

DATE: December 22, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0044

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated August 18, 2000, 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 that follow 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, dated January 2, 1992, as amended.

Applicant's appeal presents the following issue: Whether the Administrative Judge's decision is arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated March 10, 2000. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Applicant provided an answer to the SOR on April 3, 2000 and declined a hearing. Department Counsel prepared a File of Relevant Material (FORM) on April 25, 2000 and forwarded a copy to Applicant. Applicant did not respond to the FORM. On August 18, 2000 the Administrative Judge issued her decision, which was unfavorable to the Applicant. The case is before the Board on Applicant's appeal of that decision.

Appeal Issue

Whether the Administrative Judge's decision below is arbitrary, capricious or contrary to law. On appeal, Applicant does not claim any specific error on the part of the Administrative Judge. Rather, she makes numerous statements about her past debt situation, the circumstances that aggravated her debt problems, and the circumstances behind her providing incomplete information on her security clearance questionnaire. She asserts that (1) her debts were due largely to circumstances beyond her control, (2) she has a good record with all of her defense contractor employers and she has never been tempted to engage in illegal or criminal acts to generate funds, (3) she did not deliberately conceal the full extent of her financial difficulties when answering a security questionnaire, (4) she has learned from her past mistakes, (5) she is starting a new job and is on a strict budget, (6) she is willing to have her credit status reinvestigated on a

yearly basis and (7) she is willing to furnish letters from her previous supervisors to demonstrate she is trustworthy. The Board construes these various statements and assertions as raising the issue of whether the Administrative Judge's decision was arbitrary, capricious or contrary to law.

Applicant's appeal brief is a combination of statements about her past problems, her present circumstances and her view of the future. Some of the statements refer to evidence already contained in the record and other statements make assertions that go beyond the record evidence. Concerning the factual assertions made on appeal that are already part of the record, under the Directive the Board is not empowered to weigh the record evidence *de novo* and make its own findings and conclusions about a case. Rather, the Board addresses the material issues raised by the parties to determine whether an Administrative Judge has made factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Concerning the factual assertions of events or circumstances that are outside the record, the Board is prohibited from considering new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Thus, the Board is not in a position to consider any future inquiries into Applicant's credit status nor is the Board able to consider letters from previous supervisors that were not submitted for consideration by the Administrative Judge during the proceedings below.

Applicant argues that Financial Considerations Mitigating Guideline E2.A6.1.3.3 should have been applied in mitigation in her case. ⁽¹⁾ A review of the Administrative Judge's decision indicates that she considered this mitigating guideline but did not find that the facts and circumstances of the case justified applying it to mitigate Applicant's conduct. Given Applicant's overall history of financial problems, including numerous delinquent debts that were still unsatisfied as of the close of the record evidence, the Administrative Judge had a rational basis for her doubts about Applicant's current security eligibility notwithstanding the evidence that external circumstances contributed to Applicant's financial woes. Our review of the record leads us to conclude that the Administrative Judge was not arbitrary or capricious in her ultimate application of this mitigating guideline.

Applicant speaks of her good job performance record and the fact that she has never been tempted to use illegal means to generate funds. While Applicant's past history is certainly relevant in terms of the "whole person" concept under which security clearance cases are adjudicated, the Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. Also, the government need not wait until an applicant has engaged in conduct involving illegality or violations of security practices before denying that person access to the nation's secrets. Security clearance decisions are predictive judgments about an individual's potential future conduct based upon past behavior. In this case the Administrative Judge was required to weigh both the positive and negative aspects of Applicant's case to determine whether she was eligible for access to classified information. On this record, the Judge's decision that Applicant's financial problems and falsification were not adequately mitigated was based on a reasoned view of the evidence and was not arbitrary or capricious.

Applicant contends she did not falsify the security questionnaire she filled out in July 1998. The Board concludes Applicant has not demonstrated the Administrative Judge erred by finding Applicant falsified the security questionnaire. The record below contains written statements by Applicant about why she completed the questionnaire the way she did. The Administrative Judge had the opportunity to consider and weigh those statements by Applicant. Applicant's statements were relevant and material evidence, but they were not binding on the Judge. Rather, the Judge had the obligation to consider Applicant's statements in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 2. An intent to falsify can be shown by circumstantial evidence even in the face of denials of any intent to falsify. *See, e.g.*, ISCR Case No. 99-0355 (December 14, 1999) at p. 2. Absent a showing that an Administrative Judge weighed the record evidence in a manner that is arbitrary, capricious or contrary to law, the Board will not disturb the Judge's findings. *See, e.g.*, ISCR Case No. 98-0657 (November 16, 1999) at p. 3. Applicant's ability to provide an explanation concerning her omission of numerous delinquent debts from the security questionnaire is not sufficient to demonstrate that the Judge's finding is arbitrary, capricious or contrary to law. Considering the record as a whole, the Judge's finding that Applicant falsified her security questionnaire in July 1998 reflects a plausible interpretation of the record evidence and, therefore, that finding is sustainable.

Conclusion

Applicant has failed to meet her burden on appeal of demonstrating that the Administrative Judge committed error. Accordingly, the Board affirms the Judge's August 18, 2000 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. "The 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)."