

DATE: June 9, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09209

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 September 29, 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 James A. Young issued an unfavorable security clearance decision, dated April 8, 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 issues: (1) whether the Administrative Judge failed to consider evidence submitted by the Applicant, (2) whether the Administrative Judge failed to consider other relevant information, and (3) whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions. 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 failing to consider evidence submitted by the Applicant. Applicant claims the Administrative Judge erred in his decision by not finding that the Applicant "was employed and was paying some of his creditors." He also claims that "[i]f this information had been made known to the aforementioned Judge it would have given favorable affect to mitigating conditions of Guideline F." We find no merit to these claims of error.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.⁽²⁾ Apart from that presumption, the Judge specifically found that the Applicant was currently employed by a defense contractor⁽³⁾ and that he had made some efforts over the years to resolve his financial difficulties (including credit counseling, the establishment of a payment plan, the payment of some debts, the cancellation of credit cards, the reduction of some expenses, and the filing of a Chapter 7 bankruptcy petition after the issuance of the SOR).⁽⁴⁾ Applicant's disagreement with the Judge's weighing of the record evidence in this case is not sufficient to show the Judge failed to consider evidence submitted by Applicant.

2. Whether the Administrative Judge failed to consider other relevant information. On appeal, Applicant contends that the Judge's decision is "unwarranted, by reason of facts not submitted to him by the Agency Investigators." We find no merit to this contention.

The Administrative Judge is not responsible for gathering evidence for the benefit of either party. DOHA proceedings are adversarial in nature and each party is responsible for gathering and presenting evidence for the Judge to consider.⁽⁵⁾ The Judge has the responsibility to exercise reasonable control over the development of the record evidence by the parties to ensure that a case proceeds in a fair, timely, and orderly manner.⁽⁶⁾ Although the Judge has the discretion to question witnesses at a hearing, the Judge must do so in a fair and impartial manner that does not constitute acting as a

de facto surrogate advocate for either side.⁽⁷⁾ The Judge's discretion to question witnesses at a hearing does not relieve either party of its obligation to present evidence in support of its case.

A review of the proceedings below persuades the Board that Applicant was placed on reasonable notice that he was responsible for presenting evidence on his behalf, and that the Administrative Judge would base his decision on record evidence presented by the parties for his consideration. Applicant cannot fairly claim that the Judge was obligated to consider information not presented during the hearing.

3. Whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions. Applicant contends the Judge should have concluded that the security concerns raised by his debts were mitigated by application of Financial Considerations Mitigating Conditions 4⁽⁸⁾ and 6.⁽⁹⁾ For the reasons set forth below, we conclude Applicant has not shown the Judge erred.

The Administrative Judge specifically addressed the possible application of Financial Considerations Mitigating Conditions 4 and 6, and explained why he concluded Applicant had not sufficiently mitigated the security concerns raised by his history of unresolved financial difficulties.⁽¹⁰⁾ There is no presumption of error below and the appealing party has the burden of demonstrating error below. Even making allowances for Applicant's *pro se* status, his bare assertion that the Judge should have applied Financial Considerations Mitigating Conditions 4 and 6 is insufficient to show the Judge's discussion of those two mitigating conditions was arbitrary, capricious, or contrary to law.

As the trier of fact, the Administrative Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and whether the Applicant had satisfied his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. 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 sufficient record evidence to support the Judge's conclusions.

Finally, in his brief, Applicant asserts that if he is denied a security clearance, he and his family "will suffer irreparable harm" because he will be dismissed from the position which he currently holds. The possibility of adverse job consequences following from an unfavorable security clearance decision is not relevant or material to an assessment of an applicant's judgment, reliability, and trustworthiness. Therefore, it may not be considered in reaching a determination as to whether it is clearly consistent with the national interest to grant or continue access to classified information.⁽¹¹⁾ The possible adverse job consequences of an unfavorable security clearance decision did not preclude the Administrative Judge from making an unfavorable decision based on Applicant's history of unresolved financial difficulties.

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 D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of the Applicant with respect to SOR paragraph 1.q. That favorable finding is not at issue on appeal.
2. *See e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
3. Decision at p. 2.
4. Decision at pp. 2, 3-4.
5. *See, e.g.*, Directive, Additional Procedural Guidance, Items E3.1.14 and E3.1.15.
6. *See, e.g.*, ISCR Case No. 00-0628 (April 26, 2002) at pp. 3-4 (citing various provisions of the Directive, Additional Procedural Guidance).
7. *See, e.g.*, ISCR Case No. 96-0869 (September 11, 1997) at p. 2.
8. "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).
9. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
10. Decision at p. 4.
11. *See* ISCR Case No. 01-21851 (April 18, 2003) at p. 4.