

DATE: September 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06338

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 July 21, 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). Administrative Judge Barry . Sax issued an unfavorable security clearance decision, dated June 18, 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 issue: whether the Administrative Judge erred by concluding Applicant's history of financial difficulties was not extenuated or mitigated. 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

Whether the Administrative Judge erred by concluding Applicant's history of financial difficulties was not extenuated or mitigated. The Administrative Judge concluded Applicant's history of financial difficulties was not extenuated or mitigated. On appeal, Applicant contends the Judge should have concluded that the security concerns raised by his history of indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 1, ⁽¹⁾ 4, ⁽²⁾ and 6. ⁽³⁾ In support of that contention he argues that: (1) his earlier debts have now been paid off, (2) he is currently working with a consumer credit counseling service to resolve his remaining indebtedness, and (3) certain statements in the synopsis and the body of the Judge's decision convey a pejorative or misleading characterization of his financial situation. For the reasons set forth below, we conclude the Judge's decision is sustainable.

Applicant identifies some flaws with the synopsis of the Administrative Judge's decision. Absent unusual circumstances, a flaw or failing in the synopsis of a Judge's decision is not likely to be harmful error. *See, e.g.*, ISCR Case No. 02-23336 (May 10, 2004) at pp. 3-4. The flaws in the synopsis of the Judge's decision identified by Applicant do not constitute harmful error under the particular facts and circumstances of this case.

In this case, the Applicant had a pattern of repeated indebtedness over many years--including repeated instances of unpaid taxes. At the time the case was submitted for decision, he still had significant outstanding debts and had only recently sought the help of a consumer credit counseling service. 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 promises to pay off his remaining debts and his recent efforts to work with a credit counseling service were not a substitute for a consistent record of timely remedial action. Furthermore, even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with those financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 99-0012 (December 1, 1999) at p. 4. Therefore, given the record evidence in this

case, the Judge was not required to conclude Applicant's current efforts to address his 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, decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and reach a conclusion as to whether Applicant satisfied his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15.⁽⁴⁾ 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 his history of substantial, outstanding indebtedness.⁽⁵⁾ Applicant's appeal arguments do not demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, or reached conclusions that are arbitrary, capricious, or contrary to law.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The behavior was not recent"(Directive, Adjudicative Guidelines, Item 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, Adjudicative Guidelines, Item E2.A6.1.3.4).
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
4. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."
5. Decision at p. 5.