

DATE: November 17, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-09483

## **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 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 James A. Young issued an unfavorable security clearance decision dated July 29, 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 issue has been raised on appeal: whether the Administrative Judge had a rational basis for his unfavorable security clearance. 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**

The issue before the Board is whether the Administrative Judge had a rational basis for his unfavorable security clearance decision. On appeal, Applicant makes assertions about what he has done since the hearing to deal with his financial situation. Such assertions constitute a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. A review of the proceedings below shows that Applicant had a reasonable opportunity to present evidence for the Administrative Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence. The Board will consider only those arguments made in Applicant's brief that do not rely on a proffer of new evidence.

At the hearing, Applicant provided only one exhibit, an inconclusive document regarding one debt. The Administrative Judge did not find Applicant's explanations regarding his debts persuasive and therefore made formal findings against him. The Board gives deference to a Judge's credibility determinations. Such determinations are entitled to deference on appeal. Directive, Additional Procedural Guidance, Item E3.1.32.1. The party challenging a Judge's credibility determinations has a heavy burden of persuasion, and Applicant has not met that burden. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at p. 7.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to confidential information. *See Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980). The fact that some of Applicant's debts were discharged in bankruptcy and others were charged off as bad debts by creditors did not prevent the Judge from considering Applicant's overall history of past financial problems. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 6.

The Administrative Judge found that Applicant falsified a security clearance application in February 2002 by failing to disclose his delinquent debts in that application. On appeal, Applicant challenges that finding of falsification. In considering Applicant's challenge to the finding of falsification, the Board notes the Judge's decision contains a legally erroneous statement about Applicant's burden of proof. Specifically, the Judge stated that the Board decision in ISCR

Case No. 02-23133 (June 9, 2004) held that proof of an omission is sufficient to shift the burden of proof to an applicant to prove the omission was not a falsification. The Judge appears to rely on a portion of one sentence from the Board's decision in ISCR Case No. 02-23133 out of context. In ISCR Case No. 02-23133, the Board specifically held that: (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. In that decision, the Board went on to state that *given the record evidence in that case* it was legally permissible for the Judge to conclude Department Counsel had established a *prima facie* case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

In this case, apart from the evidence of the Applicant's omission, the Administrative Judge explained why he concluded Applicant's omission was not an innocent mistake or oversight. Given the record evidence in this case, it would have been legally permissible for the Judge to conclude: (a) there was sufficient evidence to satisfy Department Counsel's obligation of presenting evidence to establish a *prima facie* case under Guideline E; (b) as a result of Department Counsel's *prima facie* case, the burden of proof shifted to Applicant to present evidence to explain the omission; and (c) Applicant's explanation for the omission was not credible and not sufficient to rebut the *prima facie* case against him under Guideline E. Applicant's appeal argument does not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law by deciding that Applicant's explanation was not credible and that the record evidence as a whole supported a finding of falsification. Accordingly, the Judge's erroneous reading of the Board decision in ISCR Case No. 02-23133 is harmless error under the particular facts and circumstances of this case.

Applicant argues that he has never mishandled confidential information. The government does not have to wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An unfavorable security clearance can be based on circumstances that raise security concerns sufficient to preclude a determination that it is clearly consistent with the national interest to grant or continue a security clearance for a given applicant. *See Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). A history of financial problems is a circumstance that raises security concerns. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at pp. 3-4. Similarly, falsification of a security clearance application raises security concerns. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4. In light of the record here, the Board concludes that the Administrative Judge had a rational basis for concluding that Applicant's history of financial difficulties and falsification of a security clearance raise such concerns and that Applicant did not present evidence that extenuated or mitigated those concerns.

### **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