

DATE: May 24, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31872

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 the Applicant a Statement of Reasons (SOR), dated November 7, 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). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated January 5, 2005.

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 there is a basis for reopening the record to allow Applicant an opportunity to provide additional evidence for the Administrative Judge's consideration. 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 failing to give sufficient weight to applicable mitigating conditions. On appeal, Applicant contends the Administrative Judge should have concluded that the security concerns raised by his substantial indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 3, ⁽¹⁾ 4, ⁽²⁾ and 6. ⁽³⁾ In support of that contention, he argues that the Judge made errors in her findings of fact which were cumulatively significant and that a correct weighing of the record evidence as a whole would have mandated a decision in Applicant's favor. For the reasons set forth below, we conclude the Judge's decision is sustainable.

Based upon the record before her, the Administrative Judge's material findings of fact concerning Applicant's history of financial difficulties are sustainable. Applicant argues the Judge erred when she stated that Applicant had paid the debt set forth in SOR paragraph 1.h with a credit card, rather than with a debit card. However, the Judge resolved that paragraph in Applicant's favor, so it is not at issue on appeal. The three other alleged factual errors are predicated, in large measure, on Applicant's proffer of new evidence on appeal. Applicant explains that the Judge mistakenly concluded that the amounts found on several different credit cards actually reflected the same debt being transferred from one credit card to another, or did not otherwise involve the acquisition of new debt, but that this was not made clear at the hearing because: (a) no attempt was made by either the Judge or the Department Counsel to ascertain the nature of the debts, and (b) Applicant did not supply relevant, clarifying information for consideration at the hearing, believing it not to be germane to the direction of the examination. ⁽⁴⁾ Applicant's contentions in this regard lack merit, in that the Board cannot consider new evidence on appeal, ⁽⁵⁾ and Applicant was responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts which he admitted or which were proven by Department Counsel and had the ultimate burden of persuasion as to obtaining a favorable clearance decision. ⁽⁶⁾

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. 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; ISCR Case No. 99-0012 (December 1, 1999) at p. 4.

In this case, the Applicant had a pattern of repeated indebtedness over many years. At the time the case was submitted for decision, he still had significant outstanding debts. In her decision, the Administrative Judge noted: (a) the extent to which Applicant's indebtedness had arisen as a result of circumstances beyond his control, and (b) the positive steps Applicant had taken to resolve his indebtedness, including paying off some of the debts in their entirety and the establishment of repayment plans with respect to the others. As a result, the Judge resolved approximately half the SOR allegations in Applicant's favor. However, the Judge also concluded that because Applicant's history of debt resolution had been uneven and inconsistent, she could not safely conclude Applicant would make the required payments under his existing debt resolution plan. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent and ongoing. Likewise the Judge could also reasonably conclude that Applicant's promises to pay off his remaining debts and his recent efforts in furtherance of a payment plan were not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required, as a matter of law, to conclude Applicant's current efforts to address his financial difficulties warranted application of Financial Considerations mitigating Conditions 3, 4 and 6.

The favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative 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*. The Judge reasonably addressed the possible application of relevant mitigating conditions and explained why she concluded Applicant had not sufficiently mitigated the security concerns raised by his history of substantial, outstanding indebtedness. 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, she 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 there is a basis for reopening the record to allow Applicant an opportunity to provide additional evidence for the Administrative Judge's consideration. On appeal, Applicant requests that if the Board finds insufficient reasons to reverse the Administrative Judge's decision, that it remand the case to the Judge to allow her to consider additional evidence. Applicant exercised his right to a hearing below, and at that hearing he had ample opportunity to present any and all matters he felt were germane to his case to the Judge. Applicant does not now assert that there were any procedural errors or irregularities which materially affected his procedural due process rights below, nor is there any indication from the record that he was denied a full and fair hearing. Accordingly, there is no basis upon which to grant Applicant the alternative relief he requests.

Conclusion

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

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 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).
2. "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).
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, E2.A6.1.3.6).
4. Applicant's Brief at pp. 2-3.
5. Directive, Additional Procedural Guidance, Item E3.1.29.
6. *Id.* at Item E3.1.15.