

DATE: August 17, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00772

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 August 11, 2003, 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 Joan Caton Anthony issued an unfavorable security clearance decision, dated March 17, 2004.

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 erred by finding that six debts of Applicant had neither been satisfied nor discharged in bankruptcy; (2) whether the Administrative Judge erred by concluding that Applicant's history of financial difficulties warranted an unfavorable security clearance decision; and (3) whether Applicant is entitled to a personal appearance before the Board to argue his appeal. For the reasons that follow, the Board affirms the Administrative Judge's decision and denies Applicant's request for a personal appearance before the Board.

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 erred by finding that six debts of Applicant had neither been satisfied nor discharged in bankruptcy. The SOR alleged that six specifically enumerated debts belonging to Applicant were of security concern.⁽¹⁾ The SOR alleged that Applicant had not paid four of these six debts and that he was delinquent or past due on the other two. In his answer to the SOR, Applicant denied that he still owed on two of the four debts allegedly not paid (his denial of one of the debts was based on an assertion that the debt had been discharged in a 2001 bankruptcy). With regard to the other two unpaid debts, Applicant asserted he was making arrangements to pay the debts by September 30, 2003, roughly 30 days after his receipt of the SOR. Regarding the two debts described by the SOR as past due, in his answer to the SOR Applicant denied that the nature of the delinquencies was accurately described by the SOR and that one of the delinquent debts was also the subject of a bankruptcy discharge. The Administrative Judge found against the Applicant on these six specific allegations as alleged in the SOR, concluding that, "[Applicant] provided no conclusive credible evidence that the debts had been paid, satisfied, or discharged and his assertions were inconsistent with the credit report of March 5, 2003."⁽²⁾

On appeal, Applicant reasserts the denials he made in the SOR regarding two debts allegedly not paid. Additionally, he asserts that he has satisfied the two debts he indicated he was going to pay in his answer to the SOR. Concerning the two debts described as delinquent in the SOR, Applicant asserts on appeal that he has paid one of the debts off and he reiterates that the other was discharged in a 2001 bankruptcy. Applicant states on appeal he has established his eligibility for a security clearance. The Board construes these numerous assertions by Applicant as raising the issue of whether the Administrative Judge erred by finding that six debts of Applicant had neither been paid nor discharged in bankruptcy.

Applicant's arguments concerning three of the debts may be dismissed outright.⁽³⁾ The documents Applicant relies on to support his assertion that the debts have been paid were submitted with his appeal brief and were not offered as evidence in the proceedings below. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, it would be untenable to review the Administrative Judge's findings of fact by making reference to evidence that was not presented by Applicant for the Judge to consider in his case. A review of the record evidence establishes that the Administrative Judge's findings and conclusions with respect to these three debts are supportable.

Concerning one other debt, Applicant made various assertions about satisfying it in his answer to the SOR and on appeal.⁽⁴⁾ These assertions make reference to a credit report that Applicant claims makes an indication that the debt is in a "paid-closed account status." No such indication is contained in any of the three credit reports that are part of the record in this case. Thus, Applicant's assertions are not supported by the record evidence. The Administrative Judge's findings and conclusions regarding this debt are supported by the record.

The last two debts are ones where there is some evidence in the case record that the debts were discharged in bankruptcy in 2001.⁽⁵⁾ In her conclusions the Administrative Judge stated that Applicant provided no credible evidence that these debts had been paid, satisfied, or discharged. The Judge noted that Applicant's assertions were inconsistent with a March 5, 2003 credit report.⁽⁶⁾ That particular report lists the two debts (one of which was a court judgment) as outstanding. Records of the bankruptcy court contained in the record evidence before the Judge appear to contradict the representations in the credit report.⁽⁷⁾

Though the bankruptcy records contained in the record evidence are not complete,⁽⁸⁾ they do nonetheless constitute strong evidence that indicates that the two debts had, in fact, been discharged. Given the nature of this record evidence, the Judge erred by failing to mention it or discuss it (outside the context of evidence that Applicant might have submitted) while making conclusions about the status of Applicant's debts. Without such a discussion, the Judge failed to articulate a rational basis for her finding that the two debts had not been discharged in bankruptcy given the record evidence that they had been discharged.⁽⁹⁾ Having found error, the Board concludes, however, that in the context of the whole record and the totality of the Judge's decision, the error is harmless. The Administrative Judge's unfavorable security clearance decision did not turn on her conclusions concerning the posture of these two debts and it was reasonably based on other record evidence. Hence, the error did not affect the outcome of the decision.

2. Whether the Administrative Judge erred by concluding that Applicant's history of financial difficulties warranted an unfavorable security clearance decision. On appeal Applicant states that his financial difficulties were caused by the disability of his spouse and subsequent loss of income. He also asserts that for the past four years following the bankruptcy no other financial challenges have occurred. The Board construes Applicant's citing of this favorable, mitigating evidence as an assertion that the Administrative Judge erred by concluding that his overall history of financial difficulties warranted an unfavorable security clearance decision.

Applicant's argument about his spouse's difficulties and the improved state of his finances in recent years does not demonstrate the Administrative Judge erred. The presence of some favorable record evidence does not preclude an unfavorable security clearance decision. The Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence, and reach a reasonable conclusion as to whether the applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Considering the record as a whole, the Board concludes that the mitigating evidence cited by Applicant did not compel the Judge, as a matter of law, to reach a favorable security clearance decision. The Judge's sustainable findings about Applicant's overall history of financial difficulties provide a sufficient basis for her adverse conclusions under Guideline F.

3. Whether Applicant is entitled to a personal appearance before the Board to argue his appeal. Applicant concludes his appeal brief by requesting a personal appearance to argue his appeal. The appeal process is governed by Items E3.1.28 through E3.1.35 of the Additional Procedural Guidance section of the Directive. None of those Items provides for or authorizes personal appearances by an applicant before the Board. Indeed, the Board has held it has no authority under the current Directive to allow an appealing party to make a personal appearance to argue an appeal. *See* ADP Case No.

30-1130 (January 4, 2001) at p. 2 (citing earlier Board decisions).

Conclusion

Applicant has failed to demonstrate harmful 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The SOR also alleged that Applicant had twice received discharges in bankruptcy under Chapter 7 of the bankruptcy code, once in 1993 and once in 2001 (subparagraphs 1.g. and 1.h. of the SOR). Appellant does not challenge the accuracy of these allegations, except to state that the dates alleged on the earlier bankruptcy are incorrect. In this regard, the record evidence supports the SOR allegation (and the Administrative Judge's finding) that the earlier bankruptcy was filed on May 27, 1993 and Applicant received his discharge on September 28, 1993.

2. The record evidence in this case consisted solely of a File of Relevant Material, or FORM. Applicant answered the SOR but did not avail himself of the opportunity to make a submission in response to Department Counsel's evidentiary materials and arguments contained in the FORM.

3. These arguments relate to the debts described at subparagraphs 1.a., 1.c. and 1.d. of the SOR.

4. These assertions concern the debt described at subparagraph 1.e of the SOR.

5. The debts listed at subparagraphs 1.b. and 1.f. of the SOR.

6. Government Exhibit 15.

7. Government Exhibits 10 and 11.

8. The record evidence contains only the discharge order (Government Exhibit 10), the Notice of Filing and Automatic Stay document (Government Exhibit 11), and Schedule F (Government Exhibit 11). The other schedules and forms were omitted.

9. The Board is not concluding that the Judge could not have articulated a rational basis for the proposition that the

debts had not been discharged. The March 5, 2003 credit report contained evidence that contradicted the evidence in the bankruptcy records. It is the responsibility of the Administrative Judge to weigh the evidence, including pieces of evidence that are at variance with one another. The Board is concluding that given the record evidence in this case, these conflicting pieces of evidence bore directly on the issue of the status of two of Applicant's debts, and the conflict should have been resolved by the Judge. By failing to discuss the evidence in Government Exhibits 10 and 11 relative to the evidence in Government Exhibit 15, the Judge never afforded herself the opportunity to rationally resolve the conflict.