

DATE: October 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22657

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 September 22, 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) and Guideline E (Personal Conduct). Administrative Judge John G. Metz, Jr. issued an unfavorable security clearance decision, dated July 6, 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 ⁽¹⁾

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. On appeal, Applicant contends that the Judge's decision is not sustainable because: (1) there are "inaccuracies, omissions, and deletions" in the Judge's factual findings, and (2) the Judge's decision did not discuss why Applicant did not disclose certain information to the Government's investigator, or Applicant's previous security clearance status. The Board interprets Applicant's appeal brief as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

(1) Applicant argues that the Judge erred in not finding that Applicant had a one-year deferment with respect to payments on his student loans. In support of that argument, he explains that the deferment documentation related to the loans had not been properly submitted by his college office because of an administrative error. He also offers, for the first time on appeal, documentary evidence to corroborate that explanation and show payments made toward those loans. It is Applicant's contention, that had the Judge found Applicant was current on his student loans, Applicant's remaining indebtedness, including a disputed judgment related to repossession of an automobile, would not have been of sufficient security significance to warrant denial of his clearance. Applicant's argument does not demonstrate the Judge erred.

The Applicant was responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts which he admitted, or which had been proven by Department Counsel. He also had the ultimate burden of persuasion as to obtaining a favorable clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. In this case, Applicant requested an administrative determination of his case, rather than a hearing. He was provided a copy of Department Counsel's File of Relevant Material (FORM) and placed on reasonable notice of: (a) his right to offer written evidence in response to that FORM, and (b) the fact that the Judge would be making his decision based upon the written materials provided to him. Applicant offered no evidence in response to the FORM. In his decision, the Judge noted Applicant's claim of a one-year grace period with respect to payments on his student loans--a claim stated in Applicant's answer. However, the Judge also noted that Applicant's claim in that regard was uncorroborated by any independent evidence. Given the record before him, the Judge's findings with respect to Applicant's student loans were sustainable. The Board

may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The submission of such new evidence does not demonstrate error on the part of the Judge, or render his decision arbitrary, capricious or contrary to law. *See* ISCR Case No. 02-18434 (August 13, 2004) at p. 3.

(2) Applicant argues that the Judge erred by not discussing in his decision: (a) the reasons why Applicant had not disclosed information about his student loans to the Government investigator, and (b) Applicant's previous security clearance status. This argument is without merit.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 (April 3, 1997) at p. 3; DISCR Case No. 93-1186 (January 5, 1995) at p. 5. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 5. Applicant is essentially arguing that he is honest and has held a security clearance for many years without any problems. Those arguments do not demonstrate the Judge erred. The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See 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. *See* ISCR Case No. 02-21282 (August 5, 2004) at p. 5.

Conclusion

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic

I concur with my colleagues' conclusion that the Administrative Judge's unfavorable security clearance decision should be affirmed.

Most of Applicant's appeal brief is based on factual assertions that go beyond, and seek to supplement, the record evidence that was before the Administrative Judge. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Apart from the restriction imposed by Item E3.1.29, a review of the procedural history of this case shows that Applicant had a fair and adequate opportunity to submit explanation and documentary information in response to the File of Relevant Material. Applicant did not take advantage of that opportunity. Having failed to do so, Applicant cannot fairly challenge the Judge's reliance on the record evidence before him to make findings of fact and reach conclusions about Applicant's case.

Applicant's challenge to the Administrative Judge's finding of falsification does not rely on a proffer of new evidence. Given the record evidence in this case, the Judge could have found Applicant's failure to disclose certain delinquent

debts on the security clearance application was a deliberate falsification or an inadvertent oversight. The Board does not review the record evidence *de novo* and make its own findings of fact on appeal. It is legally irrelevant whether I would have made the same finding as the Judge did. What is legally relevant is that Applicant has failed to demonstrate the Judge's finding of falsification does not reflect a reasonable interpretation of the record evidence.

What remains of Applicant's appeal brief are some arguments that do not raise any material issue of fact or law. The Board is required to address material issues raised on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.32. However, the Board is not required to address nonmaterial issues raised on appeal. No useful purpose would be served by addressing the nonmaterial issues raised by Applicant's appeal brief.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. In his brief, Applicant argues that SOR paragraph 2.a. "is completely unsupported and false." The Administrative Judge found in favor of the Applicant with respect to that paragraph. Therefore, that favorable finding is not at issue on appeal.