

DATE: October 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31506

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 October 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) and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated April 13, 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 finding that Applicant refused to sign a release when requested to do so as part of his background investigation; (2) whether the Administrative Judge's adverse conclusions under Guideline E (Personal Conduct) are arbitrary, capricious, or contrary to law; and (3) whether the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations) are factually or legally erroneous. 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 erred by finding that Applicant refused to sign a release when requested to do so as part of his background investigation. The Administrative Judge found that in June 2002 Applicant refused to sign a release authorizing the Defense Security Service (DSS) to obtain financial information about him as part of its background investigation. Applicant challenges that finding, asserting that he did not refuse to sign a release.

Some of Applicant's arguments in support of this claim of error are based on factual assertions that go beyond, and seek to supplement, the record evidence that was before the Administrative Judge. Such factual assertions constitute a proffer of new evidence on appeal, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to respond to the File of Relevant Material (FORM) and offer additional information for the Judge to consider in his case. In fact, Applicant did submit a response to the FORM, which was included in the case file for the Judge to consider in Applicant's case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence on appeal.

Considering the record as a whole, the Board concludes the Administrative Judge had a sufficient basis to find that Applicant refused to sign a release authorizing the DSS to obtain financial information about him as part of its background investigation. Applicant's contention to the contrary lacks merit.

2. Whether the Administrative Judge's adverse conclusions under Guideline E (Personal Conduct) are arbitrary, capricious, or contrary to law. Applicant also asserts: (a) when he was hired, he was not told that he would need a security clearance for his position; and (b) he was not told by the DSS agent that failure to sign releases could result in an unfavorable security clearance decision. The Board construes these assertions as raising the issue of whether the Administrative Judge's adverse conclusions under Guideline E (Personal Conduct) are arbitrary, capricious, or contrary

to law.

It is irrelevant to the issues in this case whether Applicant was hired without being told by his employer that his position would require a security clearance. The actions or inactions of Applicant's employer are not binding on the federal government, nor do they preclude the adjudication of Applicant's security eligibility.

There is no record evidence whether the DSS agent told Applicant that refusing to sign a financial release could result in an unfavorable security clearance decision. The absence of such evidence does not have the significance Applicant places on it, however. When Applicant received the SOR, he was placed on notice that DOHA proposed to deny or revoke his access to classified information based on his refusal to sign a financial release. When answering the SOR and when responding to the FORM, Applicant denied the SOR allegation that he refused to sign a financial release, but he did not offer to sign such a financial release and, instead, sought to justify his decision to not sign such a financial release. Given the procedural history of this case, the Board concludes Applicant was on adequate notice that DOHA proposed to deny or revoke his access to classified information based on his failure to sign a financial release.

As discussed earlier in this decision, there is sufficient record evidence to sustain the Administrative Judge's finding that Applicant refused to sign a financial release. It was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's refusal to sign a financial release falls under Personal Conduct Disqualifying Condition 2 and that Applicant's refusal to sign such a release was not mitigated in light of the record evidence in this case. The Judge's adverse conclusions under Guideline E (Personal Conduct) and his unfavorable conclusions about Applicant's security eligibility have a rational basis in Applicant's refusal to sign a financial release to allow the DSS to conduct a meaningful background investigation. *Gayer v. Schlesinger*, 490 F.2d 740, 751-752 (D.C. Cir. 1973)(federal government can deny or revoke access to classified information for a person who refuses to provide information pertinent to a security clearance decision).

3. Whether the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations) are factually or legally erroneous. The Administrative Judge made findings and reached conclusions favorable to Applicant with respect to the debts and covered by SOR paragraphs 1.e, 1.f, 1.g, 1.i, and 1.j. Those favorable findings and conclusions are not at issue on appeal. However, Applicant does challenge the Judge's findings and conclusions concerning the debts and bankruptcies covered by SOR allegations 1.b, 1.c, 1.d, and 1.h.⁽¹⁾

Applicant's challenge to the Administrative Judge's findings and conclusions concerning the bankruptcies covered by SOR paragraphs 1.b and 1.c fails to raise any material claim of error. It is irrelevant to the Judge's overall adverse conclusions under Guideline F (Financial Considerations) whether the debts covered by the Chapter 13 bankruptcy petition filed in 1998 (SOR paragraph 1.b) were the same as the debts covered by the Chapter 7 bankruptcy petition filed in 1999 (SOR paragraph 1.c).

Applicant's challenge to the Administrative Judge's finding about the amount of the debt covered by SOR paragraph 1.d is based on a proffer of new evidence about the balance still owed on that debt. As noted earlier in this decision, the Board cannot consider new evidence on appeal. Furthermore, nothing in Executive Order 10865, the Directive, or generally applicable principles of federal administrative law gives the parties a right to supplement the record evidence continuously. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (the right to present evidence in DOHA proceedings must be exercised within the provisions of the Directive and the practical need for administrative finality in these proceedings)(citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). Given the record evidence in this case, the Judge's finding about the debt covered by SOR paragraph 1.d is sustainable. In any event, apart from the amount of this debt, the Judge's conclusions about it are favorable to Applicant. *See* Decision at pp. 2 and 4 n.4.

Applicant's challenge to the Administrative Judge's finding about the debt covered by SOR paragraph 1.h also is based on factual assertions that go beyond the record evidence. For the reasons given in the preceding paragraph of this decision, Applicant has failed to demonstrate the Judge's finding about SOR paragraph 1.h is erroneous.

Given the Administrative Judge's findings about Applicant's history of financial difficulties, the Judge had a rational basis for his adverse conclusions under Guideline F (Financial Considerations). *See, e.g.*, ISCR Case No. 03-13281

(October 22, 2004) at p. 4 (discussing security significance of history of financial difficulties).

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Applicant does not challenge the Administrative Judge's findings about his bankruptcy petition that was filed in 1991 (SOR paragraph 1.a).