

DATE: December 28, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21045

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Joseph L. Johnson, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 18, 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 Claude R. Heiny issued an unfavorable security clearance decision, dated September 9, 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 by finding Applicant still owed approximately \$49,000 in unsatisfied debts; and (2) whether the Administrative Judge erred by not concluding Applicant had successfully mitigated her financial difficulties. 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 by finding Applicant still owed approximately \$49,000 in unsatisfied debts. Applicant does not challenge the Administrative Judge's findings of fact about her history of financial difficulties, which included: (a) Applicant resorting to Chapter 7 bankruptcies in 1983, 1991, and 1998; and (b) Applicant filing a Chapter 13 bankruptcy petition in June 2002 that covered approximately \$49,000 in unsatisfied debts. However, Applicant contends the Judge erred by finding that she still had \$49,000 in unsatisfied debts.

Applicant's claim of error lacks merit. Given the record evidence in this case, the Administrative Judge properly found the debts covered by Applicant's Chapter 13 bankruptcy petition were still not satisfied. Applicant's claim that \$46,000 of those debts have been satisfied through the Chapter 13 process is based on a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. *See also* ISCR Case No. 01-21274 (January 8, 2004) at p. 3 (there is no general legal right to continuously supplement the record evidence in a case).

Applicant had a reasonable opportunity to submit record evidence for the Administrative Judge to consider in her case during the proceedings below. Applicant cannot fairly challenge the Judge's findings or conclusions based on a proffer of evidence on appeal that was not made available for the Judge to consider during the proceedings below.

2. Whether the Administrative Judge erred by not concluding Applicant had successfully mitigated her financial difficulties. Applicant also contends the Administrative Judge erred by not concluding her filing of a Chapter 13 bankruptcy was sufficient to warrant a favorable security clearance decision based on application of Financial Considerations Mitigating Condition 6. ⁽¹⁾ This contention is not persuasive.

The legal availability of filing for bankruptcy does not preclude the Administrative Judge from considering the overall

history of an applicant's financial difficulties. *See, e.g.*, ISCR Case No. 97-0016 (December 31, 1997) at p. 4. *See also* ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6 (in order to claim the benefit of Financial Considerations Mitigating Condition 6, an applicant must do more than just show that he or she has relied on a legally available option such as bankruptcy). The filing of a bankruptcy petition is not evidence that the debts covered by the petition will be successfully discharged or resolved. Moreover, given the record evidence of Applicant's repeated use of the bankruptcy process over the past 20 years -- with Applicant having recurring financial difficulties despite the financial relief provided by each bankruptcy discharge -- it was not unreasonable for the Judge to decide that Applicant's Chapter 13 bankruptcy filing in 2002 did not demonstrate financial reform and rehabilitation that warranted a conclusion that Applicant had successfully overcome her long history of recurring financial difficulties and was not likely to have them again.

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: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).