

DATE: June 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28041

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 April 16, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines F (Financial Considerations). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision, dated February 14, 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 issue: whether the Administrative Judge erred by not concluding that the security concerns raised by Applicant's indebtedness had been mitigated. 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 Issue

Whether the Administrative Judge erred by not concluding that the security concerns raised by Applicant's indebtedness had been mitigated. Applicant contends the Judge should have concluded that the security concerns raised by his significant state and federal tax indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 3⁽¹⁾

and 6⁽²⁾

and the "whole person" concept. In support of that contention, Applicant argues that: (a) the indebtedness resulted from conditions beyond his control--the failure of his business due to an economic downturn, (b) he has been open and forthright in acknowledging his indebtedness, and in making offers of settlement, and (c) he served honorably in the military, held a security clearance for many years and has favorable character references from his employer and co-workers. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

The application of Adjudicative Guidelines disqualifying and mitigating conditions 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, the Administrative Judge's finding that many of the Applicant's original financial problems could be traced to conditions that were largely beyond his control did not compel the Judge to make a favorable security clearance decision. The Administrative Judge's discussion suggests that he applied some mitigation, although he did not specifically cite Financial Considerations Mitigating Condition 3. Even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge could consider whether Applicant acted in a reasonable manner when dealing with his 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 such factors as: (a) the length of Applicant's history of financial difficulties, (b) the extent and nature of his indebtedness, (c)

his uneven and unsuccessful efforts at compromising his residual tax indebtedness, and (d) the presence of a discharge in bankruptcy. Given the record evidence, the Judge could reasonably conclude that Applicant's most recent offer to compromise his significant federal tax indebtedness was a not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required to conclude, as a matter of law, that Applicant's history of financial difficulties was fully mitigated under Financial Considerations Mitigating Condition 3.

Given the overall history of Applicant's financial problems, his involvement with the bankruptcy process, the sizable nature of the tax indebtedness, and the fact that the debts at issue had been incurred years earlier, but had still not been resolved at the time of the hearing, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient to conclude that Applicant's efforts to otherwise resolve his debts warranted application of Financial Considerations Mitigating Condition 6. Therefore, although the Judge gave the Applicant some credit under Mitigating Condition 6, the Judge was not required, as a matter of law, to conclude Applicant's history of financial difficulties was fully mitigated under that mitigating condition.

With regard to Applicant's final argument, the Board notes that the federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. The Guidelines set forth in the Directive address a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole person analysis to determine an applicant's security eligibility. A whole person analysis, by its very language, is not confined to the workplace. *See ISCR Case No. 03-11231* (June 4, 2004) at p. 3. Moreover, the favorable evidence cited by Applicant did not compel the Administrative Judge to make a favorable security decision. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and whether Applicant had sufficiently rebutted, extenuated, or mitigated the security concerns raised under Guideline F to warrant a favorable security clearance decision. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6. Considering Applicant's burden of persuasion and the record as a whole, the Board concludes that Applicant has not demonstrated that the Administrative Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law, or that the Judge reached conclusions that are unreasonable.

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