

DATE: April 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10446

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 10, 2004, 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) and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated December 21, 2004.

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 by considering evidence not in the record; (2) whether the Administrative Judge's findings of fact about the debt covered by SOR paragraph 1.d are erroneous; (3) whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to take into account Applicant's exercise of his right to seek relief under federal bankruptcy law; and (4) whether the Administrative Judge erred by finding Applicant falsified a 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 considering evidence not in the record. Applicant's brief makes repeated claims that the Administrative Judge considered evidence not in the record. None of these claims has merit. There is a rebuttable presumption that government officials carry out their duties in good faith, and a party seeking to rebut or overcome that presumption has a heavy burden of presenting clear evidence to the contrary. *See, e.g., National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004). Applicant's strong disagreements with the Judge's findings and conclusions do not demonstrate the Judge made his findings of fact or reached his conclusions by referring to non-record evidence, or rebut the presumption that the Judge carried out his duties in good faith.

2. Whether the Administrative Judge's findings of fact about the debt covered by SOR paragraph 1.d are erroneous. With the exception of the debt covered by SOR paragraph 1.d, Applicant does not challenge the Administrative Judge's findings of fact concerning his history of financial difficulties. Specifically, Applicant takes exception with: (a) the Judge's finding that "He is paying college expenses for one [family member], living expenses for another [family member], and purchasing a house for his daughter" (Decision at p. 4); and (b) the Judge's finding that Applicant has no formal plan to pay the debt covered by SOR paragraph 1.d (Decision at p. 4).

When reviewing a challenge to an Administrative Judge's findings of fact, the Board must consider whether there is sufficient record evidence to support the challenged findings. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board does not have to agree with the Judge's findings in order to conclude that they reflect a legally permissible interpretation of the record evidence. Considering the record below, the material factual findings challenged by Applicant reflect a plausible and legally permissible interpretation of the evidence before the Judge.

3. Whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to take into account Applicant's exercise of his right to seek relief under federal bankruptcy law. Applicant takes exception with the Administrative Judge's reliance on the record evidence that Applicant has exercised his right to seek relief under federal bankruptcy law. This contention does not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

In evaluating an applicant's security eligibility, an Administrative Judge is not limited to considering only evidence of unlawful conduct. Even conduct that is legal may be considered in assessing an applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-01395 (November 13, 2003) at p. 4. Although it is legally permissible for an applicant to seek relief under federal bankruptcy law, the legality of such conduct does not immunize an applicant's history of financial difficulties from being considered for its security significance. *See, e.g.*, ISCR Case No. 97-0016 (December 31, 1997) at p. 4. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to take into account Applicant's bankruptcy filings as part of the overall history of Applicant's financial difficulties.

4. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. Applicant challenged the Administrative Judge's findings that he falsified a security clearance application by failing to disclose: (a) he had a security clearance revoked by the U.S. Army in 1969; (b) he had liens placed against him for failing to pay income taxes; and (c) he had filed for Chapter 13 bankruptcy in 1998 and 1999. Considering the record below, the findings of falsification reflect a legally permissible interpretation of the evidence before the Judge. Applicant's strong disagreement with those findings is not sufficient to demonstrate the Judge erred.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

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 made formal findings in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, 1.c, and 1.e. Those findings are not at issue on appeal. The Judge did not make formal findings with respect to SOR paragraphs 1.f, 1.g, 1.h, 1.i, 1.j, 1.k, and 1.l. A complete reading of the Judge's decision suggests that he intended to find in favor of Applicant with respect to those paragraphs. Therefore, the Board will consider those paragraphs resolved in Applicant's favor and not at issue on appeal.