

DATE: December 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07138

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 February 28, 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) and E (Personal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision, dated September 11, 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 issue: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's indebtedness had not been 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 Issue ⁽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 Judge's findings of fact with respect to his 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 Condition 6. ⁽²⁾ For the reasons set forth below, we conclude Applicant has failed to demonstrate the Judge erred.

In this case, the Applicant: (1) had under-withheld with respect to his contemporary tax liability in multiple years (thus creating new tax indebtedness) in order to use the funds to payoff past tax indebtedness, (2) had filed outstanding delinquent income tax returns for multiple years subsequent to the initiation of the security clearance process and the issuance of the SOR, and (3) was waiting to see what the results of his security clearance hearing would be before setting up payment arrangements with the Internal Revenue Service regarding his remaining tax indebtedness. In light of the foregoing, the Judge could reasonably conclude that although Applicant's actions had resulted in the payment of some of his older tax debts, they did not constitute the type of sustained record of timely financial payments needed to mitigate the security concerns raised by the Applicant's substantial and continuing tax indebtedness.

With respect to the application of Financial Considerations Mitigating Condition 6, 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 evidence of record, it was not arbitrary or capricious for the Judge to conclude that the Applicant's approach to resolving his extensive tax indebtedness lacked the requisite "reasonableness, prudence, honesty, and adherence to duty or obligation" sufficient to warrant the application of Mitigating Condition 6.

Finally, 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 and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Applicant's disagreement with some of the Judge's conclusions is not sufficient to demonstrate the Judge weighed the evidence as a whole in a manner that is arbitrary, capricious, or contrary to law. There is ample record evidence to support the Judge's ultimate conclusion as to the Applicant's security suitability.

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.

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.a, 1.e, 1.f, 1.g, and 2.a. Those favorable formal findings are not issue on appeal.

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