

DATE: June 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22556

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 July 21, 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 Philip S. Howe issued an unfavorable security clearance decision dated March 15, 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 in concluding that Applicant's indebtedness is disqualifying because his situation does not involve conduct covered by "The Concern" paragraph of Guideline F; (2) whether the Administrative Judge erred in applying the "whole person" concept; (3) whether the Administrative Judge erred in concluding that Applicant was unwilling to satisfy his debts; (4) whether the Administrative Judge erred in concluding that Applicant's personal conduct is disqualifying because his situation does not involve conduct covered by "The Concern" paragraph of Guideline E; (5) whether the Administrative Judge erred in concluding that Applicant deliberately omitted, concealed, falsified or misrepresented relevant and material facts from his security clearance application; and (6) whether the Judge's overall security clearance 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⁾

1. Whether the Administrative Judge erred in concluding that Applicant's indebtedness is disqualifying because his situation does not involve conduct covered by "The Concern" paragraph of Guideline F. In response to the Judge's reference in his decision to the "The Concern" paragraph of Guideline F (Financial Considerations), ⁽²⁾ Applicant contends that he is not now overextended and lives within his means. He argues that he supports a family of four, pays on a car and house, and is not affluent. He states that it is "demeaning to link everyone who has had a hardship in the past to one now considered capable of [a] criminal act." The Board construes Applicant's statements as raising the issue of whether the Judge erred in applying "The Concern" paragraph of Guideline F to Applicant's history and circumstances.

Applicant's interpretation of the language in "The Concern" section of Guideline F would render meaningless several of the specific disqualifying conditions listed in the body of the Guideline, including the two disqualifying conditions that the Judge concluded were applicable in this case. ⁽³⁾ Individual portions of the Directive should not be applied in isolation. This Board has rejected the narrow interpretation of Guideline F now advanced by the Applicant. *See, e.g.*, ISCR Case No. 01-24356 (February 26, 2003) at pp. 4-5 (holding Guideline F should not be construed or interpreted solely based on "The Concern" section, but rather the language of Guideline F in its entirety).

2. Whether the Administrative Judge erred in applying the "whole person" concept. Applicant states that he does not

deny his previous debts, but he contends that the "whole person" concept⁽⁴⁾ was not properly applied "in some areas." Applicant does not state how the Judge supposedly failed to properly apply the "whole person" concept. As noted earlier in this decision, there is no presumption of error below and an appealing party must raise claims of error with specificity. Applicant's "whole person" argument is too vague to raise an identifiable claim of error.

3. Whether the Administrative Judge erred in concluding that Applicant was unwilling to satisfy his debts. Applicant argues that he did not state that he was unwilling to satisfy his debts, but that it is hard to pay down existing debts on his current income. He states that he is paying off his debts gradually.

The Administrative Judge found the following: Applicant now has three dependents and a middle class income. Applicant worked for a firm until he voluntarily quit in 1999. Applicant then cashed out his company stock and sold his house, and he realized a profit of \$30,000 on which he lived for two years and did not work. Applicant did not pay his earlier debts because he needed money to live on while he was not working. The Judge concluded that Applicant had the money in 1999 and 2000 to pay his unsatisfied debts, but chose to live on that money rather than work, and Applicant made no efforts for four to five years to pay these debts. The Applicant has not challenged these findings and conclusions on appeal.

Notwithstanding Applicant's strong disagreement, the Judge's conclusion about his unwillingness to satisfy his debts is a reasonable, plausible interpretation of the record evidence as a whole. Accordingly, the Judge's conclusion is sustainable.

4. Whether the Administrative Judge erred in concluding that Applicant's personal conduct is disqualifying because his situation does not involve conduct covered by "The Concern" paragraph of Guideline E. Applicant argues that he does not fit the description set forth in "The Concern" paragraph of Guideline E, cited by the Administrative Judge in his decision, particularly unwillingness to comply with rules and regulations.⁽⁵⁾ Applicant contends that he is trustworthy and is more mature than when he incurred the five debts in 1998-1999. However, "The Concern" paragraph of Guideline E must be construed or interpreted in light of the language in Guideline E in its entirety, not just the portion cited by Applicant. The Judge found that the government proved its case under Guideline E because Applicant's conduct fell within Personal Conduct Disqualifying Condition 2.⁽⁶⁾ Furthermore, falsification of a security clearance application is a clear example of untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Accordingly, this claim of error is not persuasive.

5. Whether the Administrative Judge erred in concluding that Applicant deliberately omitted, concealed, falsified or misrepresented relevant and material facts from his security clearance application. Applicant argues that he did not intend to lie when he responded to Questions 38 and 39 of his security clearance application. He contends that he simply did not understand the substance of the questions at the time he responded.

The Judge had to consider Applicant's statements concerning his intent when he completed the security clearance application, but the Judge was not bound by the Applicant's explanation. In these circumstances, the Judge considers an applicant's statements about his state of mind in light of the record evidence as a whole and an applicant's demeanor while testifying. *See* ISCR Case No. 01-07292 (January 29, 2004) at p. 5 (also involving applicant claims of confusion about the security clearance application). There may not be direct proof that Applicant intentionally falsified his security clearance application; however, Applicant's state of mind may be proven through indirect or circumstantial evidence. Furthermore, falsification can be proven despite an applicant's denial of any intent to make a false or misleading statement or omission. *See, e.g.,* ISCR Case No. 00-0250 (July 11, 2001) at p. 4. The Judge's findings and conclusions about Applicant's falsifications of the security clearance application reflect a reasonable, plausible interpretation of the record evidence as a whole. Accordingly, they are sustainable.

6. Whether the Judge's overall unfavorable security clearance decision is arbitrary, capricious or contrary to law. Applicant argues that despite the personal hardships he experienced, he did not engage in any criminal activity and nothing suggests that he would do so now. Applicant also argues that he deserves a security clearance based on the fact that he is a United States citizen, a veteran and a defense contract worker with a good work ethic. Applicant's appeal raises the issue of whether the Judge's unfavorable security clearance decision is arbitrary, capricious or contrary to law because he does not pose a security risk.

Security clearance decisions are not an exact science, but are predictive judgments about a person's security eligibility in light of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). And, the federal government need not wait until an applicant mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access. *See Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The government does not have to prove that an applicant poses a "clear and present danger" to national security. *See Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975). Under Guideline F, the security eligibility of an applicant is placed into question when that applicant is shown to have a history of not meeting financial obligations or inability or unwillingness to satisfy debts. *See ISCR Case No. 00-0596* (October 4, 2001) at p. 4 (Judge reasonably could conclude applicant's history of unresolved debts posed security concerns under Guideline F, notwithstanding his prior security clearance, good past military record and years of employment in the defense industry). Similarly, as stated earlier in this decision, falsification of a security clearance application is a clear example of untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. The Applicant has the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. Given the record evidence in this case, it was not arbitrary, capricious or contrary to law for the Administrative Judge to conclude that the Applicant failed to meet this burden of persuasion in light of his unresolved delinquent debts and falsification of the security clearance application.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made a formal finding in Applicant's favor with regard to SOR paragraph 1.f. This finding is not at issue in this appeal.

2. Directive, Adjudicative Guidelines, Item E2.A6.1.1: "The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts."

3. Directive, Adjudicative Guidelines, Items E2.A6.1.2.1 ("A history of not meeting financial obligations") and E2.A6.1.2.3 ("Inability or unwillingness to satisfy debts").

4. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.

5. Directive, Adjudicative Guidelines, Item E2.A5.1.1: "The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules or regulations could indicate that the person may not properly safeguard classified information."

6. Directive, Adjudicative Guidelines, Item E2.A5.1.2.2: "The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . ."