

DATE: September 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06259

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 March 17, 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). Administrative Judge Kathryn Moen Braeman issued an unfavorable security clearance decision, dated March 28, 2005.

Applicant appealed the Administrative Judge's unfavorable remand 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 erred by failing to give sufficient weight to applicable mitigating conditions. 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 ⁽¹⁾

Whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions. On appeal, Applicant contends the Administrative Judge should have concluded that the security concerns raised by her substantial indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 1, ⁽²⁾ 2, ⁽³⁾ 3, ⁽⁴⁾ 4, ⁽⁵⁾ and 6. ⁽⁶⁾ In support of that contention Applicant: (a) offers new evidence and argument relating to her post-hearing efforts to work with a consumer credit counseling service to resolve her remaining indebtedness, and (b) reargues her case with respect to the mitigating evidence she presented at the hearing. ⁽⁷⁾ For the reasons that follow, we conclude the Judge's decision is sustainable.

The Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Therefore, we may not consider Applicant's claim that, subsequent to the submission of her case to the Administrative Judge for decision, she has taken remedial action with respect to some or all of her debts. *See* ISCR Case No. 03-01059 (September 24, 2004) at p. 4. Applicant's proffer of new evidence does not demonstrate error on the part of the Judge, as her findings and conclusions cannot be reviewed by making reference to evidence that was not presented to her during the proceedings below.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Accordingly, even if Applicant's financial difficulties initially arose due to circumstances outside her control--the loss of employment and medical problems--the Judge could still consider whether Applicant acted in a reasonable manner when dealing with those 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, the Administrative Judge made sustainable findings that: (a) Applicant had multiple, substantial debts that had remained unpaid over many years; (b) at the time the case was submitted for decision, Applicant still had significant outstanding debts and had only recently sought the help of a consumer credit counseling service; (c) Applicant had lived beyond her means with credit card purchases prior to her medical difficulties and loss of employment; and (d) Applicant had previously stated that she had no intent to pay her delinquent debts because most of them had been written off. In light of the foregoing, the Administrative Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and ongoing. The Judge could also reasonably conclude that Applicant's promises to resolve her remaining debts and her recent efforts to work with a credit counseling service were not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required to conclude Applicant's current efforts to address his financial difficulties warranted application of Financial Considerations Mitigating Conditions 1, 2, 3, 4 and 6.

The favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. 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*. The Judge applied the relevant mitigating conditions and explained why she concluded Applicant had not sufficiently mitigated the security concerns raised by Applicant's history of substantial, outstanding indebtedness.⁽⁸⁾ 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: 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in Applicant's favor with respect to SOR paragraphs 1.b, 1.e, and 2.a. Those favorable findings are not at issue on appeal.

2. "The behavior was not recent"(Directive, Enclosure 2, Item E2.A6.1.3.1).

3. "It was an isolated incident" (Directive, Enclosure 2, Item E2.A6.1.3.2).

4. "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, Enclosure 2, Item E2.A6.1.3.3).

5. "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" (Directive, Enclosure 2, Item E2.A6.1.3.4).

6. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).

7. Applicant also claims the Administrative Judge failed to recognize and admit evidence offered by Applicant. However, that claim fails for lack of specificity.

8. Decision at p. 7.