

DATE: December 20, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-02805

## **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 April 5, 2004, 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 Matthew E. Malone issued an unfavorable security clearance decision, dated June 2, 2005.

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 issues: (1) whether the Administrative Judge was biased, (2) whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of financial difficulties had not been mitigated, and (3) whether the Administrative Judge erred by finding that Applicant deliberately falsified a security clearance application. 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** [\(1\)](#)

1. Whether the Administrative Judge was biased. Applicant asserts that the Judge was biased against him because he erred in his findings of fact when he stated Applicant had failed to disclose a garnishment for a tax debt. The factual error identified by Applicant [\(2\)](#) does not constitute harmful error under the particular facts and circumstances of this case, and the Board finds nothing in the record below or the Judge's decision which supports a claim of bias.

There is a rebuttable presumption that quasi-judicial officials are unbiased and impartial, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. When the Board considers a claim of bias or lack of impartiality, the standard is not whether the appealing party personally believes that the Judge was biased and not impartial. Rather, the standard is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a disinterested person to question the fairness or impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 (March 27, 2003) at p. 3.

Bias or lack of impartiality is not demonstrated merely because the Administrative Judge made adverse findings or reached unfavorable conclusions in a case. *See, e.g.*, ISCR Case No. 94-0954 (October 16, 1995) at p. 4 (citing *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1047 (7th Cir. 1989)). Nor is bias or lack of impartiality shown by identifying legal error by the Judge. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5 (citing *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981)). Accordingly, the Judge's adverse findings and unfavorable conclusions in this case do not establish the Judge was biased or lacked impartiality. Likewise, the Board's conclusion that the Judge committed harmless error does not establish the Judge was biased or lacked impartiality.

2. Whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of

financial difficulties had not been mitigated. Applicant contends the Administrative Judge should have concluded that the security concerns raised by his history of financial difficulties was mitigated. In support of that contention, Applicant essentially reargues his case with respect to the mitigating evidence he presented below and argues that he is not at risk of engaging in illegal acts that would compromise security.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the financial considerations allegations had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3.

In this case, the Administrative Judge found that Applicant had a history of not meeting financial obligations which ran over many years. At the time the case was submitted for decision, there was evidence that Applicant still had significant outstanding debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and still ongoing. Likewise the Judge could also reasonably conclude that Applicant's promises to resolve his indebtedness and his recent efforts to resolve that indebtedness were not a substitute for a consistent record of timely remedial action. Although the Judge found in favor of Applicant with respect to two of the SOR allegations pertaining to Applicant's financial difficulties, the Judge was not required, as a matter of law, to conclude that the security concerns raised by Applicant's history of financial difficulties had been fully mitigated. As noted above, the Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings and conclusions about Applicant's history of indebtedness are sustainable.

3. Whether the Administrative Judge erred by finding that Applicant deliberately falsified a security clearance application. Applicant challenges the Administrative Judge's findings that he deliberately falsified a security clearance application in 2001. In support of this claim of error, Applicant refers to the record evidence of his claim that he previously disclosed information about his financial situation in a security clearance application that he executed in 1995.

In the decision below, the Administrative Judge noted that Applicant offered nothing to support his claim that he had disclosed information about a debt that was satisfied by a garnishment before he executed a security clearance application in 2001. In general, it is legally permissible for a Judge to take into account whether an applicant has presented documentary evidence to corroborate a particular claim. *See, e.g.*, ISCR Case No. 01-09781 (September 25, 2002) at p. 3. However, implicit in such a holding is the notion that it can be permissible for a Judge to take into account a party's failure to present documentary evidence if the party reasonably could be expected to possess or be able to obtain such documentary evidence. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 4 ("When evaluating the failure of a party to present corroborating evidence it is necessary to consider whether it is reasonable to expect the party to possess or have the ability to obtain corroborating evidence.")(federal case citation omitted). By its nature, a security clearance application is not a personal paper, and if an applicant did not make or keep a copy of a security clearance application at the time it was executed, an applicant would have to turn to the government to obtain a copy of it at a later date. Because a completed security clearance application can be expected to be forwarded to the government, it could be questionable to assume that an applicant necessarily would have a copy of the completed security clearance application or that an applicant could easily obtain a copy of a completed security clearance application at a later date. Given the record evidence in this case, the Judge did not have a sufficient basis to draw an adverse inference from the mere fact that Applicant did not produce a copy of a security clearance questionnaire he claimed he had completed several years before 2001.

Because the Administrative Judge, in making his findings about the falsification allegations, appears to have relied heavily on the adverse inference he drew from the fact that Applicant did not produce a copy of an earlier completed security clearance application, it is not clear whether the Judge's findings of falsification are sustainable on the particular record evidence in this case. However, a remand of the case to the Judge would not be warranted in this case. Even if the Board were to assume--solely for purposes of deciding this appeal--that a remand would result in the Judge making different findings about the falsification allegations, the Judge's findings and conclusions under Guideline F (Financial Considerations) are sufficient to support his overall unfavorable conclusions about Applicant's security eligibility.

Applicant also contends that the government's investigation was so "naive and incompetent" that it failed to disclose a

copy of Applicant's 1995 security clearance application. The methods and scope of DSS investigations are outside the scope of review of the Appeal Board. *See, e.g.*, ISCR Case No. 99-0293 (May 5, 2000) at p. 4.

### **Conclusion**

Applicant has failed to demonstrate harmful 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: Michael Y. Ra'anan

Michael Y. Ra'anan

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 Applicant with respect to SOR paragraphs 1.d and 1.f. Those favorable formal findings are not at issue on appeal. Applicant's brief contains additional assertions and explanations that seek to supplement the record evidence that was before the Administrative Judge. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

2. The record evidence shows the garnishment pertained to a debt to a creditor, not a tax garnishment.