

DATE: July 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04779

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Kenneth M. Roberts, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated October 22, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines F (Financial Considerations). Administrative Judge Robert J. Tuider issued an unfavorable security clearance decision, dated February 4, 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 erred in making certain material findings, and (2) 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 Issues⁽¹⁾

1. Whether the Administrative Judge erred in making certain material findings. Applicant contends that the Administrative Judge's adverse security clearance decision should be reversed because it is predicated on faulty findings of fact which, taken together, indicate that the case was not given the full attention necessary to reach a fair decision. Specifically, Applicant argues that: (a) Applicant's key witness--her accountant--was "mistaken or misinformed in a crucial portion of the testimony he gave"⁽²⁾ about Applicant's financial situation, (b) the Judge stated that Applicant had "settled" certain debts, rather than stating that those debts had been "paid," and (c) the Judge held against Applicant with respect to a single debt that was not hers. The Board does not find Applicant's contention persuasive.

Applicant's contention that the testimony of her accountant was mistaken or misinformed is based upon evidence presented for the first time on appeal. Therefore, the Administrative Judge could not have reasonably been expected to have considered it in making his findings. Moreover, the Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. And, there is no right to have the record kept open indefinitely so that a party can continuously submit new evidence for consideration in a case. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). Accordingly, the Board may not consider Applicant's new evidence and its submission does not demonstrate error on the part of the Judge, or otherwise render his findings arbitrary, capricious or contrary to law.

To the extent Applicant seeks relief from the consequences of her self-representation at the hearing, her claim for relief lacks merit. Having decided to represent herself during the proceedings below, Applicant is not entitled to be relieved of the consequences of her decision. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3.

Applicant has not met her burden of demonstrating that the Administrative Judge's material findings with respect to

Applicant's history of financial difficulties do not reflect a reasonable or plausible interpretation of the record evidence. As noted above, the Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant contends that the Administrative Judge's decision is arbitrary, capricious and contrary to law because: (a) Applicant's financial difficulties were an outgrowth of her business difficulties, and (b) the Judge held against Applicant with respect to the debts Applicant had paid off and debts that were unenforceable because the statute of limitations had run on them. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

The Administrative Judge's finding that many of the Applicant's financial problems could be traced in part to conditions that were largely beyond her control--business difficulties--did not compel the Judge to make a favorable security clearance decision. Even if Applicant's financial difficulties initially arose due to circumstances outside her control, the Judge could consider whether Applicant acted in a reasonable manner when dealing with her 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 such factors as: (1) the length of Applicant's history of financial difficulties, (2) the extent and nature of her indebtedness, (3) Applicant's failure to file timely tax returns, regardless of whether or not she could pay the amounts owed at that time, and (4) Applicant's payment or resolution of her tax indebtedness shortly before the hearing and well after the invocation of the security clearance process. Therefore, the Judge was not required to conclude, as a matter of law, that Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Condition 3. ⁽³⁾

The Board has previously noted that an applicant must do more than merely show that he or she relied on a legally available option, such as the running of a statute of limitations, in order to claim the benefit of Financial Considerations Mitigating Condition 6. ⁽⁴⁾ *See, e.g.*, ISCR Case No. 01-09691 (March 27, 2003) at p. 3. Therefore, the Administrative Judge was not required to find in favor of Applicant with respect to debts that were no longer legally collectible. The Judge gave Applicant some credit for the mitigating evidence she produced under Mitigating Condition 6 and resolved some of the SOR allegations in her favor. However, given Applicant's history of financial problems, her failure to file timely tax returns, and the fact that the debts at issue had been incurred years earlier, but had only recently been resolved, it was not arbitrary or capricious for the Judge to decide that the mitigating evidence presented by Applicant was insufficient to overcome security concerns raised by the substantial disqualifying evidence. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and decide whether Applicant had presented sufficient evidence to satisfy her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. ⁽⁵⁾ The Judge reasonably addressed the possible application of relevant mitigating conditions and explained why he concluded Applicant had not sufficiently mitigated the security concerns raised by her history of substantial, outstanding indebtedness. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's conclusions.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.g, 1.i, 1.j, and 1.k. Those favorable formal findings are not at issue on appeal.
2. Applicant's Brief at p. 2.
3. "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).
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
5. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."