

DATE: August 1, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19625

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 October 15, 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 Joan Caton Anthony issued an unfavorable security clearance decision, dated March 23, 2005.

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 some of the Administrative Judge's findings of fact are erroneous; and (2) whether the Administrative Judge erred by concluding Applicant had not mitigated his history of financial difficulties sufficiently to warrant a favorable security clearance decision. 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

Applicant's appeal brief contains: (a) some factual assertions about his history of financial difficulties and current financial situation that seek to supplement the record evidence that was before the Administrative Judge; and (b) copies of four documents that were not part of the record below. Those factual assertions and four documents constitute a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. A review of the proceedings below shows that Applicant had the opportunity to respond to the SOR allegations, and the opportunity to respond to the File of Relevant Material and submit evidence for the Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence. The Board will consider only those issues raised by Applicant that do not rely on his proffer of new evidence.

1. Whether some of the Administrative Judge's findings of fact are erroneous. Applicant challenges the following findings of fact by the Administrative Judge: (a) the dates of his enlistment in the U.S. Navy and when he was first granted a security clearance; and (b) the Judge's finding that he paid off a debt of \$996 in December 2003.

There is record evidence that Applicant was granted a security clearance in August 1990. There is no record evidence as to whether that was the first time Applicant was granted a security clearance. In any event, the date when Applicant was first granted a security clearance is not material or relevant to the Administrative Judge's findings and conclusions about Applicant's overall history of financial difficulties. Therefore, even if the Board were to conclude that the Judge's finding about Applicant's security clearance was erroneous, such an error would be harmless.

There is record evidence that Applicant was in the U.S. Navy from April 1990 through January 1995. There is no record evidence as to when Applicant enlisted in the U.S. Navy. In any event, the date when Applicant enlisted in the U.S. Navy is not material or relevant to the Administrative Judge's findings and conclusions about Applicant's overall history of financial difficulties. Therefore, even if the Board were to conclude that the Judge's finding about Applicant's

enlistment date was erroneous, such an error would be harmless.

The Administrative Judge's finding about a \$996 debt paid off in December 2003 is based on evidence Applicant submitted in response to the File of Relevant Aerial. The Judge did not err in making that finding of fact based on Applicant's proffered evidence.

2. Whether the Administrative Judge erred by concluding Applicant had not mitigated his history of financial difficulties sufficiently to warrant a favorable security clearance decision. The Administrative Judge found that Applicant had paid off some of his debts and had made efforts to contact various creditors to deal with his financial difficulties. However, the Judge concluded that Applicant had not demonstrated sufficient evidence of extenuation or mitigation to overcome the security concerns raised by his history of financial difficulties. On appeal, Applicant challenges the Judge's conclusion that he did not present sufficient evidence of extenuation or mitigation to warrant a favorable security clearance decision.

Given Applicant's admissions to the SOR allegations and the record evidence about Applicant's history of financial difficulties, the burden shifted to Applicant to present evidence sufficient to rebut, extenuate, or mitigate the security concerns raised by his overall history of financial difficulties. (1) The Judge found that most of Applicant's outstanding debts were still unsatisfied and not likely to be resolved in the near future. Those findings reflect a reasonable interpretation of the record evidence and are not challenged on appeal.

The Administrative Judge cited Applicant's answer to the SOR in support of her conclusion that Applicant did not present evidence that warranted application of Financial Considerations Mitigating Condition 3. (2) On appeal, Applicant states that he does not challenge the Judge's conclusion about the inapplicability of Financial Considerations Mitigating Condition 3 to the extent the Judge based her conclusion on the statements he made in his answer to the SOR about the loss of his parents, a failed marriage, and the diagnosis of his diabetes. However, Applicant does contend the Judge should have applied Financial Considerations Mitigating Condition 3 in his favor with respect to the medical expenses he has incurred as a result of his medical condition.

Applicant's argument concerning his medical expenses is based in part on the record evidence, and in part on factual assertions that seek to supplement the record evidence. As noted earlier in this decision, the Board cannot consider new evidence. The Board will not conclude that the Judge erred with respect to Financial Considerations Mitigating Condition 3 based on Applicant's proffer of new evidence concerning his medical expenses. To the extent that Applicant's argument relies on record evidence that was before the Judge, it does not demonstrate the Judge erred by concluding Financial Considerations Mitigating Condition 3 was not applicable. Given the limited record evidence about Applicant's medical expenses, it was not arbitrary or capricious for the Judge to conclude that those medical expenses did not warrant application of Financial Considerations Mitigating Condition 3 in Applicant's favor.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated harmful error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

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.