

DATE: August 17, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0625

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Department Counsel

Martin H. Mogul, Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Wilford H. Ross issued a decision dated April 12, 2000, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons that follow the Board reverses the Administrative Judge's decision.

The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issue: Whether the Administrative Judge's conclusion that Applicant had overcome the government's case was supported by the record evidence.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated October 22, 1999. The SOR was based on Criterion F (Financial Considerations). Applicant declined a hearing and the Administrative Judge decided the case based on the administrative record. On April 12, 2000 the Administrative Judge issued a favorable decision. The case is before the Appeal Board on the government's appeal of that decision.

Appeal Issue

Whether the Administrative Judge's conclusion that Applicant had overcome the government's case was supported by the record evidence. Department Counsel argues that the record evidence shows that Applicant is responsible for debts on which he is failing to make payments in a timely or voluntary fashion.

The bulk of the Administrative Judge's findings of fact are uncontested. The Administrative Judge concluded that the government had met its burden of proving by substantial evidence that Applicant has debts which he cannot or will not resolve. However the Administrative Judge concluded that the unresolved debts were mitigated. The Department Counsel challenges that conclusion.

Applicant has a debt of over \$90,000 for a mortgage on a mobile home. The mobile home burned and was replaced but Applicant's ex-wife sold the replacement after filing for divorce from Applicant. Applicant is not making payments on that debt. The Judge concluded that the bank has no interest in pursuing the debt. Department Counsel argues that Applicant still owes the debt and that there is no record evidence which suggests otherwise. Department Counsel's argument has merit. If the bank wanted to forgive the debt formally they could have done so but there is no evidence that the bank chose to do that. Indeed, there is no clear record evidence of the bank's intent. Applicant has failed to demonstrate that the debt is not currently a just legal obligation. Regardless of the bank's conduct in collecting its debt, the Administrative Judge did not articulate a sustainable basis for clearing Applicant on this debt. Additionally, the Administrative Judge does not have an adequate basis for concluding that Applicant made good faith attempts to repay the debt. Indeed the record includes Applicant's signed sworn statement wherein he denied responsibility for the debt and indicated he had no intention of repaying it.

Applicant has credit card debt to a bank. Applicant attempted to negotiate a compromise with the bank but the bank declined his offer. The Administrative Judge concluded the debt probably was unenforceable due to age. Applicant is not making payments on the debt. Department Counsel argues that there is no record evidence which negates Applicant's responsibility for the debt. Department Counsel's argument has merit. Neither the age of the debt nor Applicant's failed request at negotiating a compromise has obviated Applicant's current responsibility for the debt. The Administrative Judge did not articulate a sustainable basis for clearing Applicant on this debt.

Applicant owes his ex-wife a substantial amount of money for spousal support arrearages (approximately \$40,000) which accumulated over the course of several years. He has been making payments on the arrearages as a result of a Court order in the case. Department Counsel argues that Applicant's payments are a result of the Court order and thus Applicant should not benefit from having made those payments. Department Counsel's argument does not establish error. Although the accumulation of arrearages has security significance, it was not arbitrary or capricious for the Judge to conclude that the government's security concerns were mitigated by the Applicant's ongoing periodic payments to satisfy the support obligation pursuant to the Court's order.

In light of the two debts where the Administrative Judge found for Applicant without articulating a sustainable basis supported by the record evidence, the Board concludes that there is reversible error in the decision below. The Board need not address Department Counsel's argument that the decision below is arbitrary capricious and contrary to law as that argument is largely repetitious of the arguments addressed above.

Conclusion

Department Counsel has met their burden on appeal of demonstrating reversible error. Therefore, the Appeal Board reverses the Administrative Judge's April 12, 2000 decision.

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

Separate opinion of Chairman Emilio Jaksetic,

concurring in part and dissenting in part

On appeal, Department Counsel does not challenge the Administrative Judge's findings about Applicant's history of financial difficulties. However, Department Counsel contends the record evidence does not support the Judge's conclusion that Applicant has demonstrated mitigation of the debts covered by SOR 1.a. (mobile home mortgage), SOR 1.b. (credit card debt) and SOR 1.c. (spousal support arrearages).

I agree with my colleagues' conclusion that Department Counsel has demonstrated the Administrative Judge erred by deciding Applicant had demonstrated mitigation with respect to the debts covered by SOR 1.a. and SOR 1.b. The Judge's acceptance of Applicant's explanation concerning the facts and circumstances surrounding a mobile home mortgage (SOR 1.a.) and a credit card debt (SOR 1.b.) means, at most, that the Judge may have a rational basis for his factual findings about those debts. It does not mean the Judge has a rational basis for concluding Applicant demonstrated mitigation for his failure to resolve or otherwise deal with those debts. Even if Applicant's grievances against his ex-wife are totally valid, the record shows Applicant is legally obligated for the mobile home mortgage, Applicant has not satisfied that debt, and Applicant has not taken reasonable steps to address or resolve it. Similarly, Applicant's attempt to negotiate a compromise settlement for the credit card debt does not mean he is relieved of the legal obligation to pay it. Furthermore, the apparent failure of the creditor to pursue the repayment of the two debts in a diligent manner does not relieve Applicant of his responsibility for those debts or change the significance of his failure to deal with them in a responsible manner. The Judge's favorable conclusions about SOR 1.a. and SOR 1.b. cannot be sustained because they are based on reasons that do not follow rationally from the Judge's factual findings. *See, e.g.*, ISCR Case No. 99-0019 (November 22, 1999) at p. 3)(noting that an Administrative Judge's conclusions may be arbitrary or capricious even though there is substantial evidence supporting the Judge's findings of fact).

I concur with the majority's conclusion that Department Counsel has not demonstrated the Administrative Judge acted in an arbitrary or capricious manner with respect to his conclusion about the debt covered by SOR 1.c.

I respectfully dissent from my colleagues' conclusion that Department Counsel's second appeal issue "is largely repetitious of the arguments" made in support of its first appeal issue. Department Counsel's first appeal issue contends the Administrative Judge erred by concluding Applicant demonstrated his debts are mitigated. At the end of the various arguments made in support of the first appeal issue, Department Counsel closes by asserting the record evidence does not support the Judge's conclusion that Department Counsel established a case against Applicant under Criterion F, but Applicant had met his burden of demonstrating mitigation sufficient to rebut the government's case against him. Department Counsel's second appeal issue does not repeat the various arguments made in support of its first appeal issue. Rather, Department Counsel's second appeal issue reiterates the legal conclusion it asserted at the end of the first appeal issue portion of its brief, and then adds a brief argument in which it asserts the Judge's errors concerning mitigation render his favorable findings with respect to Criterion F arbitrary, capricious, and contrary to law, and that, accordingly, the Judge's favorable decision should be reversed.

Although Department Counsel's argument is not a model of clarity, it has merit. Once SOR allegations have been admitted by an applicant or proven by Department Counsel, the burden shifts to the applicant to present evidence to rebut, extenuate, or mitigate the case against him or her, and the applicant "has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15. Given the "clearly consistent with the national interest" standard, that burden is a heavy one. *See, e.g.*, ISCR Case No. 99-0005 (April 19, 2000) at p. 4; ISCR Case No. 98-0723 (June 16, 1999) at p. 3.

In this case, Applicant's answer to the SOR and the record evidence provide a rational basis for the Administrative Judge's findings that Applicant is responsible for the debts covered by SOR 1.a., SOR 1.b., and SOR 1.c. As discussed earlier, it was not arbitrary or capricious for the Judge to conclude Applicant had demonstrated mitigation with respect to the debt covered by SOR 1.c., but the Judge failed to articulate a rational basis for his conclusion that Applicant had demonstrated mitigation with respect to the debts covered by SOR 1.a. and SOR 1.b. Correction of the Judge's errors leaves Applicant with two unsatisfied debts totaling in excess of \$94,000 and no sustainable finding of mitigation concerning those debts. Under the circumstances, Department Counsel is correct in asserting that the Judge's errors warrant reversal. Accordingly, I fully concur with my colleagues' decision to reverse the Judge's April 12, 2000 decision. *See* Directive, Additional Procedural Guidance, Item E3.1.33.3.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board