

DATE: April 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12528

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 March 28, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines F (Financial Considerations) and E (Personal Conduct). Administrative Judge Joan Caton Anthony issued an unfavorable security clearance decision, dated January 2, 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 erred by not concluding that the security concerns raised by Applicant's indebtedness had been mitigated, and (2) whether the Administrative Judge erred by concluding that the Applicant had deliberately falsified her 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 not concluding that the security concerns raised by Applicant's indebtedness had been mitigated. On appeal, Applicant contends the Judge should have concluded that the security concerns raised by her significant state and federal tax indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 3⁽²⁾

and 6.⁽³⁾

In support of that contention she notes that: (a) the indebtedness resulted from an economic downturn which adversely impacted her family's business, (b) her husband, who was principally responsible for operating the businesses, had misled her as to the existence, nature and scope of the indebtedness, and (c) she had either paid, or made arrangements for the payment of, most or all⁽⁴⁾

of the debts. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Accordingly, the Administrative Judge's finding that many of the Applicant's original financial problems could be traced in part to conditions that were largely beyond her control--an economic downturn which adversely impacted her family's business--did not compel the Judge to make a favorable security clearance decision. Even if Applicant's financial difficulties initially arose due to circumstances outside her control, the Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with her financial

difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4 ; ISCR Case No. 99-0012 (December 1, 1999) at p. 4 . In this case, it was not arbitrary or capricious for the Judge to consider such factors as Applicant's: (a) possession of a college degree in economics, (b) service as vice president and secretary/treasurer of the business, (c) willingness to sign legal documents her husband or his lawyers presented to her without question, (d) service as the family's financial manager since the illness of her husband in 1997, and (e) failure to resolve the numerous and significant state and federal tax debts for many years after the conditions which had contributed to them becoming delinquent had passed and her financial situation had improved. Given the record evidence, the Judge reasonably concluded that Applicant's resolution--subsequent to the initiation of the security clearance process--of the significant tax indebtedness was a not substitute for a timely, responsible approach to resolving her financial difficulties.

Likewise, the Board has previously discussed what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

"In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' ISCR Case No. 99-0201 (October 12, 1999) at p. 4 (discussing concept of good-faith in connection with another provision of the Adjudicative Guidelines). Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6. [Footnote 12]" ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6.

Again, given Applicant's history of financial problems, her previous involvement with the bankruptcy process, the sizable nature of the tax indebtedness, and the fact that the debts at issue had been incurred years earlier, but had not resolved until after the invocation of the security clearance process, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for her to conclude that Applicant's efforts to otherwise resolve her debts had been made in "good-faith."

Finally, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. 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. *See, e.g.*, ISCR Case No. 02-00937 (February 5, 2004) at p. 4.

The Administrative Judge made findings of fact and reached conclusions about Applicant's history of financial difficulties that reflect a plausible, legally permissible interpretation of the record evidence. Given the Judge's findings and conclusions, she had a rational basis to conclude Applicant's long history of financial difficulties raised security concerns under Guideline F, and to conclude that Applicant had failed to present sufficient evidence to overcome those security concerns.

2. Whether the Administrative Judge erred by concluding that the Applicant had deliberately falsified her security clearance application. On appeal, Applicant contends that she did not deliberately falsify her security clearance application by failing to disclose her delinquent tax debts and the tax liens against her property because: (a) she relied on her husband's assurances that the problems related to her financial status had been resolved, (b) the tax debts have been paid and the liens discharged, and (c) she did not understand that the word "debt" meant more than credit card charges and included tax liens. Therefore, it is Applicant's position the Judge should have resolved the Guideline E allegations in her favor. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

An applicant's statements about her intent and state of mind when she completed her security clearance questionnaire are relevant evidence, but they are not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp.6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3 (an applicant's denials of any intent to falsify are not conclusive evidence and an Administrative Judge may make a finding of falsification despite such denials). As

the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts Applicant's denial. *Id.* As noted earlier in this decision, a judge's credibility determinations are entitled to deference on appeal and the party challenging those determinations has a heavy burden of persuasion. This case involved the omission of information which was of obvious security significance in response to three different questions on the Applicant's security clearance application. It was not unreasonable for the Judge to conclude that the Applicant's failure to disclose the relevant liens and indebtedness had been intentional--despite denials to the contrary--given: (a) the magnitude and longevity of the Applicant's financial difficulties, (b) the number and size of the debts and liens which should have been disclosed, (c) Applicant's knowledge of business and economics, (d) her service as the family's financial manager since 1997, and (e) Applicant's acknowledgment that she had not received a tax refund since 1995 because her refunds were being applied to back taxes. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to reject Applicant's denials and her conclusion that Applicant's falsifications were intentional is sustainable.

Conclusion

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, 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 entered formal findings in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, 1.d, 1.e, 1.f, 1.g, 1.h, 1.i, 1.k, and 1.l. Those favorable formal findings are not issue on appeal.
2. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive, Enclosure 2, Item E2.A6.1.3.3).
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).
4. In her appeal, the Applicant argues in part that SOR subparagraph 1.c should have been resolved in her favor based upon certain hearsay evidence acquired by the Applicant subsequent to the issuance of the Judge's decision. The Board may not consider such new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

