

DATE: September 23, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21604

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 9, 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 Martin H. Mogul issued an unfavorable security clearance decision dated June 24, 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 issue have been raised on appeal: (1) whether the Board should contact various individuals and institutions to confirm what steps Applicant has taken to deal with his financial difficulties; and (2) whether Applicant should be allowed to have a conditional or probationary security clearance so that he can have an opportunity to deal with his 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 [\(1\)](#)

The Administrative Judge found that Applicant has a history of financial difficulties, and that as of the time of the hearing Applicant had not addressed or resolved his financial difficulties. The Judge also found that Applicant falsified a security clearance application in August 2001 by failing to disclose material facts about his financial difficulties. The Judge entered formal findings against Applicant under Guideline F (Financial Considerations) and Guideline E (Personal Conduct), and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

1. Whether the Board should contact various individuals and institutions to confirm what steps Applicant has taken to deal with his financial difficulties. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. However, Applicant's appeal brief lists two individuals and three organizations that Applicant states the Board can contact if it wants to confirm what steps he has taken to deal with his financial difficulties. The Board will not contact those individuals and organizations.

The Board must be fair and impartial in its handling of appeals. *See* Directive, Section 4.1 ("All proceedings provided for by this Directive shall be conducted in a fair and impartial manner.") It would be inconsistent with that obligation if the Board were to allow itself to act as an agent or surrogate advocate for one of the parties. Accordingly, the Board cannot and will not act as an agent for Applicant in developing the record for him.

Applicant's proffer of new evidence does not demonstrate error below. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, a review of the record below persuades the Board that Applicant had a reasonable opportunity to present evidence for the Administrative Judge to consider in his case. Nothing in Executive Order 10865, the Directive, or generally applicable principles of federal administrative law gives Applicant a right to supplement the record evidence continuously. *See, e.g.*, ISCR Case No. 01-21274

(January 8, 2004) at p. 3. Furthermore, Applicant cannot fairly challenge the Judge's decision based on a proffer of evidence that he did not present for the Judge's consideration.

2. Whether Applicant should be allowed to have a conditional or probationary security clearance so that he can have an opportunity to deal with his financial difficulties. asking allowances for Applicant's *pro se* status, the Board construes various statements in Applicant's appeal brief as asking that he be allowed to have a conditional or probationary security clearance so that he can have an opportunity to deal with his financial difficulties. Under the Directive, there is no authority to grant a conditional or probationary security clearance. *See, e.g.,* ISCR Case No. 01-21274 (January 8, 2004) at p. 3.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. On appeal, Applicant states that he does not believe he needs a security clearance to perform his work. The Board does not have jurisdiction or authority to review the reason or reasons why an applicant needs or is required to have a security clearance.