

DATE: February 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30603

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 to Applicant a Statement of Reasons (SOR) dated April 16, 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), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision dated November 18, 2003.

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 Applicant should be allowed another hearing to explain his past conduct and current situation; and (2) whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. 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 Applicant should be allowed another hearing to explain his past conduct and current situation. On appeal, Applicant notes he represented himself at the hearing below and states "I would like to have my day in court" to "get things straightened out." The Board construes Applicant's statements as raising the issue of whether he should be allowed another hearing.

Applicant had a hearing before an Administrative Judge. During the hearing, Applicant had the opportunity to respond to the evidence presented against him by Department Counsel and to present evidence on his own behalf. Applicant is not entitled to have another hearing unless he shows that he was denied a reasonable opportunity to prepare for the hearing, or was denied a reasonable opportunity to present evidence on his behalf. *See, e.g.*, ISCR Case No. 02-20403 (April 7, 2003) at p. 4. Nothing in Applicant's brief or the record below indicates or suggests any basis for the Board to conclude Applicant was denied a reasonable opportunity to prepare for the hearing or a reasonable opportunity to present evidence on his behalf.

2. Whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. On appeal, Applicant does not challenge the Administrative Judge's findings of fact. However, Applicant: (a) expresses remorse for his past conduct; (b) asserts he has a payment plan for his debts so that he can start paying them off; (c) contends he was honest with the Administrative Judge during the hearing; and (d) states he served more than 20 years in the U.S. Navy and would never sell out the United States. The Board construes Applicant's various statements as raising the issue of whether the Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

During the proceedings below, Applicant expressed remorse for his past conduct. Expressions of remorse, however candid and sincere, do not compel an Administrative Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 99-0417 (February 24, 2000) at p. 3. As the trier of fact, the Judge had to consider and weigh

Applicant's expressions of remorse in light of the record evidence as a whole. Absent a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 01-13152 (October 10, 2003) at p. 5. Nothing in Applicant's appeal brief persuades the Board that the Judge erred in his consideration of Applicant's expressions of remorse in light of the record evidence as a whole.

Applicant's argument about having a payment plan for his delinquent debts does not demonstrate the Administrative Judge's adverse conclusions under Guideline F (Financial Considerations) are arbitrary, capricious, or contrary to law. The Judge found Applicant's Chapter 13 bankruptcy plan had been dismissed for failure to make payments to the bankruptcy trustee, and that as of the date of the hearing Applicant did not have a plan to deal with his delinquent debts. (As noted earlier in this decision, Applicant has not challenged the Judge's findings of fact.) Applicant's posthearing submission (Exhibit A) indicates that Applicant proposed to start paying off his delinquent debts. However, a promise to take remedial actions in the future is not the same as evidence of actual reform and rehabilitation. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at p. 9. Therefore, Applicant's Exhibit A did not require the Judge to conclude that Applicant had demonstrated financial reform or that Applicant had successfully mitigated his history of unresolved delinquent debts. Accordingly, the Judge's adverse conclusions under Guideline F are sustainable.

An applicant's honesty and candor during a hearing do not preclude an Administrative Judge from making an unfavorable security clearance decision. Even when an applicant is honest and candid during these proceedings, a Judge is entitled to consider the security significance of an applicant's admitted or proven conduct and circumstances and reach reasonable conclusions about the applicant's security eligibility. Applicant's argument about his honesty during the hearing does not demonstrate that the Judge acted in any way that was arbitrary, capricious, or contrary to law.

Applicant's military record was favorable evidence that the Administrative Judge specifically noted in his decision. The presence of that favorable evidence did not preclude the Judge from considering the security significance of Applicant's history of financial difficulties and Applicant's falsification of a written statement he gave to a Defense Security Service investigator in July 2002. The Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 4. Applicant's ability to cite to favorable record evidence, standing alone, does not prove that the Judge erred in weighing the record evidence. *See, e.g.*, ISCR Case No. 01-00274 (January 27, 2003) at p. 3. Nor did the evidence concerning Applicant's military record preclude the Judge from making an unfavorable security clearance decision based on Applicant's conduct after he left the military. *See, e.g.*, ISCR Case No. 02-15074 (September 9, 2003) at p. 3. Considering the record evidence as a whole, Applicant's military record did not constitute favorable evidence of such weight that it precluded the Judge from reaching unfavorable conclusions about Applicant's security eligibility.

The federal government is not required to wait until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The Administrative Judge's findings about Applicant's history of unresolved delinquent debts and Applicant's falsification of the July 2002 written statement provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility. *See, e.g.*, ISCR Case No. 96-0454 (February 7, 1997) at pp. 2-3 (discussing security significance of history of financial difficulties); ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of deliberate falsification).

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board