

DATE: September 24, 2004

In Re:

-----

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01059

**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 December 8, 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 June 17, 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'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. 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's decision should be reversed because: (1) his indebtedness resulted from a circumstance beyond his control--a disabling motorcycle accident; (2) his debts are not recent and he is current on his new financial responsibilities; (3) subsequent to the hearing and the Judge's decision, Applicant paid off, or made payments on, or otherwise attempted to resolve his unpaid debts<sup>(1)</sup>

; and (4) Applicant is a patriotic American who would never allow his financial situation to jeopardize his integrity. The Board interprets Applicant's various appeal assertions as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The Board construes Applicant's arguments concerning the facts and circumstances surrounding his financial difficulties as raising the issue of whether the Administrative Judge should have applied Financial Considerations Mitigating Condition 3<sup>(2)</sup>

and Financial Considerations Mitigating Conditions 1.<sup>(3)</sup>

The application of Adjudicative Guidelines disqualifying and mitigating conditions 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, 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.

Similarly, because the debts at issue had been incurred years earlier and were still outstanding at the time of the hearing, it was not arbitrary or capricious for the Judge to conclude that Applicant's financial difficulties were still recent and there was insufficient evidence for him to conclude that there were clear indications Applicant's financial problems were under control. *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). Therefore, the Judge was not required to conclude Applicant's current efforts to address his financial difficulties warranted application of Financial Considerations Mitigating Condition 1.

The Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Therefore, we may not consider Applicant's claim that, subsequent to the submission of his case to the Administrative Judge for decision, he has taken remedial action with respect to some or all of his debts. Applicant's proffer of new evidence does not demonstrate error on the part of the Judge as his findings and conclusions cannot be reviewed by making reference to evidence that was not presented to him during the proceedings below.

Applicant's assertions regarding his patriotism and his personal integrity do not demonstrate that the Administrative Judge erred. Under Guideline F, the security eligibility of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties. *See, e.g.*, ISCR Case No. 95-0611 (May 2, 1996) at pp. 2-3 (discussing then Criterion L, which was predecessor to the current Guideline F). Furthermore, Applicant has not challenged the Judge's finding that he falsified a security clearance application by failing to fully disclose his delinquent debts. Falsification of a security clearance application raises serious questions about an applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification). Applicant's history of financial difficulties and his falsification of a security clearance application provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility and the Judge's unfavorable security clearance decision.

### **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. In support of this contention Applicant submits documentary evidence relating to the actions which he has taken subsequent to the hearing.
2. "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).
3. "The behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).