

DATE: August 23, 2004

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 03-01201

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 5, 2003. The SOR was based Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Richard A. Cefola issued an unfavorable security clearance decision, dated March 16, 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 issues are raised on appeal: (1) Whether the Administrative Judge's finding as to Applicant's payment toward past indebtedness was sustainable and (2) Whether the Administrative Judge's unfavorable decision is arbitrary and capricious or contrary to law.

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 [\(1\)](#)

(1) Whether the Administrative Judge's finding as to Applicant's payment toward past indebtedness was sustainable. Applicant challenges the Administrative Judge's finding that Applicant had involuntarily paid \$2,200-\$2,300 toward an outstanding judgment that with interest totals about \$70,000. Applicant argues the Judge should have found that Applicant has paid \$15,000 toward the judgment. Applicant does not cite to any specific piece of evidence in support of his claim. There are several pieces of evidence which discuss payments against this judgment and cite various figures, one as high \$9,500 total paid against the judgment, interest and costs combined, of which \$1,743.40 is designated as on the judgment alone. In light of the disparate figures cited, and the fact that most of the collected amount did not offset the original judgment, the Board declines to conclude that the Judge's finding of fact constitutes harmful error.

(2) Whether the Administrative Judge's unfavorable decision is arbitrary and capricious or contrary to law. Applicant makes several assertions on appeal which are not based on the record evidence. Since the Board cannot consider new evidence on appeal, the Board cannot consider assertions based on new evidence. (*See*, Directive, Additional Procedural Guidance, Item E3.1.29.) Applicant's remaining assertion constitutes a claim that his financial situation in and of itself was an insufficient basis for an adverse adjudication. Applicant's claim is not persuasive. The Judge found (and Applicant does not challenge) that Applicant has repeatedly stated an intent not to pay the Judgment even at times when Applicant acknowledged having a monthly surplus of \$5,600. The Judge's finding constituted a rational basis for an adverse decision.

Conclusion

Applicant has failed to demonstrate harmful error on appeal. The Judge's March 16, 2004 decision is affirmed.

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 issued findings for Applicant under SOR paragraphs 1.b, 2.a, 2.b, and 3.a. Those favorable findings are not at issue on appeal.