

DATE: March 9, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23805

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 February 24, 2004, 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 December 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 certain findings of fact by the Administrative Judge are erroneous; and (2) whether Applicant can be granted a security clearance so that he can address his outstanding debts. 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 certain findings of fact by the Administrative Judge are erroneous. The Administrative Judge found that: (a) Applicant has a history of financial difficulties that began after his wife became ill in 1999 and lost her income as a result of her illness; (b) Applicant filed for Chapter 13 bankruptcy in November 1999; (c) the Chapter 13 bankruptcy was dismissed in May 2000, after Applicant stopped making payments to the bankruptcy trustee; (d) Applicant has seven delinquent debts that remain unpaid; and (e) Applicant falsified a security clearance application in March 2001 by not disclosing his delinquent debts in response to questions 38 and 39 on the application. On appeal, Applicant: (i) asserts the Administrative Judge's decision contains factual errors about his purchases of two cars; and (ii) makes several statements that the Board construes as challenging the Judge's finding that he falsified the security clearance application.

Applicant's challenge to the Administrative Judge's decision focuses on details concerning his purchase of two cars, which raise no material issue that warrants further discussion by the Board. *See* Directive, Additional Procedural Guidance, Item E3.1.32 (Board must address *material* issues raised by the parties on appeal).

Considering the record as a whole, and recognizing the deference owed to the Administrative Judge's assessment of the credibility of Applicant's testimony, the Board concludes that the Judge's finding of falsification is sustainable because it reflects a reasonable interpretation of the record evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Applicant's appeal arguments fail to demonstrate the Judge's finding of falsification is erroneous.

2. Whether Applicant can be granted a security clearance so that he can address his outstanding debts. Applicant asserts that he is addressing his debts to the best of his ability and asks the Board to reinstate his security clearance. The Board construes Applicant's statements as a request that the Board grant him a conditional or probationary security clearance while he deals with his outstanding debts.

Under the Directive, there is no authority to grant a conditional or probationary security clearance. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 7.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant: (a) has not raised any material issue concerning the Judge's findings about Applicant's history of financial difficulties; (b) has failed to demonstrate the Judge's finding of falsification is erroneous; and (c) asks for relief that is not authorized by the Directive.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board