

DATE: December 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-27267

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 December 15, 2003, which stated the reasons why DOHA proposed to deny or revoke Appellant's access to classified information. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable decision, dated July 21, 2004.

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 Administrative Judge's findings of fact fairly describe Applicant's situation, and (2) whether the Administrative Judge's conclusions are reasonable in light of the Judge's sustainable findings.

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) Whether the Administrative Judge's findings of fact fairly describe Applicant's situation.

Applicant does not challenge the Administrative Judge's material findings of fact in this case. Specifically, he does not challenge her finding that Applicant owes the Internal Revenue Service a total of approximately \$110,000 for delinquent federal income taxes that Applicant allowed to accrue over several years--a finding of serious security significance.

Rather, Applicant challenges several statements the Administrative Judge made in her findings of fact, which are at best peripheral to a determination of his security suitability, given the record of this case. Additionally, he argues for an interpretation of the Judge's statements consistent with error, under circumstances where there is an equally plausible interpretation of those statements justified by the record evidence. ⁽¹⁾ Applicant does identify some errors in the Judge's findings of fact. But those errors would not change the outcome of his case, given the significance of the Judge's unchallenged findings as to the extent of Applicant's tax delinquencies and the Judge's sustainable, material findings as to Applicant significant history of failures to fulfill his responsibilities regarding his federal income taxes.

(2) Whether the Administrative Judge's conclusions are reasonable in light of the Judge's sustainable findings. Applicant challenges the Administrative Judge's ultimate conclusions that his financial history and his history of exercising poor judgment make him ineligible for a security clearance. Applicant argues for an alternative interpretation of the record evidence. Applicant's argument fails to meet his burden on appeal of demonstrating error by the Administrative Judge. It is well settled that an appealing party must articulate a cogent reason or argument based on the record below and applicable principles of law that shows how or why the Judge's rulings, analysis or conclusions are arbitrary, capricious or contrary to law. Mere disagreement, no matter how strenuous, with the Judge's conclusions fails to meet that burden. *See, e.g.*, ISCR Case No. 02-06478 (October 25, 2004) at pp. 6-7. Furthermore, the Judge's challenged conclusions follow rationally from those findings of fact that were either unchallenged or sustainable.

Conclusion

Appellant has failed to meet his burden on appeal of demonstrating harmful error in the Administrative Judge's decision. The Judge's July 21, 2004 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant reads one challenged sentence as saying that he failed in each year from 1992 through 2003 to pay quarterly taxes, make income tax payments on a regular basis or file returns on a timely basis. In some years, Applicant failed to pay quarterly taxes, or file timely returns. Later, Applicant began to file returns in a timely manner, but quarterly payments varied considerably. Sometimes the amounts were substantial and at other times they were significantly less than what the Applicant knew he had to pay. Applicant's reading of the challenged language would represent a statement not justified by the record evidence, whereas the second reading would be a statement justified by the record evidence.