

DATE: July 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18093

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Peter R. Escobar, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 12, 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 James A. Young issued an unfavorable security clearance decision dated February 26, 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 erred in concluding that Applicant had a history of not meeting his financial obligations; (2) whether the Administrative Judge erred in concluding that Applicant was unable or unwilling to satisfy his debts; and (3) whether the Administrative Judge's weighing of evidence in mitigation was 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 erred in concluding that Applicant had a history of not meeting his financial obligations. The Judge concluded that Applicant failed to address two debts (SOR paragraphs 1.a and 1.b), and that this was disqualifying under Financial Considerations Disqualifying Conditions 1-⁽¹⁾

and 3.⁽²⁾

The Judge found that Applicant failed to make any payments on the debt in SOR paragraph 1.a (approximately \$8,893) since 1989, and it was charged off. The Judge also found that "[a]pparently, Applicant never even inquired into the status of . . . [the debt in SOR paragraph 1.b (approximately \$4,748)] . . . until the week before the hearing." The Judge found that the creditor of the debt in SOR 1.b notified Applicant of the transfer of this debt to a new owner, but Applicant produced no evidence indicating that he attempted to contact the new owner of the debt.

Applicant does not dispute that he did not contact the creditors involved in the account in SOR paragraph 1.b until the week before the hearing, but he argues the Administrative Judge ignored the absence of both debts in credit reports in 2003 and 2004. Applicant contends that the Administrative Judge ignored his current "outstanding financial situation," which includes a record of timely child support payments during the past nine years, a current net remainder of \$1,391.08 each month, total assets of over \$466,000, and qualification to purchase a \$160,000 house. He also argues that the two debts are mitigated because they are "not recent";⁽³⁾ one involves a debt more than 14 years old and the other is over seven years old.

Applicant's argument is not persuasive. Generally, an applicant is responsible for presenting witnesses and other

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 clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. In considering an applicant's evidence, there is a rebuttable presumption that an Administrative Judge considered all of the record evidence unless the Judge specifically states otherwise. Apart from that presumption, a review of the decision below indicates that the Judge specifically considered mitigating evidence presented by Applicant and made favorable findings for him with respect to other debts: SOR paragraphs 1.c and 1.d, that are not in issue here. A Judge must consider the record evidence as a whole and decide whether the favorable outweighs the unfavorable evidence, or vice versa. The fact that the Judge found Applicant's evidence to be unpersuasive, or that the Applicant can point to favorable evidence, like his current financial situation, does not mean that the Judge ignored the Applicant's evidence. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 3.

Applicant's characterization of the two debts as "not recent," is not binding on the Judge because it focuses only upon the initial incurring of the debts. From a security standpoint, it is just as important to consider whether the debts were resolved, and if so, the manner in which they were resolved. The two debts here continued for more than 14 and seven years respectively, up to the close of record evidence. Applicant's failure to resolve these debts is relevant information which the Judge was entitled to consider. The Board declines to conclude that the Judge was obliged to apply Financial Considerations Mitigating Condition 1 in Applicant's favor. *See, e.g.*, ISCR Case No. 01-03695 (October 16, 2002) at pp. 3-4. Applicant's failure to resolve these debts in the intervening years provided a rational basis for the Judge to apply Disqualifying Conditions 1 and 3. *See, e.g.*, ISCR Case No. 98-0111 (November 13, 1998) at p. 4. Moreover, we need not agree with the Judge's conclusion that Applicant had a history of not meeting financial obligations to conclude it is sustainable. The fact that Applicant satisfied other debts in a timely manner does not negate the record evidence that he has delinquent debts that he has not satisfied. *See, e.g.*, ISCR Case No. 98-0111 (November 13, 1998) at p. 4.

2. Whether the Administrative Judge erred in concluding that Applicant was unable or unwilling to satisfy his debts. Applicant argues on appeal that record evidence shows that the two debts in SOR paragraphs 1.c and 1.d were promptly paid by Applicant upon notice that they were due, and the Judge's findings with regard to them support this. ⁽⁴⁾

Applicant also argues that he had testified that he had contacted creditors for the debts in SOR paragraphs 1.a and 1.b and similarly would have paid them, but neither creditor had a current record of indebtedness. He contends that current credit reports confirm that he owes no debts to the two creditors.

Even if we assume for purposes of this appeal that the creditors may have decided to discontinue collection, this would not preclude the Judge from considering the security implications of Applicant's longstanding failure to resolve the debts. *Cf.* ISCR Case No. 99-9020 (June 4, 2001) at p. 3. Considering both the evidence that was favorable to Applicant, and that which was unfavorable to him, the Judge's conclusion that Applicant was unable or unwilling to satisfy the debts in SOR paragraphs 1.a and 1.b is sustainable.

3. Whether the Administrative Judge's weighing of evidence in mitigation was arbitrary, capricious or contrary to law. Applicant argues that the Judge erred in not concluding that: (a) Applicant's behavior was not recent, (b) Applicant's behavior was an isolated incident, (c) the conditions that resulted in Applicant's behavior were largely beyond his control, and (d) Applicant made good-faith efforts to repay overdue creditors or otherwise resolve debts. Applicant argues that the Judge erroneously failed to apply Financial Considerations Mitigating Conditions 1, 2, ⁽⁵⁾

3, ⁽⁶⁾

and 6 ⁽⁷⁾

and that the Judge's conclusions were arbitrary, capricious or contrary to law.

Applicant's arguments regarding recency were discussed earlier.

The Judge was not compelled to find that Applicant's conduct with respect to these two debts was "isolated" in light of their longstanding, unresolved nature and the amounts involved. The debts are not isolated to the points in time that Applicant stopped payment on the debts. *See, e.g.*, ISCR Case No. 02-14950 (May 15, 2003) at pp. 4-5.

We are not persuaded that the Judge erred because he did not find "that the sole reason for his past financial problems" is due to Applicant's ex-spouse. The debt in SOR paragraph 1.a had been outstanding since 1989, a point in time long before Applicant's self-described period of financial difficulty (1995-2002). Moreover, even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with such difficulties. *See, e.g.*, ISCR Case No. 01-21243 (September 30, 2003) at p. 4. The Judge's Decision articulates concern about Applicant's failure to demonstrate actions between the time that the debts were incurred (1989 and 1997 respectively) and the time of the hearing that were consistent with a good-faith effort to resolve these debts. Accordingly, the Judge's conclusion that Financial Considerations Mitigating Condition 3 did not apply is sustainable.

Applicant argues Financial Considerations Mitigating Condition 6 should have been applied to his case. He bases his argument in part on a claim that the two debts are resolved. In addition to his testimony that he contacted the creditors involved in the debts in SOR paragraphs 1.a and 1.b to inquire into the status of the debts, Applicant contends that the Judge erred because the two "credit reports" introduced into evidence (Exhibits C and J) demonstrate the absence of the two debts. [\(8\)](#)

Applicant says that the Judge "overlooked the obvious conclusion that there was no debtor to pay in each situation" and the "Applicant could not be expected to make payments to an unknown debtor and to an unknown account number." He argues that he has demonstrated that he is willing and able to pay either debt if the creditor makes a current demand.

"Good-faith," as used in Financial Considerations Mitigating Condition 6, requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. Applicant did not resolve these debts over the years and now seeks to avoid their effect by their removal from his credit history. *See, e.g.*, ISCR Case No. 98-0111 (November 13, 1998) at p. 4. The Judge's conclusion that Financial Considerations Mitigating Condition 6 did not apply to either debt is sustainable in view of Applicant's longstanding failure to even address them. An applicant must do more than merely show that he/she relied on a legally available option to claim the benefit of Mitigating Condition 6. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 4. The fact that an unsatisfied debt is dropped from a credit report, perhaps due to legal or regulatory requirements, does not preclude the Judge from considering its security significance. *See, e.g.*, ISCR Case No. 02-14950 (May 15, 2003) at p. 5.

In weighing all the evidence, we do not have to agree with the Judge's ultimate security clearance determination to sustain it against a challenge that it was arbitrary, capricious or contrary to law. A Judge's decision to deny a security clearance is sustainable despite claims of an excellent current financial status when an applicant has two substantial long overdue outstanding debts that he has not resolved. *Cf.* ISCR Case No. 01-19278 (April 22, 2003) at p. 5.

Conclusion

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "A history of not meeting financial obligations." Directive, Adjudicative Guidelines, Item E2.A6.1.21.
2. "Inability or unwillingness to satisfy debts." Directive, Adjudicative Guidelines, Item E2.A6.1.2.3.
3. Financial Considerations Mitigating Condition 1: "The behavior was not recent." Directive, Adjudicative Guidelines, Item E2.A6.1.3.1.
4. It is somewhat misleading to suggest that these debts "were promptly paid by the Applicant upon notice that they were due." For example, the debt in SOR paragraph 1.c was "settled" in July 2003 (Exhibit E), but it was originally incurred, and was due, in the late 1980's or early 1990's (Hearing Transcript at p. 22).
5. Financial Considerations Mitigating Condition 2: "It was an isolated incident." Directive, Adjudicative Guidelines, Item E2.A6.1.3.2.
6. "The conditions that resulted in the behavior were largely beyond the person's control(e.g., . . . business downturn . . . or . . . divorce or separation)." Directive, Adjudicative Guidelines, Item E2.A6.1.3.3.
7. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Directive, Adjudicative Guidelines, Item E2.A6.1.3.6.
8. Exhibit J appears to be more of a financial statement than a credit report, but for purposes of this appeal, we will assume that it is a credit report.