

DATE: September 16, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26479

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 September 25, 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) and Guideline E (Personal Conduct). Administrative Judge Michael H. Leonard issued an unfavorable security clearance decision dated April 21, 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 synopsis section of the Administrative Judge's decision contains errors which have an adverse impact on Applicant's case; (2) Whether the Administrative Judge gave adequate weight to his favorable findings of fact; (3) Whether the Administrative Judge erred by drawing adverse conclusions under Guideline F with respect to business debts that were not alleged in the Statement of Reasons; and (4) Whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. 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: (1) are 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 synopsis section of the Administrative Judge's decision contains errors which have an adverse impact on Applicant's case. Applicant challenges four excerpts from the Administrative Judge's synopsis of his decision. None of the four challenged statements demonstrate error by the Administrative Judge. As a rule, the Board will not defer to a Judge's synopsis over the Judge's findings of fact and conclusions in the body of the decision. In this case, the fact that the challenged language is from the synopsis makes no difference. All four of the challenges are variations of a single argument, namely that Applicant is an honorable person and he intends to reimburse his business and personal creditors even if it may appear impossible. Applicant's argument does not demonstrate that the Administrative Judge erred. While the Applicant may sincerely believe that he intends to pay his debts and that his conduct is so designed, the Administrative Judge must consider Applicant's overall circumstances including the size of the debts, the feasibility of Applicant accomplishing his financial aims, and Applicant's potential vulnerabilities if he fails. Given the record evidence in this case, Applicant's arguments about the synopsis fail to demonstrate the Judge erred.

2. Whether the Administrative Judge gave adequate weight to his favorable findings of fact. Applicant notes that the Administrative Judge made several favorable findings of fact and argues on appeal that those findings were given inadequate weight. The Judge must consider not only Applicant's conduct and character but also his overall circumstances as part of a whole person analysis. In this case the Judge made several favorable findings regarding Applicant's conduct and character but also made some adverse findings about Applicant's financial circumstances. The Judge weighed the totality of the circumstances and concluded that the risks attendant to Applicant's negative financial circumstances (specifically, a debt in excess of \$750,000, without a realistic plan for resolution) were too significant to permit a favorable conclusion. The Administrative Judge is responsible for weighing the evidence in light of the record

evidence as a whole and deciding whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. Applicant's disagreement with the Judge's assessment is not sufficient to persuade the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. The Board need not agree with the Judge's weighing of the evidence to conclude that it is not arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge erred by drawing adverse conclusions under Guideline F with respect to business debts that were not alleged in the Statement of Reasons. On appeal, Applicant argues that unpaid business debts totaling \$750,000 were not alleged in the SOR. Making allowances for Applicant's *pro se* status, the Board construes his argument as raising the issue of whether the Administrative Judge erred by drawing adverse conclusions under Guideline F with respect to those unpaid business debts. For the reasons that follow, the Board concludes Applicant has not demonstrated error below.

In general, an adverse security clearance decision cannot be based on uncharged conduct. However, not every variance between an SOR and an Administrative Judge's findings and conclusions is fatal. Indeed, defects in an SOR can be cured if the proceedings are conducted in a manner that provides fair notice to the participants of the issues being litigated. There is no simple formula by which to decide when a variance between SOR allegations and the basis stated for the Judge's decision is harmful and when it is not. When an applicant challenges such a variance on appeal, the Board must review the case record as a whole to determine whether the applicant: (a) received fair notice of the issues being raised; (b) had a reasonable opportunity to litigate the issues raised; and (c) has demonstrated he was harmed in a prejudicial manner. *See* ISCR Case No. 99-0710 (March 19, 2001) at pp. 2-3 (citing federal court decisions and prior Board decisions).

In this case, the SOR placed Applicant on notice that the government was proposing to deny or revoke his access to classified information based on concerns arising from his history of financial difficulties. Accordingly, the facts and circumstances of Applicant's overall history of financial conduct are relevant to an assessment of the security significance of the specific debts alleged in the SOR. A review of the hearing transcript shows that Applicant was placed on reasonable notice that the matter of his unpaid business debts was being raised during the proceedings, he did not object to the matter of those debts being raised, and he had ample opportunity to present evidence about the facts and circumstances surrounding those unpaid business debts. Furthermore, Applicant took advantage of the opportunity and presented evidence on those debts. Finally, Applicant has not demonstrated how he was prejudiced in any meaningful way by the Judge's consideration of those business debts. In view of the foregoing, the Board concludes Applicant was accorded due process, and the Judge did not act in an arbitrary and capricious manner by considering Applicant's financial conduct beyond the specific debts alleged in the SOR, and relying on his findings and conclusions about that conduct to make his security clearance decision.

4. Whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's adverse conclusions under Guideline F. Applicant asserts his financial difficulties are outweighed or overshadowed by: (1) his general good character; (2) the fact that most of the debt originated from a business venture⁽²⁾; (3) his intent to pay his creditors; and (4) his refusal to file for bankruptcy. Given the record evidence in this case, the Judge could rationally conclude otherwise. As noted above, the Judge was entitled to consider the security significance of Applicant's overall circumstances, specifically his significant debt and the absence of a realistic plan for resolving that debt. Applicant's strong disagreement with the Judge's adverse conclusions is not sufficient to demonstrate those adverse conclusions are arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error by the Administrative Judge. Therefore, the Judge's April 21, 2003 decision is affirmed.

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 Administrative Judge's favorable formal findings under SOR paragraph 1.e and SOR paragraph 2.a are not at issue on appeal.
2. Applicant's emphasis on the business nature of many of the debts fails to demonstrate the Administrative Judge erred. Given the record evidence that Applicant accepted personal responsibility for various business debts, the Judge properly considered those debts under Guideline F.