

DATE: October 27, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23661

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 to Applicant a Statement of Reasons (SOR) dated July 29, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision dated June 25, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge's adverse conclusions under Guideline F (Financial Considerations) are arbitrary, capricious, or contrary to law; and (2) whether Applicant can be granted a conditional or probationary security clearance. 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

On appeal, Applicant has presented new evidence for consideration in his case and offers to present additional information about his post-hearing efforts to deal with his financial difficulties. An Administrative Judge's decision is reviewed based on the record evidence that was before the Judge, and the Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the Board will consider only those arguments made by Applicant that do not rely on new evidence.

1. Whether the Administrative Judge's adverse conclusions under Guideline F (Financial Considerations) are arbitrary, capricious, or contrary to law. Apart from four debts for which the Administrative Judge entered formal findings in favor of Applicant, ⁽¹⁾ the Judge concluded that Applicant had failed to demonstrate extenuation or mitigation sufficient to overcome the security concerns raised by Applicant's overall history of financial difficulties.

On appeal, Applicant argues: (a) his financial difficulties have been the result of circumstances outside his control; (b) he has been working hard to address his outstanding debts and will continue to do so; (c) he will continue to work on resolving his outstanding debts; and (d) he is a hard-working, loyal employee for his employer and the Department of Defense. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse conclusions under Guideline F (Financial Considerations) are arbitrary, capricious, or contrary to law.

A review of the decision below shows the following: The Administrative Judge considered the evidence presented by Applicant and took into account evidence showing that: (i) circumstances outside of Applicant's control contributed to his financial difficulties, and (ii) Applicant has been working on addressing and resolving his outstanding debts. The Judge evaluated Applicant's overall history of financial difficulties in terms of pertinent provisions of the Adjudicative Guidelines (Directive, Enclosure 2) and the general factors set forth in Directive, Enclosure 2, Item E2.2.1. The Judge also took into account the difficult personal circumstances of Applicant and his wife. Finally, the Judge explained why

he concluded Applicant's overall history of financial difficulties raised security concerns under Guideline F that were not extenuated or mitigated sufficiently by the evidence presented by Applicant.

The Administrative Judge's analysis of Applicant's case is consistent with pertinent provisions of the Directive and does not reflect reasoning that is arbitrary, capricious, or contrary to law. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at p. 7. Moreover, Applicant's value to his employer and the Department of Defense is not relevant to assessing the security significance of his history of financial difficulties. *See, e.g.*, ISCR Case No. 98-0435 (September 16, 1999) at pp. 2-3. Finally, nothing in the decision below indicates or suggests the Administrative Judge made any finding or conclusion as to Applicant's loyalty. *See* Executive Order 10865, Section 7 (security clearance decisions made under the Executive Order are not loyalty determinations).

2. Whether Applicant can be granted a conditional or probationary security clearance. Applicant asks whether he can be granted a conditional or probationary security clearance while he is working on his financial problems. Under the Directive, there is no authority for a Hearing Office Administrative Judge or the Board to grant a conditional or probationary security clearance. *See, e.g.*, ISCR Case No. 01-22311 (April 4, 2003) at p. 6.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, 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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to the debts covered by SOR paragraphs 1.d, 1.g, 1.j, and 1.l. Those favorable formal findings are not at issue on appeal.