

DATE: October 18, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00060

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 November 7, 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 Roger C. Wesley issued an unfavorable security clearance decision dated June 30, 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 issue raised on appeal is whether the Administrative Judge's 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 Issue

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Administrative Judge issued an adverse decision under Guideline F (Financial Considerations). Specifically, he made findings against Applicant with regard to five delinquent debts. During the hearing, Applicant testified as to the circumstances which gave rise to the debts, primarily circumstances surrounding his divorce. On Appeal, Applicant cites mitigating conditions and extenuating circumstances which he argues are the basis for the Board to reverse the Judge's decision. He argues that the extenuating circumstances may have caused the Judge to misinterpret his attitude toward his debts. With regard to each debt on which the Judge found against him, Applicant restates the mitigating conditions to which he testified at the hearing. ⁽¹⁾ Applicant disagrees with the Judge's finding that he is unwilling or unable to settle his debts. Finally, Applicant explains the nature of his job and states that a security clearance is "an absolute requirement" for him to keep his job.

There is a rebuttable presumption that the Judge has taken all the record evidence into account. *See, e.g.*, ISCR Case No. 01-09781 (September 25, 2002) at p. 3. Here, the Judge discussed the circumstances which gave rise to Applicant's delinquent debts and ruled in Applicant's favor on one debt in the SOR. The Judge accepted Applicant's arguments that his debts had arisen due to circumstances beyond his control, but he found that Applicant had not demonstrated sufficient good-faith efforts to satisfy the debts. Applicant has not overcome the presumption on this matter. The fact that Applicant disagrees with the Judge's decision does not demonstrate error. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at pp. 3-4.

The Board gives deference to an Administrative Judge's credibility determinations. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. *See also* ISCR Case No. 01-19278 (April 22, 2003) at p. 7. Here, Applicant had the opportunity at the hearing to explain his actions and his responses to his circumstances. At the hearing, Applicant failed to document attempts to satisfy his creditors, and there was conflicting evidence regarding Applicant's income and ability to pay his debts. Applicant had the opportunity to present evidence on his financial situation, but offered no basis for the Judge to conclude that Applicant had developed a record which would justify broad application of the mitigating

conditions. Applicant's disagreement with the Judge's determinations does not demonstrate error. *See, e.g.*, ISCR Case No. 00-0433 (August 8, 2002) at p. 4.

Neither Applicant's arguments regarding the Administrative Judge's findings nor his comments about his job demonstrate that the Judge's decision is arbitrary, capricious, or contrary to law. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Applicant's overall history of financial difficulties provides a sustainable basis for the Judge's unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 02-22657 (October 8, 2004) at p. 4.

The possibility of adverse job or career consequences following from an unfavorable security clearance decision is not relevant or material to the Judge's assessment of Applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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. The Judge found in Applicant's favor regarding the debt described in SOR subparagraph 1.f; that debt is no longer at issue. Applicant includes in his Brief some current and promised future actions regarding his outstanding debts. These constitute new evidence, which the Board may not consider. *See Directive, Additional Procedural Guidance, Item E3.1.29.*