

DATE: March 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09793

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 August 4, 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). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision dated November 19, 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 issues have been raised on appeal: (1) whether Applicant was denied a reasonable opportunity to present evidence for the Administrative Judge to consider in her case; and (2) whether the Administrative Judge erred by not concluding Applicant's delinquent debts were 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 ⁽¹⁾

1. Whether Applicant was denied a reasonable opportunity to present evidence for the Administrative Judge to consider in her case. Applicant asserts that because of her *pro se* status she failed to avail herself of the opportunity to present evidence for the Administrative Judge to consider in her case and, therefore, she was not able to have the Judge consider relevant information about her case. The Board construes Applicant's appeal statements as raising the issue of whether she was denied a reasonable opportunity to present evidence for the Judge to consider in her case.

Applicant is entitled to receive: (a) adequate notice of the allegations being made against her; (b) a reasonable opportunity to respond to those allegations; (c) a reasonable opportunity to respond to any evidence presented by Department Counsel to support the allegations against her; and (d) a reasonable opportunity to present evidence on her own behalf for the Administrative Judge to consider in her case. A review of the case file indicates Applicant was provided with all those procedural rights.

Although a *pro se* applicant cannot be expected to act like a lawyer, even a *pro se* applicant is expected to take timely, reasonable steps to protect his or her rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 (May 14, 2001) at p. 4. If an applicant fails to take timely, reasonable steps to protect his or her rights, the failure of the applicant to act does not constitute a denial of the applicant's rights. *See, e.g.*, ISCR Case No. 02-19896 (December 29, 2003) at p. 6. Because Applicant did not respond to the File of Relevant Material (FORM) or submit additional information for the Administrative Judge to consider in her case, the Judge properly based his decision on the case record that was before him. Having failed to respond to the FORM or submit additional information for the Judge to consider, Applicant cannot fairly claim she was denied the right to present evidence on her behalf.

2. Whether the Administrative Judge erred by not concluding Applicant's delinquent debts were mitigated. Applicant makes various statements in her appeal brief which the Board construes as raising the issue of whether the

Administrative Judge erred by not concluding Applicant's delinquent debts were mitigated. [\(2\)](#)

A review of the Administrative Judge's decision shows the Judge considered the facts and circumstances of Applicant's history of financial difficulties and reached reasonable conclusions about Applicant's financial conduct. Furthermore, the Judge gave an explanation for why he concluded Applicant had failed to mitigate the security concerns raised by her history of unresolved financial difficulties. Nothing in Applicant's appeal brief persuades the Board that the Judge analyzed her case in a manner that is arbitrary or capricious, or contrary to pertinent provisions of the Directive.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made favorable formal findings with respect to SOR paragraphs 1.a and 1.b. Those favorable formal findings are not at issue on appeal.

2. Some of the statements in Applicant's appeal brief reflect factual assertions that go beyond the record evidence. Such factual assertions constitute new evidence, which the Board cannot consider. *See Directive, Additional Procedural Guidance, Item E3.1.29.*