

DATE: March 4, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04927

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Perregrine 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 December 8, 2003, 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) and Guideline E (Personal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated October 26, 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 have been raised on appeal: (1) whether Applicant was denied a fair hearing because she was not properly represented; (2) whether the Administrative Judge erred in concluding that Applicant intended to falsify her security clearance application; (3) whether the Administrative Judge erred in concluding that Applicant had a history of not meeting her financial obligations and is unable or unwilling to satisfy her debts; (4) whether the Administrative Judge erred in not granting or continuing Applicant's security clearance because she needed it to retain her employment; and (5) whether the Administrative Judge's conclusion that Applicant was a security risk was arbitrary, capricious or contrary to law based on her past record. 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. Whether Applicant was denied a fair hearing because she was not properly represented. Applicant contends that she "unknowingly" went into the hearing without representation because she did not understand the severity of the matter. Not appreciating the severity of the matter, Applicant suggests she was no match for the "very serious and prepared professionals" who represented the government.

The record shows that Applicant was advised in paragraph 1 of the Prehearing Guidance that the hearing would be adversarial and that normally the government would be represented by an attorney who would present the government's case. The Prehearing Guidance also advised Applicant that she could represent herself, retain an attorney at her own expense to represent her at the hearing, or select a Personal Representative to represent her at the hearing. Applicant's testimony indicates she received the Prehearing Guidance (attached to the Notice of Hearing), but she did not read it (Hearing Transcript at p. 37). Additionally, in a May 12, 2004, letter to Applicant, the Department Counsel advised Applicant on her representation choices and also stated: "[i]n making this decision you should consider that the Government is represented by an attorney and that any adverse determination could adversely affect your current employment and your future employability. If you choose to be represented by an attorney, you should retain one promptly" (Government Exhibit 15 at p.1). Applicant did not deny that she received this correspondence, but she testified that she did not read this portion of it (Hearing Transcript at p. 124).

Applicant's *pro se* status did not relieve her of the obligation to read the correspondence sent to her regarding her hearing and to take timely, reasonable steps to protect her rights under Executive Order 10865 and the Directive. Having

decided to represent herself during the proceedings below, Applicant cannot fairly complain about the quality of her self-representation or seek to be relieved of the consequences of her decision to represent herself. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. Accordingly, this claim of error lacks merit.

2. Whether the Administrative Judge erred in concluding that Applicant intended to falsify her security clearance application. Applicant disputed SOR paragraphs 2.a through 2.d, which stated that she falsified her responses to questions 33 (bankruptcy filings in the past seven years), 37 (unpaid judgments in the past seven years), 38 (delinquent debts over 180 days old in the past seven years) and 39 (currently delinquent in any debt over 90 days) in her July 2002 Security Clearance Application (SF-86). The Administrative Judge found that Department Counsel had introduced substantial evidence on each of the allegations in paragraph 2 (Decision at p. 6). Applicant did not introduce any documentary evidence to rebut the government's case, but she testified that she did not intend to falsify her responses in the SF-86. The Administrative Judge then questioned the Applicant at the hearing and compared her testimony with her own prior written statements that were included in the government's exhibits. The record evidence included Applicant's testimony that she was very familiar with the SF-86 because her employment duties included assisting other employees in completing their SF-86 questionnaires (Hearing Transcript at p. 44).

The Administrative Judge had to consider Applicant's testimony that she did not falsify her responses to the four questions, but he was not bound to accept that testimony. The Judge had to consider Applicant's explanation in light of the record evidence as a whole and his assessment of the credibility of Applicant's testimony, and make findings as to whether Applicant's omissions of information from the SF-86 were deliberate or not. *See, e.g.*, ISCR Case No. 02-28447 (September 29, 2004) at pp. 3-4. Giving due deference to the Judge's credibility determinations, the Judge's finding of falsification reflects a legally permissible interpretation of the record evidence in this case.

3. Whether the Administrative Judge erred in concluding that Applicant had a history of not meeting her financial obligations and is unable or unwilling to satisfy her debts. Applicant contends that she did not know who was garnishing her wages, and that she got a "run around" when she tried to find out. Applicant contends that she never knew what her net wages would be. Applicant assumed that if her pay was being garnished by creditors, then she was not delinquent on her debts (Decision at p. 2). The Board construes Applicant's appeal as raising the issue of whether the Judge erred in concluding that she had a history of not meeting her financial obligations or that she was unable or unwilling to satisfy her debts under Financial Considerations Disqualifying Conditions 1 ⁽¹⁾ and 3. ⁽²⁾

The Judge had to consider the record evidence, both favorable and unfavorable, and determine whether the favorable evidence outweighed the unfavorable, or *vice versa*. In her appeal Applicant references the debts that involved garnishment. The delinquent debts also included admitted delinquent debts where no garnishment was involved and denied debts where Applicant failed to pay or actively contest the indebtedness. Applicant professes confusion or ignorance of the details concerning those creditors who had garnished her salary. Given the record evidence, the Judge could have reasonably concluded that Applicant had not made any efforts to pay her delinquent debts, or to get her finances in order, and that Applicant fell within the scope of the two disqualifying factors (Decision at p. 6). Also, given the record evidence, the Judge could have reasonably concluded that Applicant's testimony was not credible in so far as she testified that she reasonably believed that the garnishments were paying her debts and made them current.

4. Whether the Administrative Judge erred in not granting or continuing Applicant's security clearance because she needed it to retain her employment. Applicant describes the potentially negative effects that losing her security clearance could have, such as possible job loss and its consequences for her family. Even if an unfavorable security clearance decision were to have an adverse effect on Applicant's employment situation, such a result would not demonstrate the Administrative Judge's decision was arbitrary, capricious or contrary to law. An applicant is not made more or less suitable for a security clearance based on how a security clearance decision might affect the applicant. The negative security significance of Applicant's history of not meeting her financial obligations or the falsification of her SF-86 is not reduced or diminished by the possibility that an unfavorable security clearance decision might adversely affect her employment. *See, e.g.*, ISCR Case No. 01-24504 (February 11, 2003) at p. 4.

5. Whether the Administrative Judge's conclusion that Applicant was a security risk was arbitrary, capricious or contrary to law based on her past record. Applicant contends that even though she did not make sound personal financial decisions, her background shows that she would never risk national security. She argues that her financial decisions and

national security are "two separate entities." She describes the clearances she has held in the past, including some clearances that were higher than top secret.

Prior security clearance adjudications and the granting of clearances for Applicant have no bearing on the legal sufficiency of the Administrative Judge's adverse security clearance decision here. The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications. *See, e.g.*, ISCR Case No. 01-24504 (February 11, 2003) at p. 3.

Moreover, security clearance decisions are not an exact science, but are predictive judgments about a person's security eligibility in light of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). The federal government need not wait until an applicant mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access. *See Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The government does not have to prove that an applicant poses a "clear and present danger" to national security. *See Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975). Under Guideline F, the security eligibility of an applicant is placed into question when that applicant is shown to have a history of not meeting financial obligations or inability or unwillingness to satisfy debts. *Cf.* ISCR Case No. 00-0596 (October 4, 2001) at p. 4 (a decision where Applicant was found to be a security risk notwithstanding his prior security clearance, good past military record and years of employment in the defense industry). Similarly, falsification of a security clearance application is a clear example of untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. The Applicant has the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. Given the record evidence in this case, it was not arbitrary, capricious or contrary to law for the Administrative Judge to conclude that the Applicant failed to meet this burden of persuasion in light of her unresolved delinquent debts and falsification of the security clearance application.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate error below.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, 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. "A history of not meeting financial obligations" (Directive, Adjudicative Guidelines, Item E2.A6.1.2.1).

2. "Inability or unwillingness to satisfy debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.2.3). The Judge referred to this disqualifying condition as Disqualifying Condition 2, but the Board finds this to be a typographical error.