial evidence.").

As discussed in the preceding paragraphs, the Administrative Judge made some errors with respect to his factual findings. However, considering the record as a whole, there is not a significant chance that correction of those errors would change the Judge's overall findings and conclusions about Applicant's history of financial difficulties. Accordingly, the factual errors identified by Applicant are harmless and do not warrant remand or reversal. *See, e.g.*, ISCR Case No. 98-0394 (June 10, 1999) at p. 4.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. In addition to challenging the Administrative Judge's factual findings, Applicant contends the Judge: (a) failed to take into account the real reasons for her financial difficulties; (b) failed to properly apply Financial Considerations Mitigating Condition 3; (c) erred by speculating that Applicant might find it to be in her interest to have her bankruptcy petition dismissed before it was approved by the court; (d) was wrong when he concluded Applicant did not make "any tangible efforts" to deal with her financial problems until she was confronted with the security investigation; and (e) failed to consider all the facts and circumstances of her case, as required by Section F.3. of the Directive. The Board construes these contentions as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 98-0350 (March 31, 1999) at p. 3. Apart from the harmless factual errors discussed earlier in this decision, Applicant's appeal arguments do not persuade the Board that the Judge failed to consider the record evidence in this case in a fair and reasonable manner. Applicant's vigorous disagreement with the Judge's findings and conclusions does not demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law.

The Administrative Judge specifically noted that Financial Considerations Mitigating Condition 3⁽¹⁾ was applicable in this case. However, the Judge gave an explanation why Financial Considerations Mitigating Condition 3 and two other Financial Considerations Mitigating Conditions he cited were not sufficient to extenuate or mitigate the security concerns presented by Applicant's history of financial difficulties. The mere presence of Financial Considerations Mitigating Conditions did not require the Judge to make a favorable security clearance decision. The Judge acted properly by considering the applicable Financial Considerations Mitigating Conditions in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0380 (March 8, 1999) at p. 5. Considering the record as a whole, the Judge's reasoning on this point is not arbitrary, capricious, or contrary to law.

The Administrative Judge erred by speculating that Applicant might find it in her interest to have her bankruptcy petition dismissed before it was approved by the court. Even the Judge conceded in the decision that this was merely speculation. Such speculation went far beyond any inferences that reasonably could be drawn from the record evidence in this case. However, considering the record as a whole, there is not a significant chance that correction of this error would result in a different result. Accordingly, this error does not warrant remand or reversal.

Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude Applicant did not take any tangible steps to deal with her financial difficulties until she was confronted with a security investigation. The Judge's conclusion reflects a plausible, if not the only possible, interpretation of the record evidence. As discussed earlier, Applicant's ability to argue for an alternate interpretation of the record evidence does not demonstrate the Judge's conclusion is unsustainable.

The Board does not find persuasive Applicant's contention that the Administrative Judge failed to comply with the requirements of Section F.3. of the Directive. A review of the decision as a whole persuades the Board that the Judge considered the record evidence as a whole and evaluated Applicant's case in light of the Section F.3. factors and pertinent provisions of the Adjudicative Guidelines. Furthermore, the Judge's adverse security clearance decision rationally follows from his sustainable findings of fact. 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. 98-0445 (April 2, 1999) at p. 3. The facts and circumstances of Applicant's history of financial problems --- which were still unresolved as of the close of the record below --- provide a rational basis for the Judge's adverse formal findings under Criterion F and his adverse security clearance decision.

Conclusion

Applicant has failed to meet her burden of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's February 11, 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. "[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)."