

DATE: February 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06703

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 14, 2003 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), and Guideline E (Personal Conduct). Administrative Judge Wilford H. Ross issued an unfavorable security clearance decision dated November 26, 2003.

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 issue has been raised on appeal: whether the Board should reverse the Administrative Judge's decision based on Applicant's submission of new evidence concerning his financial situation. 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 Issue

The Administrative Judge entered formal findings in favor of Applicant with respect to the SOR allegations under Guideline E (Personal Conduct) and five paragraphs under Guideline F (Financial Considerations). Those favorable formal findings are not at issue on appeal.

The Administrative Judge found Applicant had a long history of financial difficulties. The Judge noted Applicant's financial difficulties were somewhat mitigated by his marital and employment problems in the late 1990s, and noted Applicant's recent filing for Chapter 7 bankruptcy. However, the Judge concluded that Applicant "has virtually no current track record of being able to maintain his financial stability" and entered formal findings against Applicant under Guideline F (Financial Considerations) with respect to eight SOR paragraphs.

On appeal, Applicant does not challenge the Administrative Judge's findings about his history of financial difficulties. However, Applicant notes the Judge's comment about his filing for Chapter 7 bankruptcy, asserts he had no control over the processing of his bankruptcy case, and offers a document to prove he was granted a discharge in bankruptcy in December 2003. Applicant asks the Board to take that document into account and reverse the Judge's formal findings against him under Guideline F.

Information about changes in Applicant's financial situation that occurred after the hearing and the issuance of the Administrative Judge's decision constitute new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will not find error by the Judge based on the presentation of such new evidence.

Apart from the Directive's prohibition of new evidence on appeal, Applicant's appeal is based on an erroneous assumption. The fact that an applicant receives a discharge of debts in bankruptcy does not mandate a favorable security clearance decision under Guideline F. A discharge in bankruptcy does not preclude consideration of an applicant's

overall history of financial difficulties, nor is it a substitute for a demonstrated track record of financial reform and rehabilitation. *See, e.g.*, ISCR Case No. 01-26675 (June 13, 2003) at p. 3; ISCR Case No. 97-0016 (December 31, 1997) at p. 4.

Conclusion

Applicant has not demonstrated error below. Accordingly, the Board affirms the Administrative Judge's November 26, 2003 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board