

DATE: May 25, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0462

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Joseph Testan issued a decision, dated December 15, 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 failed to make a fair and impartial determination in Applicant's case; and (2) 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 June 30, 1999 to Applicant. The SOR was based on Criterion F (Financial Considerations), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct). A hearing was held on November 17, 1999.

The Administrative Judge issued a written decision, dated December 15, 1999. The Judge entered formal findings in favor of Applicant with respect to Criterion E and Criterion J, and formal findings against Applicant with respect to Criterion F. The Judge 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 Judge's unfavorable security clearance decision.

Appeal Issues

1. Whether the Administrative Judge failed to make a fair and impartial determination in Applicant's case. On appeal, Applicant asserts the following: " I arrived [at the hearing location] at 12:05 PM and noticed two men talking in the courtroom but the door was locked. I then went to another office to borrow the bathroom key instead of disturbing the two gentlemen in courtroom 235. I returned to the courtroom closer to 1 PM and the door was unlocked. I walked in, introduced myself and so did the two gentlemen. One was Administrative Judge Joseph Testan and the other Martin H.

Mogul counsel for the Government. When I walked in they broke their conversation, it was evident that they were good friends. I have no idea of what they talked about, but after the judge's decision I can't help but to feel that Judge Testan's decision could have been influenced prior to the hearing. This is not introducing new evidence it is my observation." [\(1\)](#) The Board construes Applicant's statements as raising the issue of whether he was denied a fair and impartial determination in his case.

Applicant's appeal statements pose a dilemma. On the one hand, Applicant's statements go beyond the record below and, therefore, constitute new evidence, which the Board cannot consider on appeal. Directive, Additional Procedural Guidance, Item 29. On the other hand, Applicant's assertions raise a serious allegation that the Board cannot simply ignore because it raises a question concerning the fairness and integrity of the proceeding in his case. *See, e.g.*, DISCR Case No. 90-1550 (March 25, 1992) at p. 3 (Board cannot simply ignore allegation made by Department Counsel that improper conduct occurred that touches upon the fairness and integrity of a DOHA proceeding). *Cf.* ISCR Case No. 95-0300 (February 1, 1996) at pp. 3-4 (Board addressed applicant's claim that DoD employee suggested he not get an attorney to represent him at the hearing); DISCR Case No. 89-0525 (June 15, 1990) at pp. 7-8 (Board considered applicant's claim that Department Counsel and Hearing Examiner discussed his case before and after hearing). The Board will resolve the dilemma by assuming, solely for the sake of deciding this appeal, that Applicant's representations about the sequence of events are true. *See* ISCR Case No. 95-0300 (February 1, 1996) at p. 3 (Board accepting as true assertions made on appeal for purpose of resolving appeal issue); DISCR Case No. 90-1550 (March 25, 1992) at p. 3 (assuming solely for sake of addressing appeal issue that representations about alleged *ex parte* communication are true).

It is well-settled that *ex parte* communications between an Administrative Judge and a party (or a lawyer) to a case could raise serious questions about the fairness and integrity of a hearing. *See, e.g.*, DISCR Case No. 90-1550 (March 25, 1992) at p. 3 (citing federal cases). However, not all conversations between an Administrative Judge and a party (or lawyer) to a case are suspect or improper. A Judge is not absolutely precluded from engaging in casual social conversation or pleasantries with a party or a lawyer. Furthermore, even some conversations with a party or a lawyer about a case may be permissible. *See, e.g.*, DISCR Case No. 89-0525 (June 15, 1990) at p. 7 ("Communications which do not affect the way a case is decided, such as requests for status reports or procedural inquiries, are exempt from [the prohibition against *ex parte* communications].")(citing federal case). Finally, even passing references to a pending case do not necessarily make a hearing unfair. *Id.* at p. 8 (citing federal case). However, even if a conversation between a Judge and a party (or lawyer) to a case is legally permissible, a Judge has an obligation to take reasonable steps to avoid the appearance of impropriety. Lawyers also have a professional responsibility to avoid conduct that is questionable or could be prejudicial to the fairness and integrity of proceedings that they participate in as advocates. *Cf.* ISCR Case No. 95-0300 (February 1, 1996) at p. 4 ("Federal officials and employees need to be sensitive to the possibility that *pro se* applicants may not understand or appreciate the nuances of statements made by them.").

There is a rebuttable presumption that quasi-judicial officers are impartial and unbiased. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). An appealing party has a heavy burden of demonstrating conduct by an Administrative Judge that deprived the hearing or decision of fairness and impartiality. *See, e.g.*, DISCR Case No. 94-0282 (February 21, 1995) at pp. 4-5 (citing federal cases). The mere fact of a conversation between the Judge and Department Counsel fails to establish that the Judge's decision lacked impartiality. The mere fact that a Judge found against the appealing party does not demonstrate the Judge was prejudiced or biased. *See, e.g.*, ISCR Case No. 94-954 (October 16, 1995) at p. 4 (citing federal case). Apart from these general propositions, in this case the willingness of the Judge to give fair and impartial consideration to the evidence presented by Applicant is shown by the Judge's findings and conclusions in favor of Applicant with respect to the SOR paragraphs concerning falsification and at least three of the SOR subparagraphs concerning his financial difficulties. Considering the record as a whole, the Board concludes Applicant's concerns are not frivolous, but they are not sufficient to overcome the rebuttable presumption that the Judge acted in an impartial and unbiased manner.

2. Whether the Administrative Judge's adverse security decision is arbitrary, capricious, or contrary to law. Applicant argues: (a) the Administrative Judge erred by applying Financial Considerations Disqualifying Conditions 1 and 3; (b) he has had a security clearance for many years without any security violations; (c) he has never had any incident that would cause his employer or its government customer to have any doubt about trusting his character; and (d) he has always filled out security questionnaires honestly and truthfully, and has never deliberately withheld information from

the government. The Board construes these arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

(a) Applicant challenges the Administrative Judge's application of Financial Considerations Disqualifying Conditions 1 (2) and 3. (3) Applicant argues the Judge should not have applied Disqualifying Condition 1 because: (i) his delinquent obligations were a result of his bankruptcy and he has not had any other delinquent obligations since then; and (ii) the Judge should have applied Financial Considerations Mitigating Conditions 2 (4) and 3. (5) Applicant's arguments fail to demonstrate the Judge erred.

Applicant's delinquent debts were incurred *before* he filed a petition for bankruptcy in 1994. Accordingly, those debts were not the result of his bankruptcy petition. The debts were not discharged because Applicant failed to follow the bankruptcy court's orders and did not pay the trustee. Ultimately, his bankruptcy petition was dismissed in 1997. Therefore, the security significance of Applicant's unsatisfied delinquent debts is not diminished, as Applicant suggests, because he did not incur more delinquent debts since filing the bankruptcy petition. His failure to make appropriate payments under the trusteeship also matters. Applicant's history of financial difficulties falls within the scope of Financial Considerations Disqualifying Condition 1.

Given the record evidence in this case, it is untenable for Applicant to argue that his outstanding delinquent debts constitute "an isolated incident" within the meaning of Financial Considerations Mitigating Condition 2. The circumstances under which the delinquent debts arose might arguably fall within the scope of Financial Considerations Mitigating 3. However, given Applicant's failure to deal with his delinquent debts in a reasonable manner since 1994, it was not arbitrary or capricious for the Judge to apply Financial Considerations Disqualifying Condition 3 and to not apply Financial Considerations Mitigating Condition 3. Even if an applicant gets into financial difficulties because of circumstances beyond the applicant's control, the Judge must consider whether the applicant dealt with his or her financial difficulties in a reasonable manner. *See* ISCR Case No. 98-0257 (January 22, 1999) at p. 3.

(b) The Administrative Judge's adverse decision is not made arbitrary or capricious by the absence of evidence that Applicant has ever had a security violation. 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). The federal government need not wait until an applicant actually mishandles or fails to properly safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Even in the absence of any security violation, the federal government can deny or revoke access to classified information based on the existence of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 5. Applicant's history of financial difficulties provides a rational basis for the Judge's adverse conclusions about Applicant's security eligibility. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6 (discussing security significance of history of financial problems).

(c) Applicant's reliance on his job performance is not persuasive. An applicant with good or exemplary job performance may engage in off-duty conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0473 (May 12, 2000) at p. 3. Accordingly, however favorable the opinions that Applicant's employer and its customer have of his job performance, such opinions do not diminish the negative security implications of Applicant's history of financial difficulties.

(d) Applicant's argument about his honesty with the federal government is misplaced for two reasons. First, the Administrative Judge found in Applicant's favor with respect to the SOR allegations concerning his omission of many delinquent debts from a security questionnaire he signed in August 1998. The Judge's favorable findings and conclusions about those SOR allegations are not at issue on appeal. Second, Applicant's honesty with the federal government does not negate or diminish the negative security implications of his history of financial difficulties. *See, e.g.*, ISCR Case No. 99-0119 (September 13, 1999) at p. 3 ("An applicant's honesty and candor with the government do not preclude the government from considering the security significance of the applicant's admitted conduct.").

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's December 15, 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. Department Counsel chose to not file a reply brief. Accordingly, the Board does not have the benefit of any response from Department Counsel to Applicant's assertions.
2. "[A] history of not meeting financial obligations"
3. "[I]nability or unwillingness to satisfy debts"
4. "[I]t was an isolated incident"
5. "[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)"