

DATE: December 21, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17869

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Rebecca Barthelemy-Smith, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 21, 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 Philip S. Howe issued an unfavorable security clearance decision, dated September 3, 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's decision contains erroneous findings about two debts alleged in the SOR; and (2) whether it was arbitrary, capricious or contrary to law for the Administrative Judge to conclude Applicant had not made a good faith effort to repay his debts. 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's decision contains erroneous findings about two debts alleged in the SOR.

Applicant contends: (a) SOR paragraphs 1.b and 1.l refer to the same debt, and the record evidence shows there is only a balance of \$517 left on that debt, not the amounts alleged in SOR paragraphs 1.b and 1.l; (b) given the record evidence concerning the debt covered by SOR paragraph 1.b and 1.l, the Judge erred by stating there is no documentation that Applicant has paid that debt; and (c) under state law, the debt alleged in SOR 1.t does not exist and it should not be listed on Applicant's credit report.

The Board need not decide whether the Administrative Judge's challenged findings of fact concerning the debts covered by SOR paragraphs 1.b and 1.l are supported by substantial record evidence or not. Even if the Board were to assume -- solely for purposes of deciding this appeal -- that the challenged findings of fact were erroneous, the Judge's unchallenged findings of fact about Applicant's overall history of financial difficulties (which spans a period of several years, and involves multiple delinquent debts) are sufficient to support his overall adverse conclusions under Guideline F (Financial Considerations). As to the debt covered by SOR paragraph 1.t, Applicant persuasively argues the Judge erred by finding he still owed the full amount of the mortgage debt. However, given the totality of the facts and circumstances of Applicant's overall history of financial difficulties, this error is harmless.

2. Whether it was arbitrary, capricious or contrary to law for the Administrative Judge to conclude Applicant had not made a good faith effort to repay his debts. Applicant challenges the Administrative Judge's conclusion that he has not made a good faith effort to repay his debts. In support of this contention, Applicant argues: (a) he filed for Chapter 13 bankruptcy; (b) he has made an effort to contact creditors, obtain correct balances on his outstanding debts, repay his debts; and (c) the Judge's unfavorable decision in this case is not consistent with another decision the Judge issued in a similar one, and it is not consistent with the favorable decision another Hearing Office Judge reached in a similar case. For the reasons that follow, the Board concludes Applicant's claim of error is not persuasive.

In the decision below, the Administrative Judge specifically noted: (i) Applicant's filing of a Chapter 13 bankruptcy occurred on the morning of the hearing in this case; and (ii) Applicant's failure to address or otherwise deal with his delinquent debts (which included four judgments against him) earlier than he did. Considering the record evidence as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's belated efforts to deal with his delinquent debts did not demonstrate a good-faith effort to repay or resolve his debts that warranted application of Financial Considerations Mitigating Condition 6 ("The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," Directive, Adjudicative Guidelines, Item E2.A6.1.3.6). Moreover, Applicant's filing of a bankruptcy petition did not: (a) preclude the Judge from considering the security significance of Applicant's history of financial difficulties; or (b) compel the Judge to conclude Applicant had demonstrated financial reform and rehabilitation sufficient to warrant a favorable security clearance decision. *See, e.g.*, ISCR Case No. 01-26675 (June 13, 2003) at p. 3; ISCR Case No. 97-0016 (December 31, 1997) at p. 4.

The decisions by one Hearing Office Administrative Judge are not legally binding precedent on another Hearing Office Judge. Accordingly, an appealing party does not demonstrate a Judge erred merely by identifying a Hearing Office decision in another case that the appealing party believes is similar to his or her case. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp.3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges, and the burden of persuasion that a party has when citing such decisions on appeal). Moreover, the two Hearing Office decisions cited by Applicant in support of his appeal are factually distinguishable from this case because neither one of those cases involved findings of falsification. In this case, the Judge found that Applicant falsified a security clearance application in February 2001 by failing to disclose all of his delinquent debts. That finding of falsification has not been challenged on appeal.

Conclusion

With the possible exception of some factual errors that would constitute harmless error, Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's security clearance decision.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board