

DATE: March 4, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03797

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 February 23, 2004, 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 Martin H. Mogul issued an unfavorable security clearance decision, dated November 15, 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 should have concluded Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Condition 3; and (2) whether Applicant can be granted a conditional or probationary security clearance while he resolves his delinquent debts. 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

The Administrative Judge found that Applicant has a long history of financial difficulties, and that as of the hearing date, Applicant had not taken significant action to address or resolve his delinquent debts. The Judge concluded that Applicant had not mitigated the security concerns raised under Guideline F by Applicant's history of unresolved financial difficulties.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. However, Applicant: (a) offers new evidence about what he is doing to deal with his delinquent debts; (b) argues that his financial difficulties were the result of circumstances outside his control; and (c) asks that he be granted a security clearance for a period of time so that he can work on resolving his delinquent debts.

The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, Applicant cannot fairly challenge the Administrative Judge's decision based on a proffer of new evidence. Accordingly, the Board will not address those arguments in Applicant's brief that are based on a proffer of new evidence. Applicant's remaining arguments will be addressed in turn.

1. Whether the Administrative Judge should have concluded Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Condition 3. Applicant argues his history of financial difficulties arose because of circumstances outside of his control. The Board construes Applicant's argument as raising the issue of whether the Judge erred by not concluding Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Condition 3. [\(1\)](#)

Application of the Adjudicative Guidelines is not reducible to a simple formula, but rather requires the exercise of sound judgment within the parameters set by the Directive. *See, e.g.*, ISCR Case No. 01-27371 (February 19, 2003) at pp. 3-4.

In this case, the Administrative Judge noted the record evidence concerning the circumstances under which Applicant's financial difficulties arose, but concluded that it did not mitigate Applicant's failure to address and resolve his financial difficulties over the next several years. Applicant's appeal arguments fail to demonstrate it was arbitrary, capricious, or contrary to law for the Judge to decide that Applicant had not presented sufficient evidence to conclude his history of financial difficulties was mitigated under Financial Considerations Mitigating Condition 3.

2. Whether Applicant can be granted a conditional or probationary security clearance while he resolves his delinquent debts. In the alternative, Applicant asks that he be granted a security clearance for a period of time so that he can work on resolving his delinquent debts. Applicant's request cannot be granted. There is no authority under the Directive to grant a conditional or probationary security clearance. *See, e.g.,* ISCR Case No. 02-19479 (June 22, 2004) at p. 7.

Conclusion

The Administrative Judge's security clearance decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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 conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)." Directive, Adjudicative Guidelines, Item E2.A6.1.3.4.