

DATE: September 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08107

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 29, 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 7, 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 issues have been raised on appeal: (1) whether Applicant should be allowed another opportunity to present additional evidence on his behalf; (2) whether the Administrative Judge erred by concluding Applicant's overall history of financial difficulties warranted an unfavorable security clearance decision; and (3) whether Applicant can be granted a security clearance to allow him the opportunity to demonstrate he will address and resolve his remaining debts. 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

Applicant's appeal brief relies heavily on offers of new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Apart from offering new evidence on appeal, Applicant makes various arguments that the Board construe as raising three issues on appeal: (1) whether Applicant should be allowed another opportunity to present additional evidence on his behalf; (2) whether the Administrative Judge erred by concluding Applicant's overall history of financial difficulties warranted an unfavorable security clearance decision; and (3) whether Applicant can be granted a security clearance to allow him the opportunity to demonstrate he will address and resolve his remaining debts. ⁽¹⁾

1. Whether Applicant should be allowed another opportunity to present additional evidence on his behalf. Apart from offering new evidence on appeal, Applicant asks for "another chance to clarify and explain why my Security Clearance should be restored." Applicant's right to have a hearing ⁽²⁾ does not mean that he is entitled to have multiple hearings in his case. Furthermore, nothing in Executive Order 10865, the Directive, or general principles of federal administrative law gives the parties a right to supplement the record evidence continuously. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (the right to present evidence in DOHA proceedings must be exercised within provisions of the Directive and the practical need for administrative finality in these proceedings)(citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). Applicant is not entitled to have his case remanded just so he can have another chance to present his case to the Judge.

2. Whether the Administrative Judge erred by concluding Applicant's overall history of financial difficulties warranted an unfavorable security clearance decision. Applicant asserts "I am not a threat or liability to any company or task that I am assigned," and that he has provided and can continue to provide technical services in support of the national security

is he is allowed to retain a security clearance. The Board construes those assertions as raising the issue of whether the Administrative Judge erred by concluding Applicant's overall history of financial difficulties warranted an unfavorable security clearance decision.

Although evidence about an applicant's job performance and employment history can be relevant to a whole person analysis of the applicant's security eligibility, such evidence is not dispositive of a case. *See, e.g.*, ISCR Case No. 01-26723 (November 30, 2004) at p. 3 (security clearance adjudications are not limited to consideration of an applicant's conduct on the job or during duty hours). A history of financial difficulties raises security concerns that can provide a rational basis for an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of a history of financial difficulties). Given the record evidence of Applicant's overall history of financial difficulties over many years, it was not arbitrary or capricious for the Judge to conclude that Applicant's history of financial difficulties raised security concerns under Guideline F (Financial Considerations) that warranted an unfavorable security clearance decision. Considering the record as a whole, the Judge was not compelled, as a matter of law, to conclude that the evidence presented by Applicant concerning his job performance and employment history was sufficient to rebut, mitigate, or extenuate the security concerns raised by his overall history of financial difficulties. ⁽³⁾

3. Whether Applicant can be granted a security clearance to allow him the opportunity to demonstrate he will address and resolve his remaining debts. Applicant asks to given a security clearance "so that I will have the opportunity to apply for positions in the classified field again. This will only help me in paying all debts." This request could be construed as either (a) a request for a conditional security clearance; or (b) an argument that the Administrative Judge's unfavorable security clearance should not be affirmed because it will result in adverse financial consequences for Applicant.

Under the Directive, there is no authority for a Hearing Office Administrative Judge or the Board to grant a conditional security clearance. *See, e.g.*, ISCR Case No. 02-32842 (November 29, 2004) at p. 4. Moreover, the possible effect a security clearance decision could have on Applicant's economic situation is not relevant or material to whether the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8. Accordingly, Applicant requests relief to which he is not entitled.

Applicant asks for information regarding reapplication. The Board refers Applicant to the provisions of Directive, Additional Procedural Guidance, Items E3.1.37 - E3.1.41.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Portions of Applicant's appeal brief seek to have the Board review some of the record evidence, make its own findings of fact, and reach its own conclusions about his security eligibility. The Board does not re-try a case on appeal. Rather, the Board reviews a case to decide whether an appealing party has raised claims of error that demonstrate the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32.
2. Executive Order 10865, Section 3; Directive, Section 4.3.3; Directive, Additional Procedural Guidance, Item E3.1.4.
3. The security significance of Applicant's history of financial difficulties does not turn on whether he is able to make a contribution to the defense effort. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8 (discussing why an applicant's ability to make a contribution to the defense effort is not relevant or material to assessing the applicant's security eligibility).