

DATE: October 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05197

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 December 22, 2003, which stated why DOHA proposed to deny or revoke a security clearance for Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). After a hearing, Administrative Judge Roger C. Wesley issued an unfavorable decision, dated July 26, 2004.

Applicant appealed the Administrative Judge's 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 issue: Whether the Administrative Judge was required to conclude that Applicant had successfully rebutted, mitigated or extenuated all the allegations against him. 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 the Administrative Judge was required to conclude that Applicant had successfully rebutted, mitigated or extenuated all the allegations against him. The Administrative Judge issued favorable formal findings under Guideline E and paragraphs 1.a., 1.c., 1.d., 1.g., and 1.i. Those favorable formal findings are not at issue on appeal. Applicant contends that the evidence he provided in the proceedings below was sufficient to require the Administrative Judge to conclude that he had rebutted, mitigated or extenuated the four remaining allegations under Guideline F. The Board disagrees.

Applicant provided the Judge copies of a series of letters he wrote to his creditors, an on-line credit report, reproductions of three checks he drafted, a performance review and testimony (of a friend and himself). The only corroboration of his specific claims regarding the four debts was: his letters to the creditors, the absence of three debts from the on-line credit report, and a copy of his check to the fourth creditor, dated the day after hearing, for a small fraction of the debt. The Judge could have reasonably concluded that Applicant's letters added little or no weight to his testimony, and the credit report added little weight, since there was more than one plausible explanation for the absence of debts from the credit report. The Judge could also have reasonably concluded that the check was entitled to only limited weight because of the date, the amount on its face and the absence of evidence that it was successfully deposited by Applicant's creditor. Given the totality of the record evidence in this case, the Judge was not required to find for Applicant on the four debts based on Applicant's testimony and the documentary evidence which provided insufficient corroboration for that testimony. Applicant has failed to prove error.

Conclusion

Applicant has not met his burden on appeal of demonstrating error by the Administrative Judge. The Judge's July 26, 2004 decision is affirmed.

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

Concurring opinion of Chairman Emilio Jaksetic:

Applicant's appeal brief challenges the Administrative Judge's weighing of the record evidence. The Board will not disturb the Judge's findings of fact unless the appealing party shows that: (a) the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law; or (b) made findings of fact that do not reflect a reasonable or plausible interpretation of the record evidence as a whole. Applicant strongly disagrees with the Judge's weighing of the record evidence and, for all practical purposes, seeks to have the Board review the record evidence *de novo* and make its own findings of fact about Applicant's case. Applicant's appeal brief does not show that: (a) the Judge acted in a manner that is arbitrary, capricious, or contrary to law when weighing the record evidence; or (b) the Judge's findings of fact do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, Judge's findings of fact are sustainable. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.*

Applicant's appeal brief also challenges the conclusions that the Administrative Judge reached about his history of financial difficulties. Although Applicant strongly disagrees with the Judge's conclusions, he does not demonstrate those conclusions are arbitrary, capricious, or contrary to law. *See Directive, Additional Procedural Guidance, Item E3.1.32.3.*

Because Applicant has failed to demonstrate error below, I concur with my colleagues' conclusion that the Administrative Judge's decision should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board