

DATE: May 28, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02528

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the March 3, 2003 decision of Administrative Judge Phillip S. Howe, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

This 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 adhered to the procedures required by the Directive; and (2) whether the Administrative Judge's findings of fact are supported by sufficient record evidence. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 8, 2002. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which he indicated "I believe that I should forgo the hearing." A File of Relevant Material (FORM) was prepared, and a copy of the FORM was provided to Applicant. A response to the FORM was received from Applicant. The case was assigned to an Administrative Judge for determination. The Judge issued a written decision, dated March 3, 2003, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is before the Board on Applicant's appeal from the Administrative Judge's adverse 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. *See 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 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. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

Appeal Issues

Applicant's appeal brief sets forth 12 numbered arguments that he labels "Point 1" through "Point 12." The Board construes Points 1 through 6 as raising the issue of whether the Administrative Judge's written decision adhered to the procedures in the Directive, and construes Points 7 through 12 as raising the issue of whether the Administrative Judge's findings of fact are supported by sufficient record evidence.

1. Whether the Administrative Judge adhered to the procedures required by the Directive. Applicant's Points 1, 2 and 3 take exception to the Administrative Judge's summary of SOR allegations. Applicant's Point 4 challenges the Administrative Judge's characterization of Applicant's answer to the SOR. Applicant's Point 5 and Point 6 take issue with the Judge's characterization of Applicant's response to the FORM. All of these challenges focus on passages in that section of the decision below labeled "Statement of the Case." Applicant's Points 1 through 6 do not raise issues under Directive, Additional Procedural Guidance Item E3.1.32.1⁽¹⁾ or E3.1.32.3.⁽²⁾ Making allowances for Applicant's *pro se* status, the Board construes Applicant's Points 1 through 6 as falling under Directive, Additional Procedural Guidance, Item E3.1.32.2⁽³⁾ and raising the issue of whether the Judge adhered to the procedures required by the Directive.⁽⁴⁾

An Administrative Judge has broad discretion in how to write a security clearance decision, subject to the legal constraints of the Directive and basic concepts of due process. *See, e.g.*, ISCR Case No. 99-0809 (August 19, 1999) at p. 2. An appealing party that claims there are errors or flaws with the Judge's written decision must show that the Judge committed factual or legal error in writing a decision that falls within the scope of the Board's appellate jurisdiction. *See* Directive, Additional Procedural Guidance, Items E3.1.32. Furthermore, even if the appealing party makes such a showing, the Board must consider whether the identified error(s) are harmful in nature. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Nothing in Executive Order 10865 addresses what an Administrative Judge must include in a written decision. The only provisions of the Directive that specifically address what an Administrative Judge must include in a written decision are Additional Procedural Guidance, Items E3.1.25 and E3.1.35. Nothing in those provisions requires that a Judge's written decision have a "Statement of the Case." Furthermore, the decision in this case satisfies the requirements of E3.1.25 to the extent it has findings of fact, discusses pertinent provisions of the Directive (including the Adjudicative Guidelines), reaches conclusions as to the SOR allegations, and sets forth the Judge's conclusion as to whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.⁽⁵⁾ Moreover, Applicant's Points 1 through 6 fail to raise any material challenge to the Judge's findings of fact, the Judge's discussion of pertinent provisions of the Directive, the Judge's conclusions as to the SOR allegations, or the Judge's conclusion as to whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Applicant's Points 1 through 6 fail to show that the Administrative Judge's written decision violated Directive, Additional Procedural Guidance, Item E3.1.25 or any other procedural requirement of the Directive. Furthermore, Applicant's Points 1 through 6 fail to show any factual or legal error by the Judge that falls within the Board's appellate jurisdiction. Accordingly, even if the Board were to conclude that Applicant's Point 1 through 6 identify flaws with the Judge's "Statement of the Case," such flaws would be, at most, harmless error that does not affect any substantial right of Applicant under Executive Order 10865 or the Directive.

2. Whether the Administrative Judge's findings of fact are supported by sufficient record evidence. Making allowances for Applicant's *pro se* status, the Board construes Applicant's brief as challenging the Administrative Judge's finding that Applicant owes \$670,000 in unpaid federal taxes. Considering the record evidence as a whole, that finding is not sustainable. However, that error is harmless in light of the Judge's sustainable findings and conclusions.

The Board construes Applicant's Points 7 through 12 as raising the issue of whether various findings of fact made by the Administrative Judge are supported by sufficient record evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. In reviewing a Judge's challenged factual findings, the Board must consider whether they reflect a reasonable interpretation of the record evidence. And, as noted earlier in this decision, 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.

Even if the Board were to conclude that Applicant's Points 7, 8, and 9 had merit, they would fail to demonstrate harmful error by the Judge. Accordingly, no useful purpose would be served by discussing Applicant's Points 7, 8, and 9 in greater detail.

The Board reads the Administrative Judge's decision as finding that Applicant did not falsify a security clearance questionnaire by not listing a state tax lien because the state tax lien was not filed until after Applicant completed the security clearance questionnaire. Given that favorable finding, Applicant's Point 10 is moot.

Applicant's Points 11 and 12 rely on factual assertions by Applicant that constitute new evidence, which the Board cannot consider. *See* footnote 4 of this decision. And, in any event, the sentences in the Administrative Judge's decision that Applicant's Points 11 and 12 challenge are sustainable in light of the record evidence in this case.

Conclusion

Applicant has failed to meet his burden of demonstrating error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's security clearance decision.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Challenging the Administrative Judge's findings of fact.

2. Challenging the Administrative Judge's rulings or conclusions.
3. Challenging the Administrative Judge's adherence to procedures required by Executive Order 10865 and the Directive.
4. In support of Points 1 through 6, Applicant's brief makes some factual assertions that go beyond the record evidence in this case. As such, those factual assertions constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
5. Because this case does not involve the Administrative Judge issuing a new decision on remand, the requirements of Directive, Additional Procedural Guidance, Item E3.1.35 are not pertinent to this appeal.