

DATE: February 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16061

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Gary R. Long, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 17, 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 Robert Robinson Gales issued an unfavorable security clearance decision, dated October 14, 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 abused his discretion in denying Applicant's request for a continuance of his hearing; and (2) whether the Administrative Judge's unfavorable decision 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 abused his discretion in denying Applicant's request for a continuance of his hearing. Applicant claims that the Administrative Judge abused his discretion by denying Applicant's request for a continuance in his hearing. Applicant contends that as a result of the denial he was deprived of a fair hearing because his counsel was unavailable on the hearing date and Applicant had to settle for the assistance of a personal representative who "was neither an attorney nor familiar with the hearing process." Applicant argues that the Judge sent notice of the August 19, 2004 hearing to Applicant on August 2, 2004, and this "did not provide sufficient time for Applicant or his attorney to coordinate their schedules." Applicant contends that there was no support on the record for the Judge's conclusion that Applicant's "nine months of inaction since Applicant received the SOR" contributed to Applicant's lack of preparation for the hearing. On the contrary, Applicant argues that it was the Hearing Office's failure to set a hearing date that caused the unavailability of Applicant's attorney.

There is no right to a continuance⁽¹⁾ and a party challenging the denial of a continuance has the burden of showing the Administrative Judge's denial was arbitrary or capricious. The Board concludes that the Judge's denial of a continuance in this case is sustainable. The SOR was issued in November 2003, and in December 2003 Applicant requested a hearing in his case. Nevertheless, the attorney who he chose to represent him at the hearing stated in August 2004 that she could not attend the hearing, in part, because she was "just recently hired," and the Applicant admits in his brief that he did not retain counsel until he received the Notice of Hearing. The Judge was justified in considering such things as how long Applicant had notice of the case (about nine months) and whether the Applicant had a reasonable opportunity to obtain counsel. *See, e.g.*, ISCR Case No. 01-03683 (August 9, 2002) at p. 4. Nothing in the record indicates that Applicant was unable to hire counsel in the months between December 2003 and August 2004 to assist him in preparing for the hearing he asked for in December 2003. Considering the record as a whole, it was not arbitrary or capricious for the Judge to conclude Applicant had sufficient time to hire an attorney to represent him.

2. Whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. Applicant generally does not dispute the findings of fact, but contends that the Administrative Judge's conclusions are arbitrary, capricious and against the weight of the record evidence because the record evidence "clearly establishes" that Applicant's disqualifying conduct was mitigated under Financial Considerations Mitigating Conditions 3⁽²⁾ and 6.⁽³⁾

Applicant persuasively argues that the Administrative Judge erred in stating that there was "some unexplained reason" for Applicant's financial difficulties⁽⁴⁾ even though the Judge later identified two contributing factors for Applicant's financial difficulties.⁽⁵⁾ The Judge did not have to conclude that those contributing factors were extenuating or mitigating under the particular facts and circumstances of Applicant's case, but he could not have reasonably found that "Applicant's financial situation and difficulties . . . bring this matter within Financial Considerations Mitigating Condition[3]," while also finding that there is "some unexplained reason" for Applicant's difficulties. However, because the Judge applied Financial Considerations Mitigating Condition 3 in Applicant's favor, and for reasons explained hereafter in this decision, the Judge's error is not outcome determinative.

The Judge distinguished between Financial Considerations Mitigating Condition 3 and Financial Consideration Mitigating Condition 6. The Judge was not convinced that Applicant had met his burden on Mitigating Condition 6. The Judge found that Applicant continued to incur debts without making any effort to pay them off in a timely manner and was particularly troubled by Applicant's apparent failure to make any efforts to pay any creditor, with the exception of possibly two of them.

Applicant had the burden of presenting evidence to rebut, explain, extenuate or mitigate his history of financial difficulties. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Judge had to consider the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Applicant's ability to argue for a more favorable weighing of the record evidence is not sufficient to demonstrate the Judge erred. *See* ISCR Case No. 99-9020 (June 4, 2001) at p. 4. It was not arbitrary or capricious for the Judge to look at how Applicant handled all the debts over an extended period of time, rather than focusing in a piecemeal fashion on Applicant's conduct with respect to the largest debt. Considering the record in this case, Applicant has not persuaded the Board that he presented evidence below that would require the Judge to apply Financial Considerations Mitigating Condition 6 in Applicant's favor.

Conclusion

The Board affirms the Administrative Judge's decision because the Applicant has failed to demonstrate harmful error below.

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. Directive, Additional Procedural Guidance, Item E3.1.8 ("A continuance may be granted by the Administrative Judge only for good cause.").
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, Adjudicative Guidelines, Item E2.A6.1.3.3).
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
4. Decision at p. 3.
5. Decision at p. 8.