

DATE: June 4, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-9020

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Acting Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Darlene Lokey Anderson issued a decision, dated February 5, 2001, 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 some of the Administrative Judge's findings and conclusions are not supported by the record evidence; (2) whether the Administrative Judge erred in applying pertinent provisions of the Directive; and (3) 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 July 21, 2000 to Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). A hearing was held on November 16, 2000. The Administrative Judge issued a written decision, dated February 5, 2001, 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 the Judge's adverse decision.

Appeal Issues

1. Whether some of the Administrative Judge's findings and conclusions are not supported by the record evidence. Applicant challenges various paragraphs in the Administrative Judge's decision, contending the record evidence does not support the Judge's findings and conclusions. Applicant's arguments have mixed merit.

As a preliminary matter, the Board notes that there is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1285 (9th Cir. 1984). Applicant's disagreements with the Judge's findings, standing alone, are not sufficient to rebut that presumption.

Applicant correctly notes the Administrative Judge erred by finding that Applicant seeks to retain a security clearance. The record evidence shows that Applicant is applying for a security clearance, not retain one. However, this error is harmless because for purposes of adjudicating Applicant's eligibility for a security clearance it is irrelevant whether Applicant currently possesses a security clearance.

Applicant's challenge to the third paragraph of the Administrative Judge's findings of fact section lacks merit. That paragraph consists of a simple summary of what the government alleged in the SOR under Guideline F, not a finding by the Judge. The Judge's summary of what the government alleged in the SOR is essentially accurate.⁽¹⁾

Applicant's challenges to the fourth, fifth, sixth and tenth paragraphs of the Administrative Judge's findings of fact are not persuasive. Those paragraphs reflect a reasonable, plausible interpretation of the record evidence in this case. Applicant's strong disagreement with those paragraphs is not sufficient to demonstrate the Judge erred. Applicant's ability to argue for an alternate interpretation of the record evidence does not demonstrate the Judge's findings and inferences are erroneous. *See, e.g.*, ISCR Case No. 00-0248 (March 21, 2001) at p. 2.

Applicant also contends that Department Counsel and the Administrative Judge "clearly do not understand gaming, markers, bankruptcy law, or the gaming laws of the State of Nevada." The Board reviews the decisions by Administrative Judges on appeal. Directive, Additional Procedural Guidance, Item E3.1.32. What Department Counsel understands or does not understand is irrelevant to this appeal. The fact that Applicant is legally free to seek a discharge of his debts in bankruptcy is irrelevant to adjudicating his security eligibility. The legality of Applicant's exercise of his rights under bankruptcy law does not preclude the government from considering the negative security implications of his history of financial difficulties. *See, e.g.*, ISCR Case No. 97-0016 (December 31, 1997) at p. 4 (discussing why discharge in bankruptcy does not preclude consideration of security implications of applicant's financial problems that led to the bankruptcy). Furthermore, the fact that a casino eventually decided to write off Applicant's gambling debt of approximately \$58,000 did not preclude the Judge from considering that debt as part of Applicant's overall history of financial difficulties.⁽²⁾

Applicant also contends the Administrative Judge erred by finding that gambling caused his financial problems. The Judge's decision is not a model of clarity on this aspect of the case. However, the Board does not measure a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 00-0311 (March 8, 2001) at p. 2. Reading the Judge's decision in its entirety, the Board concludes Applicant has not demonstrated any harmful error by the Judge with respect to her findings and conclusions on this aspect of the case. In the finding of fact section of the decision, the Judge: (a) found Applicant accumulated credit card debts of approximately \$120,000 during the period 1996-1998; (b) found Applicant's financial difficulties began when Applicant lost a substantial part of his assets when the stock market experienced a downturn in 1998-1999; (c) found Applicant suffered gambling losses of approximately \$60,000 during the period October-December 1998; and (d) noted Applicant's explanation concerning the circumstances under which Applicant's gambling debt was excused or written off by the casino. In the conclusion section of the decision, the Judge concluded: (1) Applicant could afford his gambling habit for most of his life; (2) Applicant's gambling had gotten out of control in recent years and had caused him serious financial indebtedness; and (3) Applicant filed for bankruptcy to resolve "this problem."

The Administrative Judge's reference to "this problem" is somewhat ambiguous. However, given the record evidence in this case, it was not arbitrary or capricious for the Judge to find that Applicant's gambling had gotten out of control and that it had caused him serious financial indebtedness. The fact that Applicant had other large debts unrelated to his gambling did not negate or diminish the significance of the fact that his gambling debts were substantial. Furthermore, the fact that a casino eventually decided to forgive Applicant's gambling debt did not preclude the Judge from considering the negative security implications of Applicant accruing a significant gambling debt in an effort to try to "win a jackpot" so that he could deal with his serious financial difficulties. Given the record evidence as a whole, it was not arbitrary or capricious for the Judge to conclude Applicant's attempt to use gambling to get out of his financial difficulties was an aggravating circumstance, not a mitigating one. *Cf.* ISCR Case No. 99-0462 (May 25, 2000) at p. 4 ("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.").

2. Whether the Administrative Judge erred in applying pertinent provisions of the Directive. Applicant also contends the Administrative Judge: (a) erred by applying Financial Considerations Disqualifying Conditions 1, 3 and 5; (b) erred by not applying Financial Considerations Mitigating Conditions 1, 2, 3, 4, or 6; (c) had no basis to apply Personal Conduct Disqualifying Condition 4; and (d) failed to consider the record evidence that show Applicant's financial difficulties will not happen again. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge committed harmful error.

(a) Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to apply Financial Considerations Disqualifying Condition 1, ⁽³⁾ Financial Considerations Disqualifying Condition 3, ⁽⁴⁾ and Financial Considerations Disqualifying Mitigating Condition 5. ⁽⁵⁾ Applicant's arguments to the contrary fail to demonstrate the Judge erred because they are based on a narrow reading of the record evidence. The Judge had to consider the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, Applicant's ability to argue for a more favorable weighing of the record evidence is not sufficient to demonstrate the Judge erred in applying these Financial Considerations disqualifying conditions. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 6. Furthermore, the fact that not all of Applicant's financial problems were linked to his gambling did not preclude the Judge from applying Financial Considerations Disqualifying Condition 5 to that portion of Applicant's financial difficulties reasonably attributable to his gambling.

(b)(i) Financial Considerations Mitigating Condition 1. ⁽⁶⁾ The Board has declined to make a "bright line" definition for what constitutes "recent" under the Directive. *See, e.g.*, ISCR Case No. 99-0018 (April 11, 2000) at p. 4; ISCR Case No. 98-0583 (November 18, 1999) at p. 6. Given the record evidence in this case, it was not arbitrary or capricious for the Judge to decide that not enough time had passed since Applicant's discharge in bankruptcy to apply Financial Considerations Mitigating Condition 1.

(b)(ii) Financial Considerations Mitigating Condition 2. ⁽⁷⁾ The record evidence shows that Applicant's financial difficulties grew over a period of several years before cumulating in the financial crisis that led to his seeking bankruptcy. It is simply untenable for Applicant to characterize his history of financial difficulties as merely "an isolated incident." Given the record evidence in this case, application of Financial Considerations Mitigating Condition 2 was not warranted.

(b)(iii) Financial Considerations Mitigating Condition 3. ⁽⁸⁾ Applicant correctly notes that he had no control over his being laid off in 1995 and the downturn of the stock market in 1998-1999. Applicant may have had no control over the job market in the state to which he moved in 1995, but he had control over the decisions to relocate there despite not having a job offer and to stay there despite his continued inability to find a suitable job. The record evidence shows that during the period 1995-1999 Applicant made several voluntary choices that contributed to and aggravated his financial situation. Accordingly, it is untenable for Applicant to claim the benefit of this mitigating condition.

(b)(iv) Financial Considerations Mitigating Condition 4. ⁽⁹⁾ Applicant obtained some counseling about his gambling. There is no record evidence that Applicant obtained any counseling concerning handling his financial difficulties. Because Applicant's financial difficulties were not limited to his gambling debts, the counseling Applicant received concerning his gambling did not compel the Judge to apply this mitigating condition.

(b)(v) Financial Considerations Mitigating Condition 5. ⁽¹⁰⁾ Applicant correctly notes that his case does not involve any unexplained affluence. Accordingly, this mitigating condition is not relevant to his case.

(b)(vi) Financial Considerations Mitigating Condition 6. ⁽¹¹⁾ Applicant correctly notes that it was legal for him to seek legal advice and file for bankruptcy. However, the legality of obtaining a discharge in bankruptcy does not automatically require application of Financial Considerations Mitigating Condition 6.

Given the record evidence, Applicant had the burden of presenting evidence "to rebut, explain, extenuate, or mitigate" his history of financial difficulties. *See* Directive, Additional Procedural Guidance, Item E3.1.15. That burden includes presenting evidence sufficient to warrant application of pertinent mitigating conditions. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 7 n.1. In order to qualify for application of Financial Considerations Mitigating Condition

6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201 (October 12, 1999) at p. 4 (discussing concept of good-faith in connection with another provision of the Adjudicative Guidelines). Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6. ⁽¹²⁾ Considering the record evidence in this case, Applicant has fallen far short of presenting evidence that would require the Judge to apply Financial Considerations Mitigating Condition 6 in his case.

(c) Personal Conduct Disqualifying Condition 4. ⁽¹³⁾ Applicant contends the Administrative Judge did not set forth any explanation for why she concluded Applicant's conduct fell under Guideline E or why she applied Personal Conduct Disqualifying Condition 4. This contention is persuasive. A Judge has broad discretion in writing his or her decision, but a Judge must issue a written decision that enables the parties and the Board to understand what the findings the Judge is making, what conclusions the Judge is reaching, and sufficient explanation to show that the Judge is engaged in reasoned decision making. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 2. In this case, the Judge's decision lacks any meaningful discussion or analysis that explains her adverse conclusions under Guideline E or her application of Personal Conduct Disqualifying Condition 4. However, the Judge's errors with respect to Guideline E are harmless because the Judge's sustainable findings and conclusions under Guideline F are sufficient to support the Judge's adverse security clearance decision.

(d) Applicant also argues the Administrative Judge failed to consider the record evidence that show his financial difficulties will not happen again. Security clearance decisions are not an exact science, but rather involve predictive judgments about an applicant's possible future behavior based on consideration of the applicant's past conduct and present circumstances. *See Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). *See also* Directive, Section 6.3.6 and Item E2.2.1.9 (directing security adjudicators to consider likelihood that circumstances or conduct will continue or recur). The Judge properly considered the likelihood that Applicant's financial difficulties might recur and gave an explanation for why she decided it was too soon to conclude Applicant would not fall into financial difficulties in the future. The Judge's consideration of this aspect of the case fell within the bounds of her discretion and did not demonstrate arbitrary or capricious action by her.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant makes several other arguments that raise the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Specifically, Applicant argues: (a) the Judge drew inferences and reached conclusions based on speculation and conjecture; (b) the Judge's adverse decision is not consistent with Applicant Exhibit H and Applicant Exhibit I, which show it is in the interest of the government to grant him a security clearance; (c) the Judge failed to take into account the fact that Applicant's gambling and his financial difficulties did not result in his committing any criminal acts, or that there is no evidence that any creditor objected to Applicant's bankruptcy petition or tried to collect the debts through various means; (d) the Judge failed to consider the brief period of Applicant's financial difficulties against the entirety of his entire life, or the evidence that he has had no financial difficulties since he was granted a discharge in bankruptcy; and (e) the Judge failed to consider that Applicant's financial problems and bankruptcy were "an isolated out of character event, never to be repeated." For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's adverse decision is arbitrary, capricious, or contrary to law.

(a) Applicant's strong disagreement with the inferences drawn and conclusions reached by the Administrative Judge is not sufficient to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law. Considering the record as a whole, the Board concludes the Judge drew inferences and reached conclusions that reflect a reasonable, plausible interpretation of the record evidence with respect to her analysis of Applicant's history of financial difficulties under Guideline F. ⁽¹⁴⁾

(b) Applicant's reliance on Applicant Exhibit H is misplaced. Applicant Exhibit H is a memorandum from Applicant's supervisor that is strongly supportive of him and recommends that he be granted a security clearance. The opinions of an applicant's employer or supervisor about an applicant's suitability for a security clearance are not binding or conclusive on an Administrative Judge. *See, e.g.*, ISCR Case No. 99-0481 (November 29, 2000) at p. 4 ("The opinions

of an applicant's employer or supervisor are not binding on federal officials who make security clearance decisions. An Administrative Judge can have a rational basis for making an adverse security clearance decision even if an applicant's employer or supervisor does not have any concerns about the applicant getting or keeping a security clearance." (citation omitted). Given the record evidence of Applicant's history of financial difficulties, the favorable opinions set forth in Applicant Exhibit H did not require the Judge to make a favorable security clearance decision.

Applicant's reliance on Applicant Exhibit I also fails to demonstrate the Administrative Judge erred. Applicant's contribution to his defense contractor employer does not have the significance that Applicant places on it. As the Board has noted:

"The value of an applicant's expertise to a defense contractor or a military service is not relevant or material to determining the applicant's suitability for a security clearance. *See, e.g.*, ISCR Case No. 98-0435 (September 16, 1999) at p. 2 (applicant's value to his defense contractor employer is not a relevant consideration); ISCR Case No. 96-0710 (June 20, 1997) at p. 3 (Administrative Judge erred by relying on applicant's potential to contribute to national security); DISCR Case No. 92-0310 (June 22, 1993) at p. 3 (applicant's contribution to defense effort is not determinative of his or her security suitability). An applicant's expertise (or lack thereof) is not a measure of whether that applicant demonstrates the high degree of judgment, reliability, and trustworthiness that must be reposed in persons entrusted with classified information." ISCR Case No. 99-0109 (March 1, 2000) at p. 6.

Applicant Exhibit I did not require the Judge to make a favorable security clearance decision.

(c) The failure of Applicant's creditors to object to his bankruptcy petition is irrelevant to the Administrative Judge's assessment of the security significance of Applicant's history of financial difficulties. Furthermore, the fact that Applicant did not engage in criminal conduct as a result of his gambling and financial difficulties is not dispositive. Even if an applicant has not engaged in more serious conduct, the Judge must consider the security significance of the conduct that the applicant did engage in. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 9 ("The security significance of Applicant's conduct and circumstances is not negated or diminished merely because Applicant is not in a worse situation than he is."); ISCR Case No. 99-0254 (February 16, 2000) at p. 3 ("Even if an applicant has not engaged in other conduct that has more serious negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct the applicant did engage in.").

(d/e) Contrary to Applicant's contentions, the Administrative Judge's decision reflects a reasonable consideration of Applicant's financial difficulties within the context of the whole person analysis required by the Directive. Given the extended period of time over which Applicant's financial difficulties accumulated, it is untenable for Applicant to argue the Judge should have concluded his financial problems were isolated or out of character for him.

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). The federal government need not wait until an applicant mishandles or fails to properly handle or 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). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). All that is required is proof 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.

Under Guideline F, the security eligibility of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties. *See* ISCR Case No. 96-0454 (February 7, 1997) at p. 2. "Furthermore, [f]inancial difficulties, financial irresponsibility and greed have proven to be significant motivating forces for espionage or attempted espionage. It is clear that the United States must consider whether individuals granted access to classified information are, through financial irresponsibility, greed or *financial misfortune*, in a position where they may be more susceptible to mishandling or compromising classified information or material for financial gain." ISCR Case No. 95-0611 (May 2, 1996) at pp. 2-3 (quoting earlier Board decision)(italics added). *Accord* ISCR Case No. 00-0104 (March 21, 2001) at pp. 4-5. Department Counsel does not have to prove that an applicant poses a "clear and

present danger" to national security, *Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975), or that an applicant poses an imminent threat of engaging in criminal acts. The facts and circumstances of Applicant's history of financial difficulties provide a rational basis for the Administrative Judge's adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden of demonstrating error that warrants reversal or remand. Accordingly, the Board affirms the Administrative Judge's February 5, 2001 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. Applicant also contends that Applicant Exhibit P shows that "I live well within my means." A review of Applicant Exhibit P shows that it falls short of proving Applicant's contention on this point.

2. Applicant asks the Board to contact a named person at the casino to confirm the facts of his casino debt. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, if Applicant wanted any particular evidence considered in his case, it was his responsibility to obtain that evidence and present it during the proceedings below. Directive, Additional Procedural Guidance, Item E3.1.15.

3. "A history of not meeting financial obligations"

4. "Inability or unwillingness to satisfy debts"

5. "Financial problems that are linked to gambling . . . "

6. "The behavior was not recent"

7. "It was an isolated incident"

8. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business turndown, unexpected medical emergency, or a death, divorce or separation)"

9. "The 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"

10. "The affluence resulted from a legal source"

11. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts"

12. For example, a person who decides not to honor his or her debts may be able to avoid paying those debts until they are legally uncollectible because the statute of limitations has run. Reliance on the running of a statute of limitations would be a legally permissible course of action. However, it would not demonstrate a good-faith effort to resolve one's debts that would fall under the meaning of Financial Considerations Mitigating Condition 6.

13. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail"

14. As discussed earlier in this decision, the Administrative Judge's decision lacks any meaningful discussion or analysis that explains her adverse conclusions under Guideline E or her application of Personal Conduct Disqualifying Condition 4, but those errors are harmless because the Judge's sustainable findings and conclusions under Guideline F are sufficient to support the Judge's adverse security clearance decision.