

DATE: July 12, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0614

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated January 14, 1999, in which she 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 paragraph 5 of the Prehearing Guidance was violated; and (2) whether the Administrative Judge's 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 3, 1998 to Applicant. The SOR was based on Criterion F (Financial Considerations).

A hearing was held on December 8, 1998. The Administrative Judge subsequently issued a written decision in which she 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 paragraph 5 of the Prehearing Guidance was violated. Applicant submitted various documents with his answer to the SOR. At the hearing, the Department Counsel asked that the documents be severed from Applicant's answer and Applicant be given the opportunity to offer them as exhibits, subject to any objections made by Department Counsel. The Judge granted Department Counsel's request and returned the documents to Applicant. During the hearing, Applicant offered most of those documents as exhibits on his behalf.

On appeal, Applicant contends that paragraph 5 of the Prehearing Guidance for DOHA hearings (Prehearing Guidance)⁽²⁾ was violated because: (a) Applicant was not present when the Administrative Judge received Applicant's

answer to the SOR (with the documents attached to it by Applicant); and (b) the documents were returned to Applicant at the hearing, not before the hearing.

Applicant's appeal arguments fail to demonstrate the Administrative Judge acted contrary to Paragraph 5 of the Prehearing Guidance. A careful reading of Paragraph 5 shows that it specifically addresses the issue of what should be done if documents attached to an applicant's answer to the SOR were returned to the applicant before the hearing, but it does not specifically address the issue of what should be done if documents attached to an applicant's answer to the SOR were not returned to the applicant before the hearing. In this case, the Judge was faced with the second situation. Since that second situation is not addressed by Paragraph 5, the Judge's handling, at the hearing, of the documents attached to Applicant's answer to the SOR was not in violation of Paragraph 5. Even if the Board were to assume solely for the sake of argument that Paragraph 5 was not followed when the Administrative Judge received Applicant's answer to the SOR (with the documents Applicant submitted with it) without Applicant being present, Applicant has failed to show how he suffered any prejudice or harm to his right to a hearing or his right to present evidence on his behalf. Absent any showing of such prejudice or harm to Applicant, any putative noncompliance with Paragraph 5 does not warrant remand or reversal.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant argues: (a) the Administrative Judge ignored many facts that favor Applicant; (b) the Judge erred by finding Applicant's federal tax debt was mitigated, but finding Applicant's consumer debts were not mitigated; (c) the Judge failed to give sufficient weight to the evidence that Applicant's failure to make payments to his creditors in 1996-1997 was caused by a decline in his wages; (d) the Judge erred by finding Applicant was financially overextended in 1995; (e) the Judge ignored the evidence that Applicant closed various accounts without delinquency; (f) the Judge erred by finding Applicant has no cash reserves; (g) the Judge erred by holding against Applicant the fact he borrowed money from his 401K plan to pay his debts; (h) the Judge ignored evidence Applicant was taking corrective action to deal with his federal tax debt and his consumer debts; (i) the Judge erred by finding Applicant made no payments toward his consumer delinquencies in the last year despite a 40% increase in income over the previous year; (j) the Judge erred by finding Applicant had a monthly net positive remainder of \$400-\$500; (k) the Judge erred by saying that it is unclear which debts of Applicant's might be discharged in bankruptcy; and (l) the Judge ignored the fact Applicant had 20 years of no financial difficulties before his recent difficulties arose due to a decrease in Applicant's income. The Board's construes Applicant's arguments as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

There is a rebuttable presumption that an 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 that rebuttable presumption, the Judge's detailed findings and conclusions in this show the Judge made a conscientious effort to consider the record evidence in this case. Nothing in the record persuades the Board that the Judge simply ignored record evidence as claimed by Applicant.

Furthermore, the fact that the Administrative Judge did not make findings more favorable to Applicant does not demonstrate the Judge ignored evidence favorable to Applicant. The fact that the Judge did not find Applicant's evidence demonstrated extenuation or mitigation of his financial problems sufficient to warrant a favorable security clearance decision is not proof that the Judge ignored the evidence presented by Applicant. The Judge must weigh the evidence as a whole (Directive, Section F.3.) 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. Applicant's disagreement with the Judge's weighing of the record evidence does not constitute proof that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0448 (April 19, 1999) at p. 3. *See also* ISCR Case No. 98-0445 (April 2, 1999) at p. 2 ("Error is not demonstrated by [the appealing party's] ability to argue for an alternate interpretation of the record evidence."). Accordingly, the fact that the Judge found Applicant's efforts to resolve his financial problems were not sufficient to warrant a favorable security clearance decisions does not prove that the Judge simply ignored Applicant's efforts.

The Board need not agree with the Administrative Judge to conclude it was not arbitrary or capricious for the Judge to find that Applicant's actions mitigated the significance of his federal tax debt, but that Applicant's consumer debts were not mitigated. The decision sets forth an explanation for the Administrative Judge's different conclusions about Applicant's federal tax debt on one hand and his consumer debts on the other hand. That explanation reflects a plausible

interpretation of the record evidence and is not otherwise arbitrary, capricious, or contrary to law. Implicit in Applicant's appeal argument is the assumption that his consumer debts can easily be eliminated through discharge in a bankruptcy proceeding. As will be discussed later in this decision, the possibility of a future discharge in bankruptcy is not proof of current reform and rehabilitation under Criterion F. Furthermore, a discharge of Applicant's consumer debts in bankruptcy would not have precluded the Judge from considering the security significance of Applicant's overall history of financial difficulties. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 3.

The Administrative Judge specifically took into account the fact that Applicant's decline in income led to problems with paying his consumer debts. Reading the Judge's decision as a whole, the Judge had a rational basis for not giving that mitigating evidence decisive or controlling weight in this case.

Considering the record as a whole, the Administrative Judge had a rational basis for finding that Applicant was financially overextended. Even if the Board were to accept Applicant's argument and concluded the Judge erred by finding that January 1995 marked the turning point when Applicant became financially overextended, such an error would be harmless in this case. The Judge's overall analysis of Applicant's security eligibility does not stand or fall on her finding as to when Applicant first became financially overextended. Considering the record in this case, the Judge's overall analysis of Applicant's financial problems is sustainable whether Applicant became financially overextended in 1995 or in 1996. Furthermore, the fact that Applicant closed various accounts without delinquency, and is current with some of his accounts, did not preclude the Judge from considering the security significance of Applicant's failure to satisfy his delinquent debts.

The Board does not find persuasive Applicant's contention that the Administrative Judge erred by holding against Applicant the fact he borrowed money from his 401K plan to pay debts. Applicant's contention focuses on two sentences that appear in a lengthy discussion by the Judge of Applicant's efforts to deal with his consumer debts. The Board reviews a Judge's decision in its entirety, not just isolated sentences in the Judge's decision, to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 96-0522 (May 1, 1997) at p. 3. Considering the two sentences in context of the Judge's overall analysis of Applicant's efforts to deal with his consumer debts, the Board concludes the Judge did not commit legal error or act in an arbitrary and capricious manner.

Applicant challenges the Administrative Judge's finding that "Applicant has made no payments toward any of his consumer credit delinquencies in the last year, despite a 40% increase in income over 1997." In support of that challenge, Applicant makes two arguments: his 1997 income was lower than his 1996 income, and income for both of those years was lower than his 1995 income; and the Judge failed to recognize Applicant had to spend a good portion of his money to pay an accountant and a lawyer. Applicant's challenge is not persuasive. The Judge's challenged finding pertains to Applicant's income for the year ending in December 1998 (when the hearing was held), not for year 1997. Furthermore, a reading of the decision shows the Judge was aware that Applicant was using the services of an accountant and a lawyer. The Board will not assume the Judge was oblivious to the common sense fact that accountants and lawyers generally expect to be paid for their services.

There is mixed merit to Applicant's contention that the Administrative Judge erred by finding that Applicant had a monthly net remainder of between \$400 and \$500. The Judge's finding lacks some clarity because it appears in two different portions of her decision, with the Judge using slightly different language each time to discuss the finding. Applicant's appeal argument cites to the second time the finding is discussed (Decision at p. 10), but does not cite to the first time (Decision at p. 6), where the Judge notes some of Applicant's monthly net remainder was used to pay legal fees. Applicant refers the Board to page 132 of the hearing transcript in support of his appeal argument. At the hearing, Applicant was asked how much money he had left over each month. A review of transcript page 132 shows there is some ambiguity as to whether Applicant's answer referred to November 1998 only or a broader period of time. Given the ambiguity of the testimony on this point, the Judge's finding is questionable. However, considering the Judge's decision as a whole, this error is harmless and does not warrant remand or reversal. *See, e.g.*, ISCR Case No. 98-0380 (March 8, 1999) at p. 4 (discussing harmless error doctrine).

The Administrative Judge did not err by stating that it is not clear what debts might be discharged if Applicant received a discharge in bankruptcy. The Judge is not required to speculate about which of Applicant's debts might be discharged *if* he were to file for bankruptcy and *if* he were granted a discharge of his debts by a bankruptcy court. And, in any

event, the possibility that Applicant might obtain a discharge of his credit card debts by a bankruptcy court at some future date does not constitute evidence of rehabilitation or reform in the present. *Cf.* ISCR Case No. 98-0188 (April 29, 1999) at p. 3 ("A stated intention to perform acts in the future does not constitute proof of a demonstrated track record of reform and rehabilitation.").

Applicant's ability to handle his financial matters prior to his most recent problems constitutes evidence that is relevant under the whole person concept of security clearance decisions. However, that favorable evidence does not preclude the Judge from considering the security significance of Applicant's recent history of financial problems. Considering the record as a whole, Applicant's prior favorable financial history did not preclude the Judge from concluding Applicant's recent history of financial problems has negative security significance. 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. 98-0349 (February 3, 1999) at p. 4. The overall facts and circumstances of Applicant's delinquent consumer debts provide a rational basis for the Judge's adverse formal findings under Criterion F and her overall adverse security clearance decision.

Conclusion

Applicant has failed to demonstrate the Administrative Judge committed error that warrants remand or reversal. Accordingly, the Board affirms the Judge's January 14, 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 in favor of Applicant with respect to SOR 1.a. (tax debt) and SOR 1.b. (department store account). Those formal findings are not at issue on appeal.

2. Paragraph 5 of the Prehearing Guidance reads as follows: "Neither party should attempt to furnish any information relating to the case without giving the other party the opportunity to be present. Such actions constitute what are known as prohibited *ex parte* communications. Also, copies of any proposed exhibits must not be submitted to the Administrative Judge prior to the hearing. Any documents to be offered as evidence should be presented at the hearing itself during the presentation of that party's case. In some instances, when an Applicant has appended documents to the response to the Statement of Reasons, the documents have been returned with an explanation that such materials are inappropriate to a pleading and that they should be resubmitted as proposed exhibits during the hearing. If such action has occurred, an Applicant should inform the Administrative Judge during the hearing, and be prepared to again offer the material previously rejected."

