

DATE: December 1, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0012

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esq., Department Counsel

FOR APPLICANT

Bart J. Cook, Esq.

Administrative Judge Roger C. Wesley issued a decision, dated June 30, 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 not considering Applicant's response to the File of Relevant Material; 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 January 8, 1999 to Applicant. The SOR was based on Criterion F (Financial Considerations).

Applicant submitted an answer to the SOR in which he indicated he did not want a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response dated June 4, 1999.

The Administrative Judge issued a written decision, dated June 30, 1999, 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 the Administrative Judge's adverse decision.

Appeal Issues

1. Whether the Administrative Judge erred by not considering Applicant's response to the File of Relevant Material. Applicant contends the Administrative Judge did not consider his June 4, 1999 response to the FORM. In support of this contention, Applicant cites to his June 4, 1999 response when challenging some of the Judge's factual findings. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

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. 98-0617 (July 14, 1999) at p. 3. Apart from that presumption, the Board notes the following: Applicant's June 4, 1999 response to the FORM is in the case file; the Judge noted in the decision that he would consider Applicant's response to the FORM; and Applicant's response to the FORM contained documentation of his satisfaction of a debt referred to a collection agency by a medical center, which the Judge found in Applicant's favor. Merely because the Judge did not find other portions of Applicant's response to the FORM to be persuasive does not demonstrate the Judge ignored it.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's adverse decision is arbitrary, capricious, and contrary to law because: (a) the Judge failed to consider Applicant's efforts to work with his creditors to resolve his outstanding debts; (b) the Judge erred by finding Applicant had monthly net income of \$1411 but did not use that income to repay delinquent debts; (c) the Judge erred by not giving Applicant the full benefit of applicable Financial Considerations Mitigating Guidelines; and (d) the Judge erred by concluding Applicant did not successfully mitigate the government's case against him. Applicant's arguments fail to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

(a) Contrary to Applicant's arguments, the Administrative Judge specifically considered Applicant's efforts to deal with his outstanding debts. The Judge did not act in an arbitrary or capricious manner by distinguishing between (i) debt resolution efforts for which Applicant provided corroborating documentation and (ii) debt resolution efforts for which Applicant did not provide such documentation. A Judge is not required to accept an applicant's statements at face value merely because they are not rebutted by Department Counsel. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at page 4 note 2. It is reasonable for a Judge to consider the record as a whole and use common sense in evaluating the absence of corroborating evidence. *See, e.g.*, ISCR Case No. 98-0592 (May 4, 1999) at p. 5. Failure to present documentation in support of an applicant's claims about financial matters is a factor to be considered by a Judge in evaluating such claims. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 4. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to decline to accept Applicant's undocumented claims that he was negotiating with some of his creditors to resolve certain unsatisfied debts.

Furthermore, some of Applicant's claims concerning his debt resolution efforts were, on their face, based on commitments made by Applicant to perform various acts in the future. Promises to take actions in the future, however sincere, are not a substitute for a documented track record of remedial actions. *See, e.g.*, ISCR Case No. 98-0188 (April 29, 1999) at p. 3. The possibility that Applicant might achieve resolution of his outstanding debts at some future date does not constitute evidence of financial reform or rehabilitation in the present. *See, e.g.*, ISCR Case 98-0614 (July 12, 1999) at p. 5. Given Applicant's overall history of financial problems, it was not arbitrary, capricious, or contrary to law for the Judge to give little or no weight to Applicant's promises to take actions in the future to satisfy various outstanding debts.

(b) The Board is not persuaded by Applicant's challenge to the Administrative Judge's finding about the significance of Applicant's monthly net income. Applicant's argument is based, in part, on statements that go beyond the record evidence. Such statements constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item 29. Furthermore, the Judge cannot be expected to consider information outside the record that Applicant could have presented when he responded to the FORM. To the extent Applicant's argument on this point is based on record evidence, it merely reargues the significance of evidence the Judge had the opportunity to consider and weigh. Applicant's argument fails to demonstrate the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

(c) Applicant contends the Administrative Judge erred by not giving him the full benefit of Financial Considerations Mitigating Conditions 3, [\(1\)](#) 4, [\(2\)](#) and 6. [\(3\)](#) Applicant's contention lacks merit.

An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines. Directive, Section F.3. However, the mere presence or absence of an Adjudicative Guidelines Disqualifying or Mitigating Condition is not solely dispositive of a case. Rather, the Judge must consider applicable Disqualifying or Mitigating Conditions in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0617 (July 14, 1999) at p. 4; ISCR Case No. 98-0394

(June 10, 1999) at p. 4.

In this case, the Administrative Judge noted that Applicant's financial problems were mitigated somewhat under Financial Considerations Mitigating Condition 3. However, the Judge concluded Applicant had presented "insufficient explanations as to why he could not have worked out repayment arrangements with his creditors earlier . . ." It was not arbitrary and capricious for the Judge to consider whether Applicant made timely, reasonable efforts to deal with the financial setbacks that resulted from conditions beyond his control. *See, e.g.*, ISCR Case No. 98-0257 (January 22, 1999) at p. 3 ("Even if Applicant's former marriage to a drug abuser were the source of many of her problems, it did not relieve Applicant of the obligation to address her problems in a responsible and reasonable manner.").

The Board is not persuaded by Applicant's argument that the Administrative Judge was arbitrary and capricious when he did not apply Financial Considerations Mitigating Condition 4. Applicant's argument relies on the fact that he received financial counseling, but ignores the Judge's conclusion that Applicant has not yet shown that his financial problems are resolved or under control. The Judge's conclusion reflects a reasonable interpretation of the record evidence and provides a rational basis for his decision to not apply Financial Considerations Mitigating Condition 4.

The Administrative Judge also articulated a rational explanation for concluding that Applicant's efforts to resolve his financial problems warranted little weight under Financial Considerations Mitigating Condition 6. Given the Judge's explanation, it was not arbitrary or capricious for the Judge to give little weight to Mitigating Condition 6.

(d) Applicant's ability to cite to favorable record evidence does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. A Judge must consider the record evidence as whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0435 (September 16, 1999) at p. 3. In this case, the Judge gave an explanation for his conclusion that Applicant had failed to successfully mitigate the government's case against him. The Judge's explanation reflects a reasonable interpretation of the record evidence. Applicant's disagreement with the weight the Judge placed on favorable and unfavorable evidence is not enough to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0767 (August 18, 1999) at p. 3.

Applicant's argument about the relative seriousness of his financial problems does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Judge was not required to make a favorable security clearance decision merely because Applicant did not engage in certain serious kinds of financial misconduct (such as theft, fraud, breach of trust, or incurring financial problems due to gambling or substance abuse). 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). A history of financial problems provides a rational basis for questioning an applicant's security eligibility. *See, e.g.*, ISCR Case No. 96-0544 (May 12, 1997) at pp. 5-6 (discussing security significance of history of financial problems). The Judge's findings and conclusions about Applicant's overall history of financial problems provided a rational basis for the Judge's doubts about Applicant's security suitability. Given those doubts, the Judge acted properly by resolving them in favor of the national security. *Department of Navy v. Egan*, 484 U.S. at 531.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's June 30, 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)."
2. "[T]he person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control."
3. "[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."