

DATE: June 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26018

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 October 20, 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), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision, dated January 5, 2005.

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 in making certain material findings, (2) whether the Administrative Judge erred by concluding Applicant's history of financial difficulties raised security concerns under Guideline F, and (3) whether the Administrative Judge erred by finding the Applicant's falsifications were deliberate. 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 in making certain material findings. On appeal, Applicant contends that the Administrative Judge's adverse security clearance decision should be reversed because it is predicated on five findings that, either individually or when taken together, are misleading, incomplete, only partially true, or erroneous. ⁽¹⁾ Applicant offers new evidence in the form of a detailed explanation challenging the respective findings. The Board may not consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Applicant also asserts that because the Judge's decision doesn't discuss all the evidence relating to Applicant's situation, it is not "based upon consideration of all the relevant and material information" as required by the Directive. Applicant's arguments do not demonstrate that the Judge erred. 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. 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 has not met his burden of demonstrating that the Administrative Judge's material findings do not reflect a reasonable or plausible interpretation of the record evidence. As noted above, the Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings of fact are sustainable.

2. Whether the Administrative Judge erred by concluding Applicant's history of financial difficulties raised security concerns under Guideline F. On appeal, Applicant contends the Administrative Judge erred by concluding that Applicant's history of financial difficulties raised security concerns under Guideline F. In support of that contention, Applicant argues that because his indebtedness has been charged off, he is not at risk of having to engage in illegal acts to generate funds.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the financial considerations allegations presented security concerns. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3

In this case, the Applicant had a history of not meeting financial obligations which ran over multiple years. At the time the case was submitted for decision, he still had significant outstanding debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. A security clearance adjudication is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness to make a decision about the applicant's security eligibility. Accordingly, even if delinquent debts are legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. Therefore, it was not arbitrary, capricious, or contrary to law for the Judge to consider, under Guideline F, Applicant's history of financial difficulties and delinquent debts, including those that might now be unenforceable by his creditors. *See, e.g.*, ISCR Case No. 01-09691 (March 27, 2003) at pp. 2-4.

3. Whether the Administrative Judge erred by finding the Applicant's falsifications were deliberate. The Applicant contends that he did not deliberately provide false information on his security clearance application. In support of that contention Applicant argues: (a) he answered "yes" to one question as to whether he had outstanding debts, even though he did not list them all, (b) he answered "no" to one question regarding the current status of his debts because he was not delinquent on recent debts, (c) he did not list the debts because he wanted to conceal them from his employer, not from the government, (d) he signed an authorization for release of information, specifically giving permission to for the government investigator to have full access to his credit reports, and (e) he candidly provided the information about his debts in his interview with the government agent. Applicant's arguments do not persuade us that the Judge erred.

An applicant's statements about his intent and state of mind, when responding to the government's inquiries during a background investigation, are relevant evidence, but they are not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at p. 6; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. 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 Applicant's denial. *Id.* The security concerns raised by Applicant's disqualifying conduct were not necessarily mitigated by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (government's security concerns not mitigated by the fact that Applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed). Considering the record as a whole, the Judge's finding that Applicant's failure to disclose the relevant information was deliberate reflects legally permissible inferences drawn from the record evidence. Applicant's ability to argue for an alternative interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification is unsustainable.

Conclusion

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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

1. Applicant also contends that four statements made by Department Counsel in her File of Relevant Material (FORM) were either misleading, untrue or expressions of opinion. Such statements were in the nature of argument and did not constitute evidence. The FORM is not a decision by the Government. Applicant had an opportunity to respond to Department Counsel's FORM. The appeal process is an opportunity for the parties to contest the Administrative Judge's decision. Therefore, the Board need not address Applicant's claims regarding Department Counsel's statements in the FORM.