

DATE: April 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28891

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Christopher M. Swanson, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 11, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations). Administrative Judge James A. Young issued an unfavorable security clearance decision dated January 20, 2004.

Applicant appealed the Administrative Judge's unfavorable 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's formal finding against Applicant that she had a monthly net remainder of \$226, as stated in SOR paragraph 1.c, is arbitrary and capricious; (2) whether the record evidence supports the Judge's conclusion that Applicant demonstrated no intention of satisfying the medical debt until her financial situation improved enough to accommodate the debts without sacrificing her and her husband's comfort; (3) whether the Judge erred by not applying Financial Considerations Mitigating Condition 6; and (4) whether the Judge's errors are harmful. ⁽¹⁾ 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's formal finding against Applicant that she had a monthly net remainder of \$226, as stated in SOR paragraph 1.c, is arbitrary and capricious. The Administrative Judge correctly noted that, in a written statement Applicant gave to a Defense Security Service investigator in August 2002, Applicant had indicated she and her husband had a net remainder of \$226 a month after paying their expenses (Decision at p. 2). Applicant correctly notes that, at the hearing (held in December 2003), she presented evidence in support of her claim that she and her husband had less than \$226 a month in income after paying their expenses. Although the Judge did not specifically refer to that evidence, or make a specific finding as to how much Applicant and her husband had left as a net monthly remainder as of the date of the hearing, the Judge did conclude that Applicant failed to pay her delinquent medical debt despite having income exceeding her expenses (Decision at p. 3).

There is no requirement that an Administrative Judge specifically mention and discuss each and every piece of record evidence. However, the Judge's failure to make a specific finding as how much Applicant and her husband had left as a net monthly remainder as of the date of the hearing is somewhat problematic given such a finding would be relevant to SOR paragraph 1.c.. However, even if the Board were to assume -- solely for purposes of deciding this appeal -- that Applicant is correct in contending that the record evidence shows she and her husband have a net monthly remainder of less than \$226 a month, Applicant does not persuasively show the Judge committed harmful error.

Although an Administrative Judge must make findings, reach conclusions, and apply pertinent provisions of the Adjudicative Guidelines to each allegation in an SOR, ⁽²⁾ the Judge also must evaluate an applicant's security eligibility ⁽³⁾

under the whole person concept after considering the record evidence as a whole. Accordingly, Applicant's security eligibility does not turn on the Judge's findings and conclusions with respect to any one paragraph of the SOR in this case, but rather on the Judge's findings and conclusions about the overall facts and circumstances of Applicant's history of financial difficulties. Furthermore, whether the record evidence shows Applicant has a net monthly remainder of \$26 a month, \$226 a month, or some amount in-between, there is no dispute that Applicant still has an unresolved medical debt of more than \$20,000. Applicant fails to articulate a persuasive argument for why there is a significant chance that the Judge would have reached a different result in this case if he had found Applicant had a net monthly remainder of only \$26 a month. As will be discussed later in this decision, the Judge had sufficient basis in the record evidence to conclude that Applicant had not demonstrated that she took reasonable steps to address or otherwise resolve the significant medical debt.

(2) Whether the record evidence supports the Judge's conclusion that Applicant demonstrated no intention of satisfying the medical debt until her financial situation improved enough to accommodate the debts without sacrificing her and her husband's comfort. The Administrative Judge correctly noted that Applicant, in the August 2002 written statement, indicated she did not intend to satisfy the medical debt "until my financial situation improves enough to accommodate it without sacrificing our comfort," but also recognized that at the hearing Applicant had changed her attitude (Decision at p. 4). Applicant's appeal brief makes an argument for how the record evidence on this aspect of the case could be interpreted in a manner more favorable to her than the interpretation reached by the Judge. However, the Judge's interpretation of the record evidence is a legally permissible one that does not reflect arbitrary or capricious action by the Judge. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 7 ("Applicant's strong disagreement with the inferences drawn and conclusions reached by the Administrative Judge is not sufficient to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.").

(3) Whether the Judge erred by not applying Financial Considerations Mitigating Condition 6. (4) In this case, the Administrative Judge had to decide whether Applicant took reasonable steps -- given her particular circumstances -- to deal with the unresolved medical debt. (5) Applicant's appeal brief makes a plausible argument for how the Judge could have interpreted the record evidence in a manner that could warrant the application of Financial Considerations Mitigating Condition 6. However, given the record evidence in this case, the Judge was not compelled, logically or legally, to conclude Applicant's overall course of conduct in dealing with the medical debt was sufficient in timeliness or degree to warrant application of Financial Considerations Mitigating Condition 6. Even if Applicant proved that she and her husband lacked financial resources to pay off the medical debt, it was not arbitrary and capricious for the Administrative Judge to conclude that Applicant failed to show reasonable efforts to explore alternative means of addressing the debt (*e.g.*, negotiated deferment or adjustment of the debt; further appeal or request for reconsideration of the insurance denial; seeking relief or review through appropriate state health care or insurance officials). The Judge's choice to not apply Mitigating Condition 6 in this case was a legally permissible one. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6. The Judge's choice is not rendered arbitrary or capricious merely because Applicant can argue for a plausible, alternate interpretation of the record evidence.

(4) Whether the Judge's errors are harmful. For the reasons discussed above, most of Applicant's claims of error are not persuasive. Furthermore, Applicant's first claim of error shows, at most, harmless error that does not warrant remand or reversal. Given the record evidence in this case, the Administrative Judge had a rational basis for concluding that Applicant's overall history of financial difficulties raised security concerns under Guideline F. *See, e.g.*, ISCR Case No. 96-0454 (February 7, 1997) at p. 2 (discussing security concerns raised by history of financial difficulties). Applicant had the burden of demonstrating explanation, extenuation or mitigation sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant has failed to show that it was arbitrary, capricious, or contrary to law for the Judge to conclude that she did not satisfy that burden of persuasion.

Conclusion

Applicant has failed to meet her burden of demonstrating harmful error below; therefore, for the reasons stated herein, the Administrative Judge's decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant's brief contains some arguments based on factual assertions that go beyond record evidence. Such assertions constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29.
2. Directive, Additional Procedural Guidance, Item E3.1.25.
3. Directive, Section 6.3; Enclosure 2, Items E2.2.1 and E2.2.3.
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).
5. An applicant's conduct must be evaluated under the reasonable person standard. *See, e.g.*, ISCR Case No. 01-03695 (October 16, 2002) at p. 5 n.7. However, what constitutes reasonable conduct cannot be determined in the abstract without consideration of the particular facts and circumstances of an applicant's case.