

DATE: September 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21243

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated March 12, 2003, 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). Administrative Judge Richard A. Cefola issued an unfavorable security clearance decision, dated July 1, 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 issue: (1) whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions. 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 Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions. On appeal, Applicant does not dispute the Administrative Judge's findings of fact with respect to the Applicant's business and financial history. Rather, Applicant contends the Judge should have concluded that the security concerns raised by his unresolved federal tax debt were mitigated by application of Financial Considerations Mitigating Conditions 1, ⁽²⁾ 2, ⁽³⁾ 3, ⁽⁴⁾ 4, ⁽⁵⁾ and 6. ⁽⁶⁾ In support of that contention, Applicant argues that evidence supporting those Mitigating Conditions was not considered by the Administrative Judge, and that when properly weighed that evidence was sufficient to overcome the government's security concerns. For the reasons set forth below, we disagree.

It is clear from the Administrative Judge's findings of fact and conclusions that the Judge considered the evidence which the Applicant considers mitigating and concluded that it was not sufficient to overcome the security concerns raised by the Applicant's indebtedness. The application of Adjudicative Guidelines disqualifying and mitigating conditions is not a simple, mechanical operation or reducible to a simple formula. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7 (discussing various considerations that must be taken into account by an adjudicator when applying Adjudicative Guidelines disqualifying or mitigating conditions). Accordingly, even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with his financial difficulties. *See, e.g.*, 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."); ISCR Case No. 99-0012 (December 1, 1999) at p. 4 ("It was not arbitrary or capricious for the Judge to consider whether Applicant made timely, reasonable efforts to deal with the financial setbacks that resulted from conditions beyond his control."). In this case, it was not arbitrary or capricious for the Judge to consider Applicant's failure to resolve his outstanding federal tax debt after the conditions which had contributed to it becoming

delinquent had passed and his financial situation had improved.

Similarly, given Applicant's previous bankruptcy filings, and the fact that the federal tax debt at issue had been incurred years earlier, but still not resolved as of the date of the hearing, it was not arbitrary or capricious for the Judge to conclude that Applicant's debt was recent, and that there was insufficient evidence for him to conclude that there were clear indications that the problem was under control.

Likewise, the Board has previously discussed what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

"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.' 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." ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6 (citation and footnote omitted).

Given the fact that the federal tax debt was incurred in 1995, that the Applicant had repeatedly denied liability for it, that he had filed for bankruptcy on several occasions in an effort to avoid it, and been unsuccessful in reaching any agreement with the Internal Revenue Service (such as a payment plan) with respect to the debt, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to repay or otherwise resolve the debt had been made in "good-faith."

Finally, the favorable record evidence cited by Applicant, including the fact that the security concerns arose as a result of a single, large debt, is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. 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. Given the fact that the amount of the debt exceeded the amount earned by the Applicant in a year, it was reasonable for the Judge to conclude that the Applicant had not rebutted the Government's case regarding his financial difficulties.

The Administrative Judge made findings of fact and reached conclusions about Applicant's history of financial difficulties that provided a rational basis for the Judge to conclude Applicant had failed to present sufficient evidence to overcome the security concerns raised by his overall history of financial difficulties.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.d and 1.f. Those favorable formal findings are not at issue on appeal.
2. "The behavior was not recent" (Directive, Enclosure 2, Item E2.A6.1.3.1).
3. "It was an isolated incident" (Directive, Enclosure 2, Item E2.A6.1.3.2).
4. "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)" (Directive, Enclosure 2, Item E2.A6.1.3.3).
5. "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" (Directive, Enclosure 2, Item E2.A6.1.3.4).
6. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).