

DATE: October 13, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0124

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge John R. Erck 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 issue of whether the Administrative Judge's adverse security decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 5, 1999 to Applicant. The SOR was based on Criterion F (Financial Considerations).

Applicant submitted an answer to the SOR wherein she admitted all the factual allegations presented, with one qualification concerning the amount of her debts discharged in bankruptcy. She also indicated that she did not wish to have a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant who did not exercise her right to submit a response to it. The case was then assigned to the Administrative Judge for disposition.

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 Issue

The Administrative Judge found: (a) Applicant received a discharge in bankruptcy in December 1998 wherein \$35,408.82 of debt was discharged; (b) a reduction of family income of about \$20,000.00 annually occurred in 1991 when her husband quit working; (c) further reductions in income took place when Applicant lost a \$15,000.00

investment in her former employer's company (which went into receivership) and she took a \$10,000.00 per year pay cut when she changed jobs; (d) between 1991 and 1998 Applicant and her husband went heavily into debt by using credit cards to maintain the lifestyle they had before the husband stopped working; (e) Applicant and her husband owe Applicant's mother about \$35,000.00 and this debt was not discharged in bankruptcy; (f) Applicant formerly spent \$5,000.00 to \$6,000.00 per year on state lottery tickets, and more recently she spends about \$30.00 per week on the lottery; and (g) according to a Personal Financial Statement prepared in January 1999 Applicant has about \$300.00 left over each month after expenses are met. The Judge concluded that Applicant's behavior and spending habits were more to blame for her financial difficulties than uncontrollable outside events. He also concluded that Applicant was repeating some of her past mistakes after the bankruptcy discharge provided her with a "fresh start." The Judge concluded that Applicant's history of financial conduct warranted an adverse security clearance decision.

On appeal, Applicant makes the following assertions; (a) the Judge's statement that she has extra income available each month to use to repay the debt to her mother is misleading; (b) Applicant is no longer financially overextended, has incurred no new debts and no longer spends money weekly on the lottery; (c) Applicant resorted to no illegal activity in resolving her debts; and (d) while the case raises questions about her past judgment, it did nothing to challenge her reliability or trustworthiness. The Board construes these assertions as raising the issue of whether the Judge's adverse decision is arbitrary, capricious or contrary to law.

Based on the record before him, it was reasonable for the Judge to find that Applicant had discretionary income available each month. The record also supports his finding that Applicant was not allocating any of this surplus to repay the \$35,000.00 owed her mother. On appeal Applicant asserts that recurring unanticipated expenses compromise the \$300.00 monthly surplus and that her mother has agreed to a postponement of the debt repayment. These assertions relate facts that were not available to the Administrative Judge. As such, they constitute new evidence which cannot be considered on appeal. ⁽¹⁾ Because review of an Administrative Judge's decision is limited to the record before him, 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); ISCR Case No. 98-0392 (February 4, 1999) at p. 2. Applicant has failed to demonstrate error by the Judge.

Applicant asserts on appeal that she is no longer financially overextended. Given the fact that her discharge in bankruptcy relieved her of in excess of \$35,000.00 of debt, her statement has a degree of merit. Nevertheless, the Administrative Judge was not obligated to make a favorable decision merely because her financial situation has improved. An Administrative Judge is required to consider individual pieces of evidence and specific circumstances in light of all the evidence of record. In this case the Judge was aware of the significant fact of Applicant's bankruptcy discharge. He did, in fact, acknowledge the favorable aspects of Applicant's discharge when discussing the potential applicability of Mitigating Condition 6. ⁽²⁾ Ultimately, however, the Judge concluded that Applicant's history of financial irresponsibility and her spending habits after bankruptcy perpetuated doubts about her security clearance eligibility that were not alleviated by her somewhat improved financial condition. His conclusion is not arbitrary, capricious, or contrary to law.

In a related argument, Applicant asserts on appeal that she has not incurred any new debt and that she no longer purchases lottery tickets on a regular basis. Applicant is again making assertions that go beyond the record below. Accordingly, these assertions do not establish error on the part of the Administrative Judge.

Applicant's last two arguments may be considered together. She asserts that she never resorted to any illegal acts in resolving her financial plight. She also states that while the facts of the case indicate that she is guilty of some past errors in judgment, they do not impact upon her trustworthiness or reliability. 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 Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). The fact that Applicant refrained from resorting to illegal activity to solve her debt problems is favorable evidence. However, the Judge must consider the record as a whole, including both favorable and unfavorable evidence, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Nothing in Applicant's brief persuades the Board that the Judge acted in an arbitrary and capricious manner when weighing the record evidence in this case. Furthermore, Applicant's appeal brief offers examples of her trustworthiness and reliability that cannot be

considered on appeal since they go beyond the record evidence.

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.

Conclusion

Applicant has failed to meet her 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. *See* Directive, Additional Procedural Guidance, Item 29.

2. "[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."