

DATE: September 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33038

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 August 6, 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). Administrative Judge James A. Young issued an unfavorable security clearance decision dated June 29, 2004.

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 issue has been raised on appeal: whether the Board can reverse the Administrative Judge's unfavorable security clearance decision based on Applicant's proffer of new evidence on appeal. 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 Issue

The Administrative Judge found that Applicant had a history of financial difficulties that left him with delinquent debts totaling more than \$28,000, which were unresolved as of the date of the hearing. The Judge concluded that the security concerns raised by Applicant's unresolved debts were not mitigated by his filing for a Chapter 7 bankruptcy the day before the hearing.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. However, Applicant offers evidence to support his claim that -- after the Judge's decision was issued -- certain events have occurred which have improved his financial situation by eliminating some debts through bankruptcy and allowing him to make arrangements to institute payment plans for other debts not discharged in bankruptcy.

The Directive expressly precludes the Board from considering new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the Board cannot consider Applicant's proffer of new evidence on appeal.⁽¹⁾

A review of the record persuades the Board that Applicant had a reasonable opportunity to present evidence for the Administrative Judge to consider in his case. Nothing in Executive Order 10865, the Directive, or general principles of federal administrative law give the parties to these proceedings a right to supplement the record evidence continuously. *See, e.g.*, ISCR Case No. 01-21274 (January 8, 2004) at p. 3. During the proceedings below, Applicant presented evidence on his behalf and the Judge took it into consideration when making his decision in this case.

There is no presumption of error below and the appealing party has the burden of demonstrating factual or legal error that warrants remand or reversal. Applicant has raised no claim of factual or legal error by the Administrative Judge. Furthermore, Applicant's proffer of new evidence on appeal does not give rise to any colorable claim of error by the Judge.

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. Because the Board cannot consider new evidence on appeal, the Board declines Applicant's offer to contact him to request additional information from him.