

DATE: May 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16631

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 July 29, 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 February 27, 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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to rely on Applicant's failure to provide a specific reason for his debt problems; and (2) whether the Administrative Judge erred by finding Applicant did not present evidence that he would pay off his outstanding debts in a timely manner. 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

The Administrative Judge found that Applicant has a history of financial difficulties that began during 2000, and which was not resolved as of the close of the record in early 2004. The Judge concluded that Applicant had not presented sufficient evidence to warrant a conclusion that Applicant had overcome the negative security concerns raised by his history of financial difficulties. The Judge entered formal findings against Applicant under Guideline F and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

1. Whether it was arbitrary, capricious or contrary to law for the Administrative Judge to rely on Applicant's failure to provide a specific reason for his debt problems. Applicant notes that the Administrative Judge indicated that Applicant did not provide a specific reason for his debt problems and asserts that he would have done so if he had been asked to provide such information. The Board construes Applicant's argument as raising the issue of whether it was arbitrary and capricious for the Judge to rely on Applicant's failure to provide a specific reason for his debt problems.

The SOR issued to Applicant placed him on adequate notice that his history of financial difficulties raised security concerns. The Directive placed Applicant on adequate notice that he had the burden of presenting evidence "to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security clearance decision." *See* Directive, Additional Procedural Guidance, Item E3.1.15. Given Applicant's burden of persuasion under the Directive, it was not arbitrary or capricious for the Judge to take into account whether Applicant had presented evidence that explained the reasons for his getting into financial difficulties. Such reasons could be relevant to an evaluation of his security eligibility under the general factors of Directive, Section 6.3 and Enclosure 2, Item E2.2.1, and the Financial Considerations disqualifying and mitigating conditions. Furthermore, when a party has the burden of proof, it is not arbitrary, capricious, or contrary to law for a Judge to draw adverse inferences or conclusions when the party fails to present evidence that satisfies the party's burden of proof. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 10. Accordingly, it was not

improper for the Judge to take note of Applicant's failure to provide evidence concerning the reasons for his debt problems.

2. Whether the Administrative Judge erred by finding Applicant did not present evidence that he would pay off his outstanding debts in a timely manner. Applicant states the Administrative Judge's decision "noted that I did not provide evidence that I would pay off my outstanding debts in a timely manner." Applicant goes on to state that he provided a statement about authorizing direct withdrawals from his checking account on a monthly basis so that payments toward his debt could be made by a consumer counseling service. The Board construes Applicant's statements as raising the issue of whether the Judge erred by finding Applicant did not present evidence that he would pay off his outstanding debts in a timely manner.

The Administrative Judge specifically noted the evidence that Applicant submitted about his contacting a consumer credit counseling service for assistance with his financial difficulties. However, the Judge concluded that the evidence presented by Applicant was not sufficient to support a finding that Applicant had followed through with creating an actual payment plan or making payments in support of such a plan. Although there is record evidence that Applicant recently set up a debt payment plan with a consumer counseling service, the Judge reasonably could decide that there was insufficient evidence to conclude that Applicant would follow through with that plan to its end. *Cf.* ISCR Case No. 00-0365 (May 16, 2001) at p. 3 (promise to pay off debts in the future is not evidence of actual reform and rehabilitation). Applicant's appeal argument does not persuade the Board that the Judge committed harmful error when weighing the record evidence.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate 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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board