

DATE: March 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22628

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Nathaniel J. Webb, III, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated December 17, 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 Joan Caton Anthony issued an unfavorable security clearance decision, dated November 26, 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: whether the Administrative Judge's findings and conclusions are arbitrary, capricious, or contrary to law. For the reasons set forth below the Board affirms the Administrative Judge's November 26, 2003 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 Issue

Whether the Administrative Judge's findings and conclusions are arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations). Applicant does not directly challenge the Administrative Judge's findings and conclusions against Applicant under Guideline E (Personal Conduct).⁽¹⁾ As noted earlier, there is no presumption of error below and an appealing party must raise claims of error with specificity. Since no claim of error has been made with regard to the adverse findings and conclusions under Guideline E, those findings and conclusions stand.

Applicant's brief sets forth four theories of Applicant's financial situation: 1. All of Applicant's alleged past due debts have been discharged or otherwise satisfied and he has no past due indebtedness; 2. Applicant admits that he has yet to resolve several small debts overlooked in his bankruptcy filing, but he has offered an explanation, testifying that the creditors did not contact him after the bankruptcy, and testifying convincingly of his efforts to resolve the debts albeit after an initial delay. Applicant also contends that he has no new debts and there are clear indications that the problem is being resolved or is under control; 3. Applicant contends that omitted debts may be added to a closed bankruptcy under local bankruptcy rules; 4. Applicant states that his bankruptcy discharge "effectively mitigated the SOR allegations concerning his debts alleged in the SOR."

The Board concludes that Applicant's first theory is contradicted by the second and third theories. Reading the case as a whole the first theory is without merit and need not be considered any further.

Applicant's contention that his omitted debts may be added to the bankruptcy that was closed in May 2001 is raised for the first time on appeal. Applicant offered no evidence in the hearing below that the unscheduled debts were eligible for such treatment under such a rule, and significantly, did not offer evidence that he petitioned for inclusion of such debts. The Administrative Judge cannot be expected to have considered the practice in a local bankruptcy tribunal when no evidence, or even argument, of such practice was offered. Moreover, Applicant's suggestion that his discharge in

bankruptcy somehow mitigates his conduct with respect to the debts he failed to schedule, as well as his separate misconduct under Guideline E, is unsupported.

Applicant has failed to demonstrate error under his third theory.

Applicant cites several sections of the Bankruptcy Code in support of his argument that the discharge mitigates the SOR allegations concerning his debts. Those provisions void judgments and discharge debts that are subject to the discharge. However, Applicant has not cited any provision of law or other appropriate authority that requires the Administrative Judge to mitigate Applicant's conduct for security clearance purposes. Applicant's filing for bankruptcy in 2001 did not preclude the Administrative Judge from considering the security significance of the Applicant's actions. *See, e.g.*, ISCR Case No. 01-26675 (June 13, 2003) at p. 3. Looking at the Applicant's conduct with respect to his overdue debts incurred since he filed for bankruptcy, the Judge had ample room to conclude that Applicant had not mitigated the government's concerns about his finances.

Finally, Applicant challenges the Administrative Judge's weighing of the evidence and the Judge's adverse credibility determination regarding Applicant's testimony. As noted earlier, the Appeal Board is mandated to give a Judge's credibility determinations deference on appeal. Applicant offers no reason to undermine the Judge's credibility determination. The Judge's adverse credibility determination of Applicant stands. All that is left is a challenge to the Judge's weighing of the evidence. The Judge must do a whole person analysis. Given her unchallenged adverse findings and conclusions under Guideline E (Personal Conduct), her sustainable adverse credibility determination of Applicant and the totality of the record evidence on Applicant's history of bad debts, adverse judgments, and multiple bankruptcy filings, the Board has no reason to upset the Judge's weighing of the evidence. Applicant has failed to demonstrate error.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's November 26, 2003 decision. Therefore, that decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made a formal finding in Applicant's favor with respect to SOR allegation 2.e. That finding is not in issue on appeal.