

DATE: October 24, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27133

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Joseph R. Whaley, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 20, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline F (Financial Considerations). Administrative Judge Kathryn Moen Braeman issued a favorable security clearance decision, dated September 30, 2004. The Department Counsel appealed, and the Board remanded the matter on March 3, 2005. On remand, Administrative Judge Braeman issued an unfavorable security clearance decision, dated April 6, 2005.

Applicant appealed the Administrative Judge's unfavorable remand 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 by failing to weigh properly applicable mitigating conditions under Guideline F (Financial Considerations); (2) whether the Administrative Judge erred in concluding that Applicant's plan to resolve debts rendered unenforceable by the statute of limitations lacked sufficient specificity and lead her to conclude that Applicant had only partially mitigated security concerns; (3) whether the Administrative Judge erred by failing to take into account relevant factors under the "whole person" concept; (4) whether the Administrative Judge's remand decision erroneously imposes a duty upon Applicant to pay or resolve debts rendered legally unenforceable under the applicable statute of limitations; and (5) whether the Administrative Judge's decision can be affirmed on other grounds. While not raised as error, to fashion an appropriate remedy, Applicant also requests the Board to remand this matter to the Administrative Judge to re-open the record for additional evidence. 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 by failing to properly weigh applicable mitigating conditions under Guideline F (Financial Considerations) and erroneously imposed a duty upon Applicant to pay or resolve debts rendered legally unenforceable under the applicable statute of limitations. ⁽²⁾ In the initial decision, the Board concluded that there was insufficient record evidence for the Administrative Judge to apply Financial Considerations Mitigating Conditions 4 ⁽³⁾ and 6, ⁽⁴⁾ where the Judge's findings were consistent with an effort by Applicant to pay or settle debts that creditors pressured Applicant to resolve, but not resolve other debts (totaling approximately \$20,000) in which creditors did not keep pressure on Applicant and which became unenforceable under the applicable statute of limitations.

Applicant now contends that the Administrative Judge erred in her remand decision because she did not follow the Board's direction to determine whether the evidence falling under the remaining mitigating conditions (other than Financial Considerations Mitigating Conditions 4 and 6) was sufficient to overcome the security concerns. Specifically,

Applicant contends that the Judge erroneously interpreted the Appeal Board decision of March 3, 2005, to mean that Applicant "had a duty to resolve" each unenforceable debt in order to counter the security concerns. Applicant's argument is persuasive.

An Administrative Judge's decision is not measured by a standard of perfection. However, the remand decision did not address the issue of whether the unenforceable debts could still be mitigated without the benefit of Mitigating Conditions 4 and 6. Instead, the Judge determined that "the Appeal Board concluded in its March 3, 2005, Appeal Board Decision and Remand Order that in the context of a security clearance assessment, Applicant nevertheless had a duty to resolve these other debts in order to counter security concerns." Decision at p. 8. A fair reading of this language supports Applicant's position that the Administrative Judge erroneously interpreted the Board's March 3, 2005, decision as requiring her to deny mitigation on any unsatisfied debt specified in the SOR if, for example, Mitigating Condition 6 could not be applied to that debt. It is one thing to find that Financial Considerations Mitigating Conditions 4 and 6 are not applicable to particular debts, but it is another to conclude that the debts necessarily could not be mitigated just because either of those mitigating conditions is inapplicable. The mere presence or absence of any Adjudicative Guidelines disqualifying or mitigating factor is not dispositive of the case. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4. For the same reason, Applicant persuasively argues that the Judge's decision is flawed because it appears to impose a duty upon Applicant to pay or resolve debts rendered legally unenforceable under the applicable statute of limitations. (S)

2. Whether the Administrative Judge erred in concluding that Applicant's plan to resolve debts rendered unenforceable by the statute of limitations lacked sufficient specificity and lead her to conclude that Applicant had only partially mitigated the security concerns. Applicant also contends that the Administrative Judge erred in her finding that Applicant's plan to resolve debts rendered unenforceable by the statute of limitations was rational but incomplete because Applicant offered no timetable or plan for doing so. Applicant believes that this led the Judge to conclude erroneously that Applicant had only partially mitigated security concerns with respect to the debts. Applicant contends, among other things, that the finding of a lack of specificity in Applicant's plan is not based on record evidence, and in any respect, it is only relevant to Mitigating Condition 6, that the Board found did not apply to the debts.

As explained above, the Administrative Judge erroneously interpreted the Board's March 3, 2005, decision to mean that unless Financial Considerations Mitigating Condition 6 applied to each of the unenforceable debts, a security concern would remain that rigidly precluded mitigation of the debt. This erroneous interpretation may or may not have also contributed to the Administrative Judge's finding on remand that Applicant's plan to resolve the unenforceable debts was incomplete. However, we need not decide whether the Administrative Judge had a reasonable basis for her finding because, as Applicant believes, this would be related to Mitigating Condition 6, which the Board has held did not apply to the debts given the record. Accordingly, even if we assume, solely for purposes of this appeal, that the Judge erred, such an error would be harmless in this particular context.

3. Whether the Administrative Judge erred by failing to take into account relevant factors under the "whole person" concept. Applicant contends that the Administrative Judge did not weigh appropriate factors under Directive, Item E2.2.1 (6) in reaching her unfavorable security clearance determination and that if she had followed the Appeal Board's direction, she would have inevitably issued a favorable security clearance decision.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. An applicant's disagreements with the Judge's findings, standing alone, are not sufficient to rebut that presumption. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Here, the Administrative Judge stated that she considered "the Adjudicative Process factors [which includes "whole person" factors] and the Adjudicative Guidelines," and in fact, her decision contains many findings favorable to Applicant. In effect Applicant urges that the Administrative Judge's findings and conclusions only support a favorable security clearance decision, and that any other decision is necessarily arbitrary or capricious. For reasons explained below, the Board does not agree with Applicant that a weighing of "whole person" factors reasonably could only lead to a favorable security clearance determination for Applicant.

4. Whether the Administrative Judge's decision can be affirmed on other grounds. In the absence of a cross-appeal, the non-appealing party is entitled to urge affirmance of the decision below on the basis of any matter supported by the

record, even if the argument relies on matters overlooked, ignored, not relied on, or even rejected by the lower tribunal. *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6. In this case, in support of its contention that the Judge's adverse decision should be affirmed, Department Counsel contends that: (a) record evidence supports the Judge's conclusion that the possible applicability of the remaining Guideline F Mitigating Conditions (Mitigating Conditions 1, 2, 3 and 5) were not sufficient to overcome the security concerns raised by Department Counsel; and (b) doubts about an applicant's security suitability should be resolved in favor of denial.

Department Counsel makes cogent arguments, based on record evidence,⁽⁷⁾ showing, among other things, that: (1) Applicant had enough disposable income to travel for pleasure to Hong Kong, Macao and the People's Republic of China while he owed substantial debts that, at that time, had not yet become unenforceable under the statute of limitations; and (2) Applicant had a substantial amount of unpaid federal and state tax debt at the same time that he had several credit card accounts that had been turned over for collection or charged off as bad debts. That evidence could reasonably support conclusions that: (i) neither Financial Considerations Mitigation Condition 1⁽⁸⁾ nor 2⁽⁹⁾ favorably applied to Applicant; or (ii) to the extent that they might apply, the weight of the supporting evidence was not as strong as other considerations. Department Counsel also notes that Financial Considerations Mitigating Condition 5⁽¹⁰⁾ was not a relevant issue in this case. Thus, the only Financial Considerations Mitigating Condition that arguably applied to Applicant was Financial Considerations Mitigating Condition 3⁽¹¹⁾ (the Board previously held that Financial Considerations Mitigating Conditions 4 and 6 did not apply to the debts at issue in this appeal). Therefore, such a record could reasonably support adverse formal findings against Applicant under the SOR paragraphs still in issue and result in an unfavorable security clearance determination. Viewed in this light, the evidence highlighted by Department Counsel would impact such "whole person" factors as the frequency and recency of the conduct;⁽¹²⁾ the potential for pressure, coercion, exploitation, or duress;⁽¹³⁾ and the likelihood of continuation or recurrence,⁽¹⁴⁾ and not result in a favorable finding for Applicant under a "whole person" analysis. Finally, as the Directive itself specifically states: "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, Adjudicative Guidelines, Item E2.2.2. *See also* Directive, Additional Procedural Guidance, Item E3.1.15.

In this context, we find Department Counsel's arguments to be persuasive. The Appeal Board must select one of three possible remedies: remand, reversal, or affirmation. Directive, Additional Procedural Guidance, Item E3.1.33. We are not convinced that a second remand would result in a materially different decision from the Judge. Reversal is not appropriate because there is sufficient record evidence to support the Administrative Judge's overall adverse security clearance determination, given a legal standard that required the Judge to err on the side of national security. Accordingly, we affirm on the basis urged by Department Counsel.

Conclusion

Applicant has failed to meet his burden of demonstrating error below that warrants remand or reversal. For reasons stated in this decision, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

DISSENTING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I am puzzled by the majority's reasoning.

The Board, in its initial Decision appeared to conclude that some portions of the Administrative Judge's initial favorable Decision were sustainable and some portions were not. The Board remanded the case to the Judge for her to re-analyze Applicant's situation without applying either Mitigating Condition 4 or itigating Condition 6 because Applicant's financial history includes six debts which do not reasonably fall under either of those conditions. The majority said, "Absent the applicability of these two mitigating conditions, there is a significant chance that the Judge could have reached a different result based upon the record as a whole." The Board's language suggests that there was also a reasonable possibility of a favorable outcome given the record evidence. (Otherwise, the "significant chance" would have been a certainty and there would have been no need for a remand, the case would have been reversed).

The record has not changed. The Judge has not altered most of her favorable findings and conclusions, except where specifically instructed by the Board to do so.

The Board concludes that the rewritten (unfavorable) portions of the Judge's Remand Decision are an erroneous interpretation of the Board instructions because she concluded mistakenly that she was required to deny mitigation on the unsatisfied debts. Department Counsel's arguments on remand are a reworking of the arguments they made on their first appeal. At this point, it would appear that what remains is very similar to what remained after the first decision, some favorable findings and conclusions and a requirement for sustainable analysis on the remaining issues. If anything, one might conclude that Applicant's situation has improved because the Board is agreeing that the Judge erred in her interpretation of the Board's earlier instructions by concluding that she was required to find specified debts not mitigated. This is the point where the majority now concludes the Judge's unfavorable decision is sustainable based on the same record and Department Counsel arguments which did not justify an unfavorable decision previously.

Based on the law of the case (considering the majority's previous remand decision), the right outcome would appear to be to remand the case with instruction to re-analyze Applicant's situation in light of a corrected understanding of the Board's first instructions. Absent, such a remand, all the sustainable findings and conclusions are favorable and do not support the majority's conclusion.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. In her remand decision, the Administrative Judge made formal findings in Applicant's favor with respect to SOR paragraphs 1.a through 1.d and 1.h. In the initial decision, the Administrative Judge also had made a favorable formal finding for Applicant under SOR paragraph 2. These favorable formal findings are not at issue in this appeal. Moreover, we need not address Applicant's request to open the record for admission of additional evidence because, as Applicant recognizes, such a procedure is not permitted under the Directive. *See* Directive, Additional Procedural Guidance, E3.1.29.
2. This paragraph addresses both Issues 1 and 4 outlined above.
3. "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, Adjudicative Guidelines, Item E2.A6.1.3.4).
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).

5. Failure to repay or otherwise resolve such a debt does not necessarily preclude mitigation of the security concerns surrounding the inability or unwillingness to satisfy the debt, but, depending on record evidence, it may make it more difficult to do so.
6. These are generally referred to as the "whole person" concept. *See also* Directive, Section 6.3.
7. Government Exhibit 1 at p. 4; Hearing Transcript at pp. 85-91.
8. "The behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).
9. "It was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.2).
10. "The affluence resulted from a legal source" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.5).
11. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn . . ." (Directive, Adjudicative Guidelines, Item E2.A6.1.3.3).
12. Directive, Adjudicative Guidelines, Item E2.2.1.3.
13. Directive, Adjudicative Guidelines, Item E2.2.1.8.
14. Directive, Adjudicative Guidelines, Item E2.2.1.9.