

DATE: November 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06926

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 January 6, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines F (Financial Considerations), E (Personal Conduct), and J (Criminal Conduct). On June 30, 2003, the Government filed a motion to amend the SOR, to which the Applicant had no objection. Administrative Judge James A. Young issued an unfavorable security clearance decision, dated August 25, 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 concluding that the security concerns raised by Applicant's indebtedness had not been mitigated; and (2) whether the Administrative Judge erred by concluding that the Applicant had intentionally falsified his security clearance application. 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⁾

1. Whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's indebtedness had not been mitigated. On appeal, Applicant does not dispute the Administrative Judge's findings of fact with respect to the Applicant's financial history. Rather, Applicant contends the Judge should have concluded that the security concerns raised by his debts were mitigated by application of Financial Considerations Mitigating Conditions 3⁽²⁾ and 6.⁽³⁾ For the reasons set forth below, we disagree.

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. The applicability of a particular condition, mitigating or disqualifying, is not necessarily dispositive 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. Accordingly, the Administrative Judge's finding that much of the Applicant's original financial problems could be traced to conditions that were largely beyond his control--the inability to sell his business without a costly environmental cleanup--did not compel the Judge to make a favorable security clearance decision. Even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge could consider whether Applicant acted in a reasonable manner when dealing with his 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. In this case, it was not arbitrary or capricious for the Judge to consider Applicant's failure to resolve his numerous and significant federal tax debts after the conditions which had contributed to them becoming delinquent had passed and his financial situation had improved. Given the record evidence, the Judge could reasonably conclude that Applicant's payment on several small consumer debts--subsequent to the initiation of the security clearance process and the issuance of the SOR--was

not a substitute for a sustained record of timely financial payments.

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. 99-0201 (October 12, 1999) at p. 4 (discussing concept of good-faith in connection with another provision of the Adjudicative Guidelines)." ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6.

Given Applicant's history of financial problems, the sizable nature of his indebtedness, and the fact that the debts at issue had been incurred years earlier, but virtually no effort had been made to resolve them until after the invocation of the security clearance process and the issuance of the SOR, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for the Judge to conclude that Applicant's efforts to otherwise resolve his debts warranted application of Financial Considerations Mitigating Condition 6.

Finally, the favorable record evidence cited by Applicant 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 conclusions concerning Applicant's overall history of financial difficulties.

The Administrative Judge made findings of fact and reached conclusions about Applicant's history of financial difficulties that reflect a plausible, legally permissible interpretation of the record evidence. Given the Judge's findings and conclusions, he had a rational basis to conclude Applicant's overall history of financial difficulties raised security concerns under Guideline F, and to conclude that Applicant had failed to present sufficient evidence to overcome those security concerns.

2. Whether the Administrative Judge erred by concluding that the Applicant had intentionally falsified his security clearance application. On appeal, Applicant contends that he did not intentionally falsify his security clearance application by failing to disclose his delinquent debts and the tax liens against his property, because it was his belief that the debts and liens in question were over seven years old and their disclosure was not required. Therefore, he thinks the Judge should have resolved the Guideline E and J allegations in his favor. We disagree.

Given the magnitude and longevity of the Applicant's financial difficulties, as well as the number and size of the debts and liens which should have been disclosed, it was reasonable for the Judge to conclude that the Applicant's failure to disclose them had been intentional-- despite Applicant's claims to the contrary. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3 (an applicant's denials of any intent to falsify are not conclusive evidence and an Administrative Judge may make a finding of falsification despite such denials). Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to reject Applicant's denials. The Judge's finding that Applicant's falsifications were intentional is sustainable.

Given the Administrative Judge's sustainable finding of falsification, the Judge had a rational basis for entering a formal finding against Applicant with respect to Guideline J. Falsification of a security clearance application is a violation of 18 U.S.C. §1001. And, in these proceedings, a Judge may find an applicant's conduct is criminal in nature even in the absence of any arrest, prosecution, or conviction of the applicant. *See, e.g.*, ISCR Case No. 00-0713 (February 15, 2002) at p. 5.

Conclusion

Applicant has failed to demonstrate 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 Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.n, 1.o, 3.a, 3.b, 3.d, 3.e, 3.f, 3.g, and 3.h. Those favorable formal findings are not at issue on appeal.

2. "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, Enclosure 2, Item E2.A6.1.3.3).

3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).