

DATE: July 14, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24479

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John G. Metz, Jr. issued a decision dated March 3, 2003 in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether he was denied a fair and impartial hearing; (2) whether the Administrative Judge erred in finding that Applicant's military character references were unaware of his financial problems; and (3) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant dated October 8, 2002. The SOR was based on Guideline F (Financial Considerations). Applicant requested a hearing which was held on February 7, 2003. The Administrative Judge issued a decision dated arch 3, 2003 in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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. *See* 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 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. *See, e.g.,* ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

Appeal Issues ⁽¹⁾

1. Whether Applicant was denied a fair and impartial hearing. Applicant alleges the following regarding the conduct of his hearing: (a) the hearing started three hours later than scheduled and this had the effect of requiring him to wait in a hallway that was uncomfortably cold, allowed his anxiety and apprehension to grow, affected his preparedness and personal resolve, and significantly detracted from his ability to state and support his case; (b) he was rushed through the hearing; and (c) the court reporter appeared to "doze off" on at least two occasions during the hearing. Applicant's appeal arguments fail to establish that he was denied due process.

Prior to the presentation of evidence at the hearing, the Administrative Judge specifically asked Applicant if he had any procedural problems he wished to make the Judge aware of. In making this inquiry the Judge specifically referenced the three-hour delay in the start of the hearing. At that time Applicant answered in the negative and only made brief mention of a perceived problem in attempting to submit documents prior to the hearing. ⁽²⁾ Having voiced no concerns at the hearing about the delay and any effects that delay may have had upon his ability to present his case, Applicant has waived his right to pursue the issue on appeal.

Similarly, Applicant raised no concerns at the time of the hearing based on any perception that he was "being rushed" or based on any inattentiveness on the part of the court reporter. These issues were therefore waived as well. Moreover, DOHA hearings are afforded a presumption of administrative regularity. After a review of the hearing transcript and the evidence presented, the Board is satisfied that Applicant was afforded an adequate opportunity to present his case and that the hearing transcript was accurate.

2. Whether the Administrative erred in finding that Applicant's military character references were unaware of his financial problems. In his decision, the Administrative Judge states that Applicant's military character references "specifically express no concerns over granting Applicant's clearance, although none appear to be aware of his financial problems." Applicant asserts on appeal that two of his military references were aware of his debt problems. He argues that the two military members in question were notary publics who notarized documents that contained detailed information about his finances.

A review of the record evidence shows that the two military members in question were officers who each notarized a document for Applicant. One notarized Applicant's answer to the Statement of Reasons. The other notarized Applicant's response to a request for interrogatories submitted by DOHA. The two officers later provided letters of support to Applicant which he submitted as evidence on his behalf. Neither of the two letters make any reference to Applicant's financial problems.

Applicant's argument on appeal fails to demonstrate error on the part of the Administrative Judge. The answer to the Statement of Reasons that was notarized by one officer makes general references to Applicant's financial problems but contains no specifics as to the number of debts, their delinquent or non-delinquent status or the amount of money involved. The responses to the request for interrogatories consist of a notarized letter from Applicant that again makes only general references to financial problems and his efforts to resolve them. The response included 20 attachments that did provide some detail about Applicant's overdue accounts but there is no indication that the officer who notarized the letter saw or was aware of the contents of the attachments. Even though the two officers notarized the documents, their duties as notaries extended to having Applicant swear or attest to the truthfulness of the documents. In so doing, the officers would not necessarily become aware of the details of the contents of the documents and there is no evidence in this case that they actually were aware. Since their character letters do not mention Applicant's financial difficulties, the Judge's finding that they were not familiar with Applicant's plight was a reasonable interpretation of the record evidence.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law. On appeal Appellant asserts the following: (a) he wants to pay down his debts but will not use up his savings for debt reduction until he is given the opportunity for future employment; (b) he has taken steps to be in a better position to pay his debts by no longer using credit cards, driving older vehicles and moving to a lower rent area; (c) the Administrative Judge used inflammatory and unprofessional language in his decision; and (d) the Government "failed" him by not responding to his various pre-hearing inquiries regarding how he could best mitigate his case. The Board construes these various assertions as a claim that the Judge's decision is arbitrary, capricious or contrary to law.

Regarding assertions a and b, Applicant makes no specific allegation of error on the part of the Administrative Judge. By merely discussing various factors that he feels mitigate his case, he is simply restating arguments on appeal that he made below. His ability to argue for an interpretation of the record evidence that differs from the interpretation of the Administrative Judge does not establish that the Judge rendered a decision that is arbitrary, capricious, or contrary to law.

Applicant objects to the Administrative Judge using the following language in his decision: "While Applicant appears to have stopped digging himself into a financial hole, he has not started to pull himself out of it. . . ." Applicant states that he considers the Judge's language to be inflammatory and unprofessional. While the language is pointed, Applicant fails to specifically identify how the language he complains of constitutes error. Decisions of Administrative Judges are not measured against a standard of perfection. Absent a showing of factual or legal error that prejudices a party, the Board need not concern itself with the particular language used by Administrative Judges in their decisions.

Applicant states that, prior to the hearing, he made many attempts to contact the Defense Security Service (DSS) and DOHA seeking advice on how to "make my situation better." He complains that the government did not respond, and did not offer any legal advice or legal counsel for his defense. He states he was seeking guidance on how to best mitigate his case and states that if someone had explained to him that he had to show a continuous pattern of paying his debts, his situation would now be different.

It would be inappropriate for the government, as a party in these proceedings, to offer advice or provide guidance to Applicant as to how to conduct his daily affairs so as to put his case in the most favorable light. Additionally, the government is not required to provide legal counsel for Applicant to represent him in these proceedings. Moreover, the Board has no jurisdiction over actions of the DSS and, unless its actions directly impact upon Applicant's ability to prepare his case or otherwise result in a denial of due process, the Board lacks jurisdiction over DOHA's pre-hearing interactions with Applicant. The Directive, a copy of which was provided to Applicant, placed him on notice that he was responsible for preparing for the hearing and presenting evidence on his behalf. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's obligation to prepare for the hearing and present his case also was communicated to him in the prehearing guidance sent to him by the Hearing Office. Applicant's arguments concerning the government's failure to provide him with advice do not establish error.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Part of Applicant's appeal brief (Paragraphs 2 and 3) alleges error on the part of Department Counsel as opposed to the Judge. Another part of the brief alleges a lack of preparation on the part of Department Counsel during the hearing. Absent a showing that Department Counsel's conduct resulted in a denial of due process or unduly affected the substance of the Administrative Judge's security clearance decision in some way, the Board need not address these assertions of error. Applicant has failed to establish how these alleged errors by Department Counsel prejudiced him in any meaningful way.

2. Hearing Transcript at pp. 12-13.