

DATE: April 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20579

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

C. Peyton Etheredge, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated October 10, 2002, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated December 2, 2003.

Applicant appealed the Administrative Judge's unfavorable 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.

Applicant's appeal presents the following issues: (1) whether the Board should remand the case to the Administrative Judge for a hearing, and (2) whether the Administrative Judge erred in finding against Applicant with respect to the Guideline F (Financial Considerations) and Guideline E (Personal Conduct) allegations. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision).

In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues ⁽¹⁾

1. Whether the Board should remand the case to the Administrative Judge for a hearing. Applicant argues that the Board should remand the case for a hearing because: (a) Applicant as a lay person lacked an understanding of what kind of proof he needed to produce in order to rebut, extenuate, explain, or mitigate the government's case against him, (b) based on the record below, the Judge should have been aware of Applicant's confusion and/or ignorance, and taken necessary steps to redress it, and (c) Applicant was "effectively precluded from presenting evidence in extenuation, mitigation and explanation on his own behalf." For the reasons that follow, the Applicant has failed to demonstrate he is entitled to a remand for a hearing.

Applicant's perfunctory claim that the Administrative Judge was aware of Applicant's ignorance of how to proceed and had the ability to redress Applicant's ignorance fails to demonstrate the Judge erred.

First, Applicant does not make a cogent argument as to why the Administrative Judge should have concluded Applicant was not competent to understand the nature of the proceedings below. There is a rebuttable presumption that Applicant, as an adult, is legally competent and is capable of making rational decisions concerning his actions. Even if Applicant's decision to not ask for a hearing was a mistake, such a mistake does not constitute incompetence to understand the nature of the proceedings below. Applicant chose to represent himself during the proceedings below. Applicant's *pro se* status did not relieve him of the obligation to take timely, reasonable steps to protect his rights under Executive Order 10865 and the Directive. Having decided to represent himself during the proceedings below, Applicant cannot fairly complain about the quality of his self-representation or seek to be relieved of the consequences of his decision to represent himself. *See, e.g.*, ISCR Case No. 02-19896 (December 29, 2003) at p. 6.

Second, Applicant fails to explain how the Administrative Judge was supposed to reconcile his obligation to be fair and

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impartial with Applicant's desire to have the Judge act as a surrogate advocate and help Applicant prepare and present the best possible case on his behalf.

Third, Applicant fails to make a specific claim as to what the Administrative Judge should have done to deal with Applicant's now-claimed ignorance of the proceedings below.⁽³⁾ Because Applicant asks the Board for a remand to allow him to have a hearing before the Judge, the Board construes Applicant's argument as contending the Judge erred by not scheduling a hearing. The right to ask for a hearing belongs to the parties, not to the Judge.⁽⁴⁾ If neither party asks for a hearing, then the Directive does not authorize the Judge to hold a hearing on the Judge's own motion. Moreover, Applicant's decision to not ask for a hearing does not constitute a denial of his right to have a hearing.

Nothing in the record below supports Applicant's conclusory claim that he was "effectively precluded from presenting evidence in extenuation, mitigation and explanation on his own behalf." A review of the record below shows that Applicant was placed on reasonable notice of (a) his right to respond to the SOR allegations against him, (b) his right to ask for a hearing or to ask for a decision to be made on the basis of an administrative record without a hearing, and (c) his right to respond to the evidence presented against him and to present evidence on his own behalf for consideration in his case by the Administrative Judge. Moreover, the record shows Applicant responded to the SOR, elected to have a decision made in his case without a hearing, received a copy of the File of Relevant Material (FORM), and submitted a response to the FORM for consideration by the Judge. Given the record below, it is untenable for Applicant to claim he was denied the opportunity to present evidence on his own behalf. Applicant cannot fairly claim his failure to take better advantage of his rights under the Directive constitutes a denial of those rights. *See, e.g.*, ISCR Case No. 02-19896 (December 29, 2003) at p. 6.

2. Whether the Administrative Judge erred in finding against Applicant with respect to the Guideline F (Financial Considerations) and Guideline E (Personal Conduct) allegations. Applicant contends that the Administrative Judge's adverse findings with respect to the Guideline F (Financial Considerations) allegations are unsustainable because the Judge erred in not accepting the Applicant's explanation that the unpaid debts listed on his multiple credit reports were either not his or that he was disputing their amount. He contends that the Judge's adverse findings with respect to the Guideline E (Personal Conduct) allegations are unsustainable because the Judge erred in not accepting the Applicant's explanation that he had no knowledge of the unpaid debts listed on his multiple credit reports at the time he filled out his security clearance application. Applicant further contends that had the Judge accepted the Applicant's explanation in both regards, then the government's case against him would have been rebutted, extenuated, or mitigated. The Applicant also contends that a close reading of the credit reports "appears" to indicate "a classic case of identity theft." Finally, the Applicant contends that the Judge did not properly consider the "whole person" concept, including the positive implications of the Applicant's prior career, in reaching his decision. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

The Applicant's explanations were relevant and material evidence that the Judge had to consider. However, the Judge was not bound to accept the Applicant's explanations at face value. As the trier of fact, the Judge had to consider the Applicant's statements in light of the record evidence as a whole, and Applicant's denial of knowledge of, or responsibility for, unpaid debts listed on his credit reports does not preclude the Judge from weighing the record evidence and making a finding that contradicts Applicant's denials. *See, e.g.*, *See* ISCR Case No. 02-07014 (January 7, 2004) at p. 3; ISCR Case No. 00-0430 (July 3, 2001) at pp.4-5; ISCR Case No. 99-0473 (May 12, 2000) at pp. 2-3. Given the record evidence below, and Applicant's failure to present documentary evidence in corroboration of his denials and explanations, or show what corrective actions he had pursued,⁽⁵⁾ it was not unreasonable for the Judge to conclude that the Applicant's denials alone were insufficient to rebut, extenuate, or mitigate the government's security concerns. Accordingly, the Judge's adverse findings with respect to both the Guideline F (Financial Considerations) and Guideline E (Personal Conduct) allegations arose from legally permissible inferences drawn from the record evidence and are, therefore, sustainable.

The Applicant's contention that a close reading of the credit reports appears to indicate that the Applicant is a victim of identity theft was an explanation not made to the Judge below. Furthermore, the record of the case contains no evidence--such as police reports, written complaints to financial institutions, statements from experts about identify theft, or similar evidence--to corroborate this new assertion. *Cf.* ISCR Case No. 02-29608 (December 17, 2003) at p.6. The Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the

Judge's adverse findings are unsustainable. *See, e.g.*, ISCR Case No. 02-12857 (April 6, 2004) at p. 3.

Finally, the favorable record evidence cited by Applicant, including the information relating to his prior career, is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. The Judge is not limited to consideration of an applicant's work performance or conduct during duty hours, but may also consider his off-duty conduct in assessing his security suitability. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6. Evidence of good character is relevant and material under the whole person concept. *See* Directive, Section 6.3 and Enclosure 2, Item E2.2.1. However, a finding that an applicant possesses good character does not preclude the government from considering whether the applicant's conduct and circumstances still pose a security risk. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 9. As the trier of fact, the Judge had to weigh the evidence as a whole, decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and make a reasoned decision as to whether Applicant met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. In this case, there is sufficient record evidence to support the Judge's conclusions.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found for the Applicant with respect to SOR paragraphs 1.e and 1.h. Those favorable findings are not at issue on appeal.

2. Directive, Section 4.1 and Additional Procedural Guidance, Item E3.1.10.

3. Applicant's brief makes a passing reference to DOHA's authority to take interim actions regarding security clearance cases. *See* Directive, Additional Procedural Guidance, Item E3.1.2. However, Applicant does not make any argument linking that authority to anything Applicant claims the Administrative Judge did or should have done in this case. And, in any event, the authority under Item E3.1.2 pertains to interim actions taken in lieu of issuing an SOR, not actions taken by a Hearing Office Judge or this Board after the issuance of an SOR.

4. Directive, Additional Procedural Guidance, Items E3.1.4, E3.1.7, and E3.1.8.

5. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at p. 3 (Administrative Judge can take into account the applicant's failure to present documentation in support of the applicant's claims concerning his financial situation); ISCR Case No. 99-0012 (December 1, 1999) at p. 3 ("It is reasonable for a Judge to consider the record as a whole and use common sense in evaluating the absence of corroborating evidence.").