

DATE: July 20, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33581

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Jeffrey V. Mehalic, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated July 15, 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 E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated March 30, 2004.

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 issue: whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions. 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 does not dispute the Administrative Judge's findings of fact with respect to the Applicant's lengthy history of financial difficulties. Rather, Applicant contends the Judge should have concluded that the security concerns raised by his substantial indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 1, ⁽²⁾ 3, ⁽³⁾ and 6. ⁽⁴⁾ For the reasons set forth below, we conclude the Applicant has not shown the Judge erred.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on whether there is record evidence that could support the application of one or more of them to the particular facts of a case. The presence or absence of any particular Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive 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 though the Judge found Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge did not err by considering 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, it was not arbitrary or capricious for the Judge to consider Applicant's inability to resolve the debts over a lengthy period of time, particularly after the conditions which had contributed to them becoming delinquent had passed and his financial situation had improved. Therefore, the Judge was not required to conclude Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Condition 3.

The Board is not persuaded that Applicant's argument concerning Financial Considerations Mitigating Condition 1 demonstrates the Administrative Judge erred by not applying that mitigating condition. Although the Judge found that Applicant's financial difficulties began several years ago, that finding did not compel the Judge to conclude Financial

Considerations Mitigating Condition 1 should be applied. Given the Judge's finding that Applicant's financial difficulties were still largely unresolved at the time of the hearing, the Judge was not required to conclude Applicant's history of financial difficulties was "not recent" and apply Financial Considerations Mitigating Condition 1. *See, e.g.*, ISCR Case No. 01-03695 (October 16, 2002) at pp. 3-4 (applicability of Financial Considerations Mitigating Condition 1 does not turn just on whether the debts were incurred recently, but also must include consideration of whether an applicant's debts continued to be unresolved in subsequent years).

The Administrative Judge concluded Applicant had presented evidence of a good faith effort to address his child support debt in one State and cited Financial Considerations Mitigating Condition 6. However, that conclusion did not require the Judge to give controlling or dispositive weight to that mitigating condition. Given Applicant's history of financial problems, the sizable nature of the indebtedness, and the fact that the debts at issue had been incurred years earlier, but were substantially unresolved at the time of the hearing--well after the invocation of the security clearance process and the issuance of the SOR--it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's recent efforts to address his debts warranted giving greater weight to the application of Financial Considerations Mitigating Condition 6.

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, decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and reach a conclusion as to whether Applicant met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. The Judge reasonably explained why he concluded Applicant had not sufficiently mitigated the security concerns raised by his history of substantial, outstanding indebtedness.⁽⁵⁾ 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.

Finally, in his brief, Applicant notes that if he is denied a security clearance, he will be dismissed from his position, and become unable to make the child support payments necessary to reduce his substantial indebtedness. The possibility of adverse job consequences following from an unfavorable security clearance decision is not relevant or material to an assessment of an applicant's judgment, reliability, and trustworthiness. The security significance of Applicant's overall history of financial difficulties is independent of whether Applicant will be economically affected by an unfavorable security clearance decision. *See* ISCR Case No. 02-09209 (June 9, 2004) at p. 5; ISCR Case No. 01-21851 (April 18, 2003) at p. 4. Accordingly, the Judge's decision is not rendered arbitrary, capricious, or contrary to law because it will have an adverse effect on Applicant's job situation.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

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 SOR paragraph 2.a. That favorable finding is not at issue on appeal.
2. "The behavior was not recent"(Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).
3. "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, Adjudicative Guidelines, Item E2.A6.1.3.3).
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
5. Decision at p. 4.