

DATE: June 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28935

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

M. Jefferson Euchler, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 3, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated February 23, 2005.

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 erred by concluding that Applicant's history of financial difficulties raised security concerns under Guideline F (Financial Considerations); and (2) in the alternative, whether the Administrative Judge erred by concluding that Applicant's history of financial difficulties had not been mitigated sufficiently to warrant a favorable security clearance decision. 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 concluding that Applicant's history of financial difficulties raised security concerns under Guideline F (Financial Considerations). On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. However, Applicant contends the Judge erred by concluding that his history of financial difficulties raised security concerns under Guideline F. In support of this contention, Applicant argues: (a) there is no record evidence that Applicant's unresolved debts leave him vulnerable to undue pressure to act improperly to gain funds to satisfy those debts; (b) there is no record evidence that Applicant's history of financial difficulties has resulted in illegal or improper acts by him to gain funds to satisfy his unresolved debts; and (c) there is no record evidence that his history of financial difficulties shows he has deep flaws indicative of irresponsibility on his part. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred by concluding his history of financial difficulties raised security concerns under Guideline F.

Department Counsel must present evidence to prove controverted facts.⁽²⁾ However, Department Counsel is not required to: (i) present evidence that shows a direct or objective nexus between an applicant's conduct and circumstances and an unfavorable security clearance decision;⁽³⁾ or (ii) prove that an applicant poses a clear and present danger or imminent threat to national security.⁽⁴⁾ Proven or admitted conduct or circumstances that fall under a Guideline give rise to a presumption of nexus.⁽⁵⁾ A history of financial difficulties raises security concerns.⁽⁶⁾ Evidence of greed or financial irresponsibility on the part of an applicant could be aggravating in nature. However, nothing in the language of Guideline F limits its reach to only those cases involving demonstrated greed or financial irresponsibility. Guideline F is broad enough to encompass cases involving a history of unresolved financial difficulties that is unrelated

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to any acts of financial irresponsibility. Accordingly, a Judge can consider whether an applicant poses a risk under Guideline F through financial irresponsibility, greed, *or* financial misfortune.⁽⁸⁾

In this case, the Administrative Judge's unchallenged findings of fact about Applicant's history of financial difficulties provided a rational and legally sufficient basis for the Judge to conclude that Applicant's history of financial difficulties raised security concerns under Guideline F. Applicant's ability to argue that his case is not as serious as other ones involving a history of financial difficulties does not demonstrate the Judge erred.⁽⁹⁾

2. In the alternative, whether the Administrative Judge erred by concluding that Applicant's history of financial difficulties had not been mitigated sufficiently to warrant a favorable security clearance decision. In the alternative, Applicant contends the Administrative Judge should have concluded that his history of financial difficulties had been mitigated sufficiently to warrant a favorable security clearance decision. In support of this contention, Applicant cites to record evidence that he claims demonstrates extenuation and mitigation of his history of financial difficulties.

Applicant's ability to argue for an alternate weighing of the record evidence is not sufficient to demonstrate the Administrative Judge weighed the evidence, both favorable and unfavorable, in a manner that is arbitrary, capricious, or contrary to law. The presence of some mitigating evidence in the record did not compel the Judge to make a favorable security clearance decision.⁽¹⁰⁾ Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge has the authority and discretion to consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a conclusion as to whether Applicant had satisfied his burden of persuasion to rebut, extenuate or mitigate the security concerns raised by his history of financial difficulties.⁽¹¹⁾ Considering the record as a whole, the Judge's unfavorable conclusions under Guideline F reflect a reasonable and legally permissible interpretation of the record evidence as a whole and Applicant has not shown that the Judge's conclusions are arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

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. The Administrative Judge entered formal findings in Applicant's favor with respect to Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Those favorable formal findings are not at issue on appeal.

2. *See* Directive, Additional Procedural Guidance, Item E3.1.14.
3. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973).
4. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 7.
5. *See, e.g.*, ISCR Case No. 02-07218 (March 15, 2004) at p. 5.
6. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of a history of financial difficulties).
7. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 5 (even in the absence of evidence that the applicant engaged in misconduct, evidence that financial misfortune left the applicant with unresolved financial difficulties is sufficient for Administrative Judge to conclude security concerns were raised under Guideline F).
8. *See, e.g.*, ISCR Case No. 02-20947 (June 18, 2004) at p. 5; ISCR Case No. 00-0378 (August 15, 2001) at p. 4.
9. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p. 10 (citing other Board decisions for proposition that Administrative Judge must consider the security significance of an applicant's proven or admitted conduct even if the applicant has not engaged in more serious conduct).
10. *See, e.g.*, ISCR Case No. 02-01181 (January 30, 2004) at p. 3. *See also* ISCR Case No. 02-09892 (July 15, 2004) at p. 5 (noting that Administrative Judges are not always faced with cases where the record evidence points all in one direction).
11. *See, e.g.*, ISCR Case No. 02-18663 (March 23, 2004) at p. 4.