

DATE: March 3, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27133

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

Peregrine D. Russell-Hunter, Esq., 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. 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 the Administrative Judge's favorable 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.

The following issues have been raised on appeal: (1) whether the Administrative Judge's application of Guideline F Mitigating Condition 4 is supported by the record evidence, and (2) whether the Administrative Judge's application of Guideline F Mitigating Condition 6 is supported by the record evidence. For the reasons that follow, the Board remands this matter to the Administrative Judge.

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's application of Guideline F Mitigating Condition 4⁽²⁾ is supported by the record evidence. Department Counsel challenges the Administrative Judge's application of Guideline F (Financial Considerations) Mitigating Condition 4 on the grounds that the language "there are clear indications that the problem is being resolved or is under control" does not apply to Applicant's conduct with regards to his delinquent debts.

Department Counsel's argument has merit. A close reading of the Administrative Judge's decision shows that Applicant (a man who was a bankruptcy attorney for several years) has a history of only resolving those delinquent debts that he is under legal pressure from the creditor to pay. The Judge found debts 1.a. through 1.d. resolved. According to the Judge's findings of fact three of those debts were tax debts and the fourth debt was the subject of a law suit. The Judge found six other debts unresolved. The Judge described, in her findings of fact, all six unresolved debts as "not enforceable" because of the running of a state's statute of limitations. In light of the Judge's findings, it was not reasonable for her to conclude that the challenged portion of Mitigating Condition 4 applies to Applicant's situation. The Judge erred by applying that mitigating condition to Applicant's situation.

(2) Whether the Administrative Judge's application of Guideline F Mitigating Condition 6⁽³⁾ is supported by the record evidence. Department Counsel challenges the Administrative Judge's application of Guideline F (Financial Considerations) Mitigating Condition 6 on the basis that Applicant's history (as described earlier in this decision with regard to Mitigating Condition 4) cannot reasonably be considered "a good-faith effort to repay creditors or otherwise resolve debts."

Department Counsel's argument is persuasive. In light of the Administrative Judge's findings that are outlined earlier in this decision, it was not reasonable for her to conclude that Applicant had initiated a good-fath effort to repay his creditors or otherwise resolve his debts. Rather, the Judge's findings are consistent with an effort by Applicant to pay only those debts which Applicant is under legal pressure to pay. The Judge erred by applying Mitigating Condition 6 to Applicant's conduct.

Conclusion

The Board is not convinced that the errors in this case are harmless. In reaching her affirmative security clearance decision, the Judge relied heavily on Financial Considerations Mitigating Conditions 4 and 6.⁽⁴⁾ 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. *Compare*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6. Accordingly, the case is remanded to the Judge for a new clearance decision in accordance with the Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25. The new clearance decision should address the issue of whether the evidence falling under the remaining mitigating conditions is sufficient to overcome the security concerns raised by the Department Counsel.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

On appeal, Department Counsel has demonstrated two errors by the Administrative Judge in her September 30, 2004 decision. I conclude that the errors demonstrated are ultimately harmless because the portions of the decision for which no error has been demonstrated are sufficient to affirm the Judge's favorable security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered a formal finding for Applicant under Guideline E. That favorable formal finding is not at issue on appeal.
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, Adjudicative Guidelines, Item E2.A6.1.3.4.
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" Directive, Adjudicative Guidelines, Item E2.A6.1.3.6.

4. Decision at p. 6.