

DATE: September 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04704

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 January 31, 2004 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 John G. Metz, Jr. issued an unfavorable security clearance decision dated March 28, 2005.

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 issue has been raised on appeal: whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to render an unfavorable security clearance decision based on Applicant's history of financial difficulties. 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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to render an unfavorable security clearance decision based on Applicant's history of financial difficulties. On appeal, Applicant makes the following assertions: (a) the Administrative Judge erred in making several adverse formal findings against Applicant; (b) the Administrative Judge erred in concluding that Financial Considerations Disqualifying Condition 3⁽¹⁾ applied to the case; (c) the Administrative Judge erred in not applying several Financial Considerations Mitigating Conditions to the case; and (d) the Administrative Judge waited an unreasonable length of time before rendering his decision, and then issued the decision hastily after Applicant made numerous inquiries of Department Counsel. The Board construes these arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Applicant correctly points out that the Administrative Judge ultimately made adverse formal findings on several specific allegations in the SOR that appear inconsistent with his findings and conclusions about those allegations as set forth in the body of his decision. The Judge made adverse formal findings concerning debts that he variously: (i) determined were not the responsibility of Applicant;⁽²⁾ (ii) determined were alleged twice in the SOR;⁽³⁾ and (iii) determined that the Applicant had satisfied.⁽⁴⁾ Regarding the debts included in (i) and (ii), Applicant should have received a favorable formal finding under subparagraph 1.d. of the SOR and either subparagraph 1.b. or 1.c. of the SOR based on the Judge's specific findings. The Board does not view an Administrative Judge's formal findings in a vacuum, however, but instead will evaluate the Judge's decision in its totality to determine the effect, if any, that discrepancies and inconsistencies had on the Judge's overall security clearance decision. After reading the Administrative Judge's decision, the Board concludes that the Judge ultimately gave Applicant credit for the specific findings he made regarding the debts listed under subparagraphs 1.b., 1.c., and 1.d. of the SOR and that his formal findings, to the extent they were incompatible with his specific findings, did not affect his ultimate adverse decision.

Concerning the debts listed under subparagraphs 1.h. and 1.i. of the SOR, it should be stated at the outset that merely

because a debt is paid or otherwise satisfied before the close of the record in a case does not mean that the Administrative Judge is obligated, as a matter of law, to make favorable findings and conclusions regarding that debt and is then obligated to enter a formal finding in favor of Applicant. Many facts and circumstances surrounding the debt, including the manner in which it was incurred, the circumstances under which it became delinquent, and the manner in which Applicant addressed the delinquency are relevant factors for the Judge's consideration, notwithstanding the fact that the debt delinquency was eventually resolved. In this case, the Judge noted his concern that Applicant began to address the bulk of his debts only after the issuance of the SOR in this case. The manner in which Applicant addressed his numerous debt delinquencies was thus a factor that the Judge specifically noted in his conclusions and his concern about it reasonably supported his adverse formal findings under subparagraphs 1.h. and 1.i. of the SOR.

Applicant asserts on appeal that the Administrative Judge erred by applying Financial Considerations Disqualifying Condition 3 to the facts of this case. When a party challenges an Administrative Judge's application of the Adjudicative Guidelines, the Board has to decide whether the party has shown the Judge: (i) reached conclusions not supported by substantial record evidence; (ii) acted in a manner that is arbitrary or capricious; or (iii) acted contrary to law. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4. Applicant has failed to make such a showing. His argument consists essentially of a plea in support of an alternative version or interpretation of the record evidence. Such an argument is not sufficient to establish error on the part of the Judge. After a review of the record evidence, the Board concludes that the Judge had a reasonable basis for applying Financial Considerations Disqualifying Condition 3 in this case.

Applicant argues the Judge should have concluded his conduct was extenuated or mitigated under Financial Considerations Mitigating Conditions 3, ⁽⁵⁾ 4, ⁽⁶⁾ and 6. ⁽⁷⁾ Although there is record evidence which supports the application of Financial Considerations Mitigating Condition 3 to a portion of Applicant's history of financial delinquency, considering the record as a whole, the Board concludes the record evidence does not support the application of Financial Considerations Mitigating Condition 3 to fully mitigate the government's case, and the Judge was not required to do so. Additionally, considering the record as a whole, it was not arbitrary or capricious for the Administrative Judge to conclude the record evidence did not warrant application of Financial Considerations Mitigating Conditions 4 and 6. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred by deciding that application of these two mitigating conditions was not warranted in light of the record evidence in this case.

Applicant notes that at his hearing (August 31, 2004) he was informed that he should receive the decision in his case in about six to eight weeks. He claims that he made several calls to the Department Counsel, monthly starting in December 2004 and much more frequently by late March 2005, inquiring as to the status of his decision. In the last calls, Applicant claims he was reporting that he might lose his job due to the lack of a decision. Applicant's decision was issued with the date March 28, 2005. Applicant alleges that the Administrative Judge issued the decision in haste with resultant errors. Applicant's claim of error fails for the following reasons: (1) Applicant does not specify what findings were in error as a result of the alleged haste; (2) Applicant does not include any proffer establishing that the Judge acted in haste; and (3) In any case there is a rebuttable presumption that agency officials carry out their duties in good faith and a party seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See, e.g., National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004), and ISCR Case No. 02-19136 (June 2, 2005) at p. 4. The Board does not have supervisory jurisdiction over the Administrative Judge.

Conclusion

Applicant has not demonstrated error below requiring remand or reversal. Accordingly, the Board affirms the Administrative Judge's decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "Inability or unwillingness to satisfy debts."
2. The debt alleged in subparagraph 1.d. of the SOR.
3. The debt alleged in subparagraphs 1.b. and 1.c. of the SOR.
4. The debts alleged in subparagraphs 1.h. and 1.i. of the SOR.
5. "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)."
6. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control)."
7. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."