

DATE: January 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11246

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 December 30, 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) and Guideline E (Personal Conduct). Administrative Judge Robert J. Tuider issued an unfavorable security clearance decision, dated July 15, 2005.

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 not accepting Applicant's testimony concerning his debts and his failure to list his financial delinquencies on his security clearance application; (2) whether the Administrative Judge erred by concluding Applicant's financial difficulties warranted an unfavorable security clearance decision; and (3) whether the Administrative Judge's decision should be reversed because of the severe impact that loss of his salary and benefits would have on Applicant and his family. 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 not accepting Applicant's testimony concerning his debts and his failure to list his financial delinquencies on his security clearance application. ⁽¹⁾

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's disagreement with the Judge's weighing of the evidence does not demonstrate error. *See, e.g.*, ISCR Case No. 03-05647 (December 30, 2004) at p. 4. The Judge had a duty to base his decision on the record as a whole. Applicant's testimony was record evidence, but the Judge was not required to accept that testimony at face value without reference to the other evidence or the Judge's credibility determination as to his testimony. *See, e.g.*, ISCR Case No. 03-01240 (December 28, 2004) at p. 3. Applicant has not demonstrated that the Judge erred.

2. Whether the Administrative Judge erred by concluding Applicant's financial difficulties warranted an unfavorable security clearance decision. In his appeal, Applicant states that he is not a security risk and that his financial problems are the result of tough times. The Board construes Applicant's assertion as a claim that the Administrative Judge should have applied Financial Considerations Mitigating Condition 3. ⁽²⁾ The Judge declined to apply Mitigating Condition 3 for a sustainable reason given the facts of this case, namely, the elapsed time and Applicant's continued financial lapses since the events which were beyond Applicant's control.

3. Whether the Administrative Judge's decision should be reversed because of the severe impact that loss of his salary and benefits would have on Applicant and his family. Applicant states that he desperately needs his job, and he asks that

he be allowed another chance to prove himself. The possible effect that a security clearance decision could have on Applicant's economic situation is not relevant or material to his suitability for a security clearance. *See, e.g.*, ISCR Case No. 03-08107 (September 13, 2005) at pp. 4-5. Applicant's appeal might be interpreted as requesting a conditional clearance while he settles his financial difficulties. Neither a Hearing Office Administrative Judge nor the Board has the authority to grant a conditional security clearance. *See, e.g.*, ISCR Case No. 02-32842 (November 29, 2004) at p. 4. Accordingly, Applicant requests relief to which he is not entitled.

Conclusion

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. In his appeal, Applicant lists the current status of his debts. Applicant provided much of the information in his testimony at the hearing. However, some information, such as the pay-off of debt four, is new evidence, which the Board is not able to consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

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