

DATE: February 24, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10120

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Gerald C. Baker, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated April 10, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline F (Financial Considerations). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision dated November 12, 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 the Administrative Judge erred in finding that neither of Applicant's hearing witnesses was familiar with Applicant's employment history; (2) whether the Administrative Judge erred by failing to give sufficient weight in mitigation to Applicant's conduct during his current employment; (3) whether the Administrative Judge erred in finding that Applicant's conduct was disqualifying under Guideline F; and (4) whether the Administrative Judge's adverse conclusion regarding mitigation under Guideline F is arbitrary, capricious or contrary to law. 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. Whether the Administrative Judge erred in finding that neither of Applicant's hearing witnesses was familiar with Applicant's employment history. On appeal, Applicant contends that the Judge erred because Applicant's current first-line supervisor testified at the hearing that Applicant worked for him personally for the last three and one-half years, and that he has known Applicant for most of the time he was with his current employer during the last five and one-half to six years. The supervisor testified that he knows Applicant as a person of good character and integrity who "gives me 110 percent when he's at work." Applicant's concern is that the Judge did not consider this favorable portion of his employment history in mitigation, in contrast to the unfavorable separations from prior employment covered by SOR subparagraphs 1.a through 1.d.

There is a rebuttable presumption that an Administrative Judge considered all record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Our review of the hearing transcript indicates that the Judge specifically asked the first-line supervisor whether the supervisor was aware of the reasons for the hearing, and the supervisor testified that it was his belief that it had something to do with Applicant's prior employment but he was not aware of the details (see Hearing Transcript at p. 28). The context of the Judge's reference (in the Decision) to "employment history" was that the hearing witnesses were not familiar with the period prior to Applicant's current employment. In this context, we find no basis for Applicant's claim that the Judge ignored hearing testimony about Applicant's current employment.

2. Whether the Administrative Judge erred by failing to give sufficient weight in mitigation to Applicant's conduct during his current employment. Applicant contends that if the Judge had properly considered Applicant's performance with his current employer, the Judge would have concluded all of the disqualifying conduct under Guideline E (Personal

Conduct) was mitigated. Applicant argues that Guideline E is not intended to "punish employees who have pulled themselves up by their bootstraps to become better employees." He states that the Judge should have found for him under Personal Conduct Mitigating Condition 5. ⁽¹⁾ The Judge considered the Personal Conduct mitigating conditions but concluded that nothing Applicant offered in mitigation was sufficient to overcome the record as a whole that showed Applicant was unsuitable for a position of trust.

The Applicant has the ultimate burden of persuasion as to obtaining a favorable security clearance decision and the burden of proof on extenuation and mitigation when they are in issue. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The mere presence of some record evidence in Applicant's favor did not preclude the Judge from reaching adverse conclusions about him. The Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 02-14950 (May 15, 2003) at p. 6. The Applicant's position here is unpersuasive. Applicant claims error in applying Personal Conduct Mitigating Condition 5, but he fails to explain how the Judge erred. The balance of Applicant's appeal essentially disagrees with the Judge's decision in weighing mitigating evidence. Disagreement with the Judge's adverse conclusions about mitigation is not sufficient to demonstrate those conclusions are arbitrary, capricious or contrary to law. *See e.g.* ISCR Case No. 00-0030 (September 20, 2001) at p. 10.

3. Whether the Administrative Judge erred in finding that Applicant's conduct was disqualifying under Guideline F. Based on the language in the preambulatory "The Concern" section of Guideline F (Financial Considerations), Applicant contends that the conduct alleged in the SOR is not disqualifying. Applicant's interpretation would render meaningless several of the specific disqualifying conditions listed in the body of the Guideline, including conditions that concerned the Judge and involved neglect or willful disregard of financial obligations. This Board has rejected the narrow interpretation of Guideline F now offered by the Applicant. *See, e.g.*, ISCR Case No. 01-24356 (February 26, 2003) at pp. 4-5 (holding Guideline F should not be construed or interpreted solely based on "The Concern" section, but rather the language of Guideline F in its entirety).

4. Whether the Administrative Judge's adverse conclusion regarding mitigation under Guideline F is arbitrary, capricious or contrary to law. The Judge found that the Applicant has the means to pay his outstanding delinquent debts but is unwilling to pay or otherwise resolve them. Applicant argues that his student loans are currently being paid through the involuntary collection of his tax refunds, and states that "[h]e intends to pay off the rest of the debt all in one shot just as soon as he knows that his job is secure." Applicant contends that the involuntary collection of the student loan and the promise to pay the balance are "clear indications" that the "debt problem is under control and being resolved." He contends that Judge erred by not applying Financial Considerations Mitigating Condition 4. ⁽²⁾

Applicant's contentions are unpersuasive. Applicant's appeal argument fails to show that the Administrative Judge erred by not applying Financial Considerations Mitigating Condition 4 in light of the record evidence below. Moreover, it is not arbitrary or capricious for a Judge to give little or no weight to an applicant's promise to take future remedial action. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at p. 9. The record evidence supports the Judge's adverse conclusions under Guideline F.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's decision below. Therefore the Board affirms the Administrative Judge's November 12, 2003 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 individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive, Enclosure 2, Item E2.A5.1.3.5).
2. "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, Enclosure 2, Item E2.A6.1.3.4).