

DATE: February 11, 2004

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-04017

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 the Applicant a Statement of Reasons (SOR), dated July 14, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline E (Personal Conduct) and Guideline F (Financial Considerations). Administrative Judge Michael H. Leonard issued an unfavorable security clearance decision, dated November 14, 2003.

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 finding against the Applicant with respect to the Guideline E allegation, (2) whether the Administrative Judge erred in concluding Applicant engaged in a deceptive financial practice, and

(3) whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions with respect to the Guideline F allegations. 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 finding against the Applicant with respect to the Guideline E allegation. On appeal, Applicant argues that the Judge's finding with respect to the Guideline E allegation is erroneous because: 1) the Judge amended the allegation at the hearing to conform to the record evidence, 2) the finding is contrary to certain hearsay evidence acquired by the Applicant subsequent to the Judge's decision, and 3) the finding is based upon assumptions rather than on the record evidence. For the reasons set forth below, we disagree and affirm the Judge's decision.

First, a judge may amend an SOR at the hearing on his own motion, or upon the motion of one of the parties, so as to render it in conformity with the evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.17. In this case, the amendment reasonably brought the SOR into conformity with the record evidence and it was made without objection from the Applicant.

Second, the Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Third, Applicant essentially argues that the Judge's finding with respect to the Guideline E allegation was based on assumptions, because it was contrary to Applicant's explanation at the hearing. Applicant's explanation was relevant and material evidence that the Judge had to consider. However, the Judge was not bound to accept Applicant's explanation at face value. Rather, the Judge had to consider Applicant's explanation in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0430 (July 3, 2001) at pp. 4-5; ISCR Case No. 99-0473 (May 12, 2000) at pp. 2-3. Given the

record evidence in this case, the Judge's findings, that the Applicant deliberately used a false address to obtain lower, resident tuition rates at a college and that he still has a substantial outstanding debt on that tuition, reflect legally permissible inferences drawn from the record evidence. Applicant's ability to argue for an alternative interpretation of the record evidence is not sufficient to demonstrate the Judge's findings with respect to the Guideline E allegation are unsustainable. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 4.

2. Whether the Administrative Judge erred in concluding Applicant engaged in a deceptive financial practice. On appeal, Applicant contends there is "no evidence that supports" the Judge's conclusion that Applicant engaged in a deceptive financial practice as contemplated under Financial Considerations Disqualifying Condition 1. ⁽¹⁾

We disagree and affirm the Judge's decision.

As noted above, there was sufficient record evidence for the Judge to find that Applicant deliberately used a false address to obtain lower, resident tuition rates at a college. The Judge's subsequent conclusion that Applicant's conduct constituted a deceptive financial practice as contemplated under Financial Considerations Disqualifying Condition 1 was reasonable and sustainable.

3. Whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions with respect to the Guideline F allegations. On appeal, Applicant contends the Judge's conclusion with respect to the Guideline F allegation was unsupported by record evidence and that the security concerns raised by his indebtedness should have been mitigated by application of Financial Considerations Mitigating Conditions 1, ⁽²⁾

2, ⁽³⁾

and 6. ⁽⁴⁾

For the reasons set forth below, we disagree and affirm the Judge's decision.

It is clear from the Administrative Judge's findings of fact and conclusions that the Judge considered the evidence which the Applicant considers mitigating and concluded that it was not sufficient to overcome the security concerns raised by the Applicant's indebtedness. The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7 (discussing various considerations that must be taken into account by an adjudicator when applying Adjudicative Guidelines disqualifying or mitigating conditions).

Given the fact that the indebtedness at issue had been incurred years earlier, but still not resolved as of the date of the hearing, it was not arbitrary or capricious for the Judge to conclude that Applicant's indebtedness was recent and that there was insufficient evidence for him to conclude that there were clear indications that the problem was under control.

Likewise, the Board has previously discussed what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6.

Given the fact that the debt was incurred in 1998, that the Applicant had made only token, irregular payments prior to the issuance of the SOR, and was past due on a payment plan initiated subsequent to the issuance of the SOR, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to repay or otherwise resolve the indebtedness had been made in "good-faith."

Finally, the favorable record evidence cited by Applicant, including the fact that the security concerns arose as a result of a single, albeit large debt, is not sufficient to demonstrate the Administrative 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*. 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 ample record evidence to support the Judge's conclusion that it was too soon to tell whether Applicant had truly reformed his financial practices to the extent necessary to mitigate the Government's security concerns.

Conclusion

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional breaches of trust" (Directive, Enclosure 2, Item E2.A6.1.2.2).
2. "The behavior was not recent" (Directive, Enclosure 2, E2.A6.1.3.1).
3. "It was an isolated incident" (Directive, Enclosure 2, E2.A6.1.3.2).
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, E2.A6.1.3.6).