

DATE: April 20, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30304

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Terry D. Kordeliski II, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated April 11, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline F (Financial Considerations) and Guideline J (Criminal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision, dated December 30, 2003.

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 issues: (1) whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions, and (2) whether the Administrative Judge's decision is erroneous because it is contrary to other Hearing Office decisions. 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 give sufficient weight to applicable mitigating conditions. On appeal, Applicant does not dispute the Administrative Judge's findings of fact with respect to the Applicant's business, personal, and financial history. Further, Applicant does not dispute that his prior history of not meeting his financial obligations constitutes conduct rising to the level of security concern. Rather, Applicant contends the Judge should have concluded that the security concerns raised by his debts were mitigated by application of Financial Considerations Mitigating Conditions 3, ⁽²⁾ 4, ⁽³⁾ and 6. ⁽⁴⁾ For the reasons set forth below, we affirm the Judge's decision.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition 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 (discussing various considerations that must be taken into account by an adjudicator when applying Adjudicative Guidelines disqualifying or mitigating conditions). Accordingly, even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with those financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4 ("Even if an applicant gets into financial difficulties because of circumstances beyond the applicant's control, the Judge must consider whether the applicant dealt with his or her financial difficulties in a reasonable manner."); ISCR Case No. 99-0012 (December 1, 1999) at p. 4 ("It was not arbitrary or capricious for the Judge to consider whether Applicant made timely, reasonable efforts to deal with the financial setbacks that resulted from conditions beyond his control."). In this case, it was not arbitrary or capricious for the Judge to consider Applicant's failure to resolve the debts after the conditions which had contributed to them becoming delinquent had passed and his financial situation had begun to stabilize.

Similarly, because the debts at issue had been incurred years earlier and had still not been satisfied, it was not arbitrary or capricious for the Judge to conclude that Applicant had failed to demonstrate that there was insufficient evidence for him to conclude that there were clear indications that the problem was under control. Given the record evidence in this case, the possibility that the Applicant might achieve resolution of his outstanding indebtedness at some future date was not a substitute for a worthy track record of remedial action.

Likewise, the Board has previously discussed what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

"In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' ISCR Case No. 99-0201 (October 12, 1999) at p. 4 (discussing concept of good-faith in connection with another provision of the Adjudicative Guidelines). Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6. [Footnote 12]" ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6.

Given the Applicant's history of financial problems, the sizable nature of his indebtedness, and the fact that he had submitted neither documentation of repayment efforts nor a definitive plan to address his child support obligations absent the reinstatement of his visitation rights, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to repay or otherwise resolve his debts had been made in "good-faith."

Finally, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's conclusions.

The Judge made findings of fact and reached conclusions about Applicant's history of financial difficulties that reflect a plausible, legally permissible interpretation of the record evidence. Given the Judge's findings and conclusions, he had a rational basis to conclude Applicant's overall history of financial difficulties raised security concerns under Guideline F, and to conclude that Applicant had failed to present sufficient evidence to overcome those security concerns.

2. Whether the Administrative Judge's decision is erroneous because it is contrary to other Hearing Office decisions. Applicant challenges the Administrative Judge's decision based in part on the argument that it is contrary to four Hearing Office decisions. A decision as to whether or not to grant an applicant access to classified information must be adjudicated in light of the particular facts and circumstances of that applicant's case. As counsel acknowledges in his brief, decisions by Hearing Office administrative judges are not legally binding precedent on other Hearing Office judges or the Board. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp.3-5. Accordingly, Applicant's ability to cite Hearing Office decisions in other cases that appear to support his position does not demonstrate the Judge's decision in this case is arbitrary, capricious, or contrary to law. Furthermore, the Board has no obligation to follow the Hearing Office decisions cited by Applicant, and no obligation to reconcile the Judge's decision below with the Hearing Office decisions cited by Applicant.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of the Applicant with respect to the Guideline J allegations. Those favorable findings are not at issue on appeal.
2. "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, Enclosure 2, E2.A6.1.3.3).
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, Enclosure 2, E2.A6.1.3.4).
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, E2.A6.1.3.6).