

DATE: November 23, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01624

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Nancy Shaw, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated August 7, 2003, 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 Barry M. Sax issued an unfavorable security clearance decision, dated July 30, 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 erred by concluding Applicant's history of financial difficulties was not extenuated or mitigated, and (2) whether the Administrative Judge's decision with respect to the personal conduct allegations is 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 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 concluding Applicant's history of financial difficulties was not extenuated or mitigated. Applicant contends the Judge should have concluded that the security concerns raised by her substantial indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 1, [\(1\)](#) 4, [\(2\)](#) and 6. [\(3\)](#) In support of that contention she argues that: (1) the indebtedness was accumulated four or more years ago, (2) a few of the debts have now been paid off, (3) she sought the assistance of a consumer credit counseling service for the purpose of consolidating her educational indebtedness, and (4) she is taking steps to improve her financial situation, such as reducing her rent and performing extra work. Applicant's arguments do not persuade the Board that the Judge erred.

Even if Applicant's financial difficulties involve debts that are a number of years old, the Judge reasonably could consider whether Applicant acted in a reasonable manner more recently when dealing with those financial difficulties. In this case, the Applicant had a pattern of substantial, repeated indebtedness over many years. At the time the case was submitted for decision, she still had significant outstanding debts, and had only recently taken steps towards resolving her financial difficulties and improving her financial situation. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent and ongoing. Likewise, the Judge could also reasonably conclude that Applicant's recent efforts to work with a credit counseling service and generate sufficient income to pay off her remaining indebtedness were not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required as a matter of law to conclude Applicant's efforts to address her financial difficulties warranted application of Financial Considerations Mitigating Conditions 1, 4 and 6.

The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. The Judge reasonably addressed the possible application of the relevant mitigating conditions and explained why he concluded Applicant had not sufficiently

mitigated the security concerns raised by her history of substantial, outstanding indebtedness.⁽⁴⁾ Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's conclusions.

2. Whether the Administrative Judge's decision with respect to the personal conduct allegations is arbitrary, capricious, or contrary to law. Applicant contends that the Administrative Judge erred in finding against her with respect to the Guideline E (Personal Conduct) allegations because: (1) her omissions of information from her security clearance application were not deliberate falsifications, but were due to innocent oversight and confusing financial records, (2) she subsequently disclosed the omitted information, and (3) her adverse work related conduct--receiving at least eight reprimands for problems such as tardiness, receiving personal telephone calls, falsifying a time card, and showing disrespect to a supervisor--was too trivial to be of security concern. Applicant's arguments do not persuade the Board that the Judge erred.

Based upon the record before him, the Judge's findings and conclusions with respect to the Guideline E allegations are sustainable. An applicant's statements about her intent and state of mind when she completed her security clearance application are relevant evidence, but they are not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp.6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts Applicant's denial. *Id.* Moreover, the security concerns raised by an applicant's falsifications are not necessarily mitigated by the fact that the information has subsequently been disclosed. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (government's security concerns not mitigated by the fact that Applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (government's security concerns not mitigated by the fact Applicant had "come clean" and "had nothing left to hide"). This case involved the omission of information which was of obvious security significance in response to five different questions involving three different topics. It was not unreasonable for the Judge to conclude that the Applicant's failure to disclose the relevant information had been intentional--despite denials to the contrary--given: (1) the magnitude and longevity of the Applicant's financial difficulties, (2) the number and size of the debts in question, (3) the ongoing nature of Applicant's civil court action, and (4) the obvious, negative inferences presented by Applicant's termination of employment for poor job performance and violation of an attendance policy.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960)(security requirements include consideration of a person's honesty, judgment, sobriety, and sense of obligations), *aff'd*, 367 U.S. 886 (1961). Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964)(lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965). Similarly, adverse work related conduct, such as repeated tardiness, receiving personal telephone calls, falsifying a time card, or showing disrespect to a supervisor, is not trivial. It is of security concern to the extent it constitutes unfavorable information provided by an employer,⁽⁵⁾ or reflects a pattern of dishonesty or rule violations.⁽⁶⁾ Given the record before him, the Judge's adverse findings and conclusions with respect to the Guideline E allegations are sustainable and Applicant has not demonstrated that they are arbitrary, capricious or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The behavior was not recent" (Directive, Enclosure 2, E2.A6.1.3.1).
2. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive, Enclosure 2, E2.A6.1.3.4).
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, E2.A6.1.3.6).
4. Decision at pp. 5-6.
5. Directive, Enclosure 2, E2.A5.1.2.1.
6. Directive, Enclosure 2, E2.A5.1.2.5.