

DATE: August 5, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-21282

## **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 the Applicant a Statement of Reasons (SOR), dated August 25, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline F (Financial Considerations). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision, dated April 19, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issue: whether the Administrative Judge's decision is 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** <sup>(1)</sup>

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. On appeal, Applicant argues that the Judge's decision is not sustainable because: (1) the Judge made several errors in calculating the amounts still owed by the Applicant on his various debts, which resulted in the indebtedness appearing to be somewhat higher than it actually was, (2) the Judge should have held in Applicant's favor with respect to debts which Applicant disputes or which no longer appear on his credit report, (3) the Judge did not give sufficient positive weight to the amount of Applicant's current income, his projected Cost of Living Allowance (COLA) increases, and the fact Applicant hasn't acquired any new arrearage on his debts, (4) Department Counsel did not properly question witnesses for the purposes of resolving discrepancies in the evidence or otherwise eliciting evidence favorable to the Applicant, and did not tell Applicant what additional documentation Applicant needed in order to establish that certain of his debts had been resolved, and (5) Applicant has held a security clearance for many years without incidents or problems. While Applicant acknowledges that the debts at issue are still outstanding or unresolved, it is his position that the Judge should have concluded that the security concerns raised by those debts were mitigated by application of Financial Considerations Mitigating Conditions 3, 4 and 6, and the "whole person" concept. <sup>(2)</sup>

The Board interprets Applicant's appeal brief as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on whether there is some record evidence that might warrant their application to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Accordingly, 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 those financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 99-0012 (December 1, 1999) at p. 4. In this case, it was not arbitrary or

capricious for the Judge to it consider Applicant's failure to resolve the debts after the conditions which had contributed to them becoming delinquent had passed and his financial situation had improved. Therefore, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's financial difficulties were not mitigated under Financial Considerations Mitigating Condition 3. [\(3\)](#)

Even if it is assumed, for the purposes of deciding this appeal, that the amount of Applicant's indebtedness is somewhat less, and the amount of his current income is somewhat more, than the figures referenced in the Judge's findings, the Judge's decision is still sustainable. Because the debts at issue had been incurred years earlier and were still substantially in arrearage, or still in dispute, at the time of the hearing, it was not arbitrary or capricious for the Judge to conclude that there was insufficient evidence for him to conclude that there were clear indications that Applicant's financial problems were under control. Given the record evidence in this case, the Judge could reasonably conclude that Applicant's recent and on-going efforts to resolve his financial problems were not a sufficient substitute for a consistent record of timely debt arrearage reduction. Therefore, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's financial difficulties were not mitigated under Financial Considerations Mitigating Condition 4. [\(4\)](#)

Applicant sets forth arguments that question the validity of certain domestic relations/child support type debts identified in the SOR. In effect, Applicant asks to collaterally attack these debts in a DOHA proceeding. Among his arguments, Applicant raises defenses under the Fair Credit Reporting Act. A Judge should consider record evidence concerning applicant's efforts to challenge the validity of any debt, but the proper forum for an applicant to resolve the legal validity of these debts is in a court of competent jurisdiction, not in a DOHA proceeding. Additionally, even though a debt was removed or should be removed from a credit report due to law or regulation, it is not arbitrary or capricious for a Judge to consider other record evidence of the debt and its security implications. *See, e.g.*, ISCR Case No. 02-14950 (May 15, 2003) at p. 5.

Given Applicant's history of financial problems, the sizable nature of the indebtedness, and the fact that the debts at issue had been incurred years earlier and were still substantially unpaid, or still in dispute, at the time of the hearing--well after the invocation of the security clearance process and the issuance of the SOR--it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to otherwise resolve his debts warranted application of Financial Considerations Mitigating Condition 6. [\(5\)](#)

The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's security clearance decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and reach a conclusion as to whether Applicant met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's conclusions. The fact that Applicant argues that a different conclusion should be drawn from the record evidence does not demonstrate error on the part of the Judge. *See* ISCR Case No. 02-15872 (July 23, 2004) at p.3.

The Judge reached conclusions about Applicant's history of financial difficulties that reflect a plausible, legally permissible interpretation of the record evidence as a whole. Given the Judge's conclusions, he had a rational basis to conclude Applicant's overall history of financial difficulties raised security concerns under Guideline F, and to conclude that Applicant had failed to present sufficient evidence to overcome those security concerns.

The Board finds no merit in Applicant's contention that the Judge's decision is flawed because Department Counsel did not properly question witnesses for the purposes of resolving discrepancies in the evidence of record or otherwise eliciting evidence favorable to the Applicant, and did not tell Applicant what additional documentation Applicant needed in order to establish that certain of his debts had been resolved. The Applicant was responsible for presenting evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proved or that Applicant admitted, and the Applicant also had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. Neither the Judge nor Department Counsel had the obligation to act as surrogate advocates for Applicant to help him present the best possible case.

Finally, Applicant argues that he has held a security clearance for many years without any security violation. That argument does not demonstrate the Administrative Judge erred. The federal government is not required to wait until a person commits a security violation before it can decide to deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Applicant's overall history of financial difficulties provides a sufficient rational basis for the Judge's unfavorable security clearance decision.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of the Applicant with respect to SOR paragraphs 1.a, 1.b, and 1.c. Those favorable findings are not at issue on appeal.

2. Directive, Section 6.3 and Adjudicative Guidelines, Items E2.2.1.1 through E2.2.1.9.

3. "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).

4. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.4).

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