

DATE: November 1, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20586

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 April 19, 2004, 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 Roger C. Wesley issued an unfavorable security clearance decision, dated May 31, 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 the Administrative Judge's unfavorable decision should be reversed because it failed to take into account the adverse impact an unfavorable decision would have on Applicant's spouse; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because her delinquent debts are old and her current debts are being paid 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 made findings of fact about Applicant's history of financial difficulties, which resulted in numerous delinquent debts totaling more than \$60,000. Although the Judge noted that Applicant's financial difficulties began following the death of her husband in 1993, the Judge concluded that Applicant had not extenuated or mitigated the security concerns raised by her history of financial difficulties because her delinquent debts were significant, she still had not resolved her delinquent debts, and she had not documented good-faith efforts to deal with her delinquent debts.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about her history of financial difficulties. Because there is no presumption of error below, and because Applicant has the burden of raising claims of error on appeal, the Board will not address or review the Judge's unchallenged findings of fact. However, Applicant does make the following two arguments on appeal: (1) the Judge did not take into account the adverse impact an unfavorable decision would have on Applicant's current spouse; and (2) she asks that she be allowed to retain a security clearance because her delinquent debts are old and her current debts are being paid in a timely manner.

1. Whether the Administrative Judge's unfavorable decision should be reversed because it failed to take into account the adverse impact an unfavorable decision would have on Applicant's spouse. In responding to the File of Relevant Material, Applicant indicated that she works with her current husband as a team, her husband has a security clearance, and an unfavorable security clearance decision in her case would result in both of them losing their jobs. On appeal, Applicant claims the Administrative Judge did not take into account that an unfavorable decision in her case would have unfavorable consequences for her husband.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge

specifically stated otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome merely because a party can cite to record evidence that is not specifically mentioned or discussed in the Judge's decision. *See, e.g.*, ISCR Case No. 02-33256 (October 21, 2004) at p. 4.

Apart from the presumption that the Administrative Judge considered all the record evidence, the evidence cited by Applicant did not preclude the Judge from making an unfavorable security clearance decision. Even if an unfavorable security clearance decision were to result in adverse economic consequences to an applicant and the applicant's spouse, such adverse consequences would not preclude a Judge from rendering an unfavorable decision based on evaluation of the applicant's conduct and circumstances under applicable Guidelines. The security significance of an applicant's conduct or circumstances under an applicable Guideline is not increased or decreased by the outcome of the security clearance adjudication. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because her delinquent debts are old and her current debts are being paid in a timely manner. Applicant states that her delinquent debts are old and that her current debts are being paid in a timely manner, and asks to be allowed to continue her job. The Board construes these statements as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because her delinquent debts are old and her current debts are being paid in a timely manner.

As noted earlier in this decision, Applicant does not challenge the Administrative Judge's findings of fact about her history of financial difficulties. Given the Judge's findings of fact about Applicant's history of financial difficulties, it was not arbitrary or capricious for the Judge to conclude that security concerns were raised under Guideline F (Financial Considerations) and that Applicant had the burden of presenting evidence sufficient to refute, extenuate or mitigate those security concerns. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

In deciding whether Applicant had presented evidence sufficient to refute, extenuate, or mitigate the security concerns raised under Guideline F (Financial Considerations), the Administrative Judge had to consider the record evidence as a whole in light of pertinent provisions of the Adjudicative Guidelines and the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. The Judge was not required to conclude that the security concerns raised by Applicant's overall history of financial difficulties were extenuated or mitigated because her delinquent debts arose several years in the past. Given the Judge's unchallenged findings of fact, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that the mere passage of time since those delinquent debts were initially incurred did not extenuate or mitigate Applicant's failure to resolve them in subsequent years. Applicant has not shown that the Judge's reasoning was arbitrary, capricious, or contrary to law.

Finally, Applicant's appeal brief does not challenge the Administrative Judge's findings and conclusions about her falsification of the security clearance application. As noted earlier in this decision, there is no presumption of error below. The Judge's unchallenged findings and conclusions about Applicant's falsification of the security clearance application provide a sufficient basis for the Judge's unfavorable decision under Guideline E (Personal Conduct) that is legally independent from his findings and conclusions under Guideline F (Financial Considerations).

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board