

DATE: May 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24578

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 4, 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 Joan Caton Anthony issued an unfavorable security clearance decision, dated March 10, 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 issues: (1) whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions, and (2) whether the Administrative Judge erred by concluding that the Applicant had deliberately falsified her security clearance application. 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 erred by failing to give sufficient weight to applicable mitigating conditions. On appeal, Applicant contends the Judge should have concluded that the security concerns raised by her debts were mitigated by application of Financial Considerations Mitigating Conditions 3, ⁽¹⁾ 4, ⁽²⁾ and 6. ⁽³⁾ In support of that contention, she argues that: (a) her financial difficulties arose as a result of her frequent moves and lack of employment, and (b) she has recently sought help from a consumer credit agency, her bills have now been paid, and she has received a signed copy of her agreement. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on whether there is record evidence that might support their application in a particular 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 her 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 consider Applicant's failure to resolve the debts after the conditions which had contributed to them becoming delinquent had passed and her financial situation had improved.

Similarly, because the debts at issue had been incurred years earlier and the Applicant was still in the process of initiating efforts to resolve them at the time her case was being submitted for decision based upon the administrative record, it was not arbitrary or capricious for the Judge to conclude that there was insufficient evidence that Applicant's efforts at dealing with her debts were timely, or that there were clear indications that the problem was under control. Given the record evidence in this case, the Judge could reasonably conclude that Applicant's eleventh-hour efforts to resolve her financial problems were not a substitute for a consistent record of timely remedial action.

In view of the foregoing, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to not apply Financial Considerations Mitigating Conditions 3, 4, and 6.

Further, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's 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 whether Applicant had satisfied her 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 Judge made findings of fact and reached conclusions about Applicant's history of financial difficulties that reflect a plausible, legally permissible interpretation of the record evidence. Given the Judge's findings and conclusions, she 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.

Finally, the Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Therefore, we may not consider the statements Applicant makes about (1) actions she took after the submission of her case to the Administrative Judge for decision, and (2) her motivations for conduct which were not part of the record evidence before the Judge.

2. Whether the Administrative Judge erred by concluding that the Applicant had deliberately falsified her security clearance application. On appeal, Applicant contends that she did not deliberately falsify her security clearance application by failing to disclose her delinquent debts, a lien, and some of her employment history. Rather, she contends the omission of the information in question was the result of an oversight or mistake. Therefore, it is Applicant's position the Judge should have resolved the Guideline E allegations in her favor. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

An applicant's statements about her intent and state of mind when she completed her security clearance questionnaire are relevant evidence, but they are not binding on the Administrative Judge. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts the applicant's denial. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp.6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. This case involved the omission of information which was of security significance in response to three different questions on the Applicant's security clearance application. Given the record evidence in this case, it was not unreasonable for the Judge to conclude that the Applicant's failure to disclose the relevant information had been intentional--despite her denials to the contrary. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to reject Applicant's denials of any intent to falsify. The Judge's findings of falsification are sustainable.

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 Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "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, Enclosure 2, Item E2.A6.1.3.3).
2. "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, Enclosure 2, Item E2.A6.1.3.4).
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).