

DATE: December 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10380

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 8, 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) and Guideline E (Personal Conduct). Administrative Judge Richard A. Cefola issued a favorable security clearance decision, dated May 11, 2005.

Department Counsel appealed the Administrative Judge's favorable 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 are raised on appeal: (1) whether the Administrative Judge erred in his application of Guideline F (Financial Considerations) Mitigating Condition 3 and Mitigating Condition 6; and (2) whether the Administrative Judge erred in his favorable findings of fact under Guideline E (Personal Conduct). For the reasons that follow the Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

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 the Administrative Judge erred in his application of Guideline F (Financial Considerations) Mitigating Condition 3 ⁽¹⁾

and Mitigating Condition 6 ⁽²⁾

. Department Counsel's argument under this issue relies to a great extent on an overly broad reading of the Board's decision in ISCR Case No. 97-0281 (April 3, 1998). In that case the Board affirmed an unfavorable decision and rejected an applicant's appeal which the Board construed in substantial part as asking us to disturb the Administrative Judge's weighing of the evidence ("Error is not demonstrated merely because the Judge did not find the mitigating evidence presented by Applicant to be sufficient to overcome the negative aspects of Applicant's history of financial problems."). Here, Department Counsel asks the Board to read the cited case as prohibiting the Judge from finding full mitigation of Applicant's disqualifying financial conduct. The Board declines to follow that reading. Indeed, it is fair to say that if we followed Department Counsel's approach we would, effectively, do that which we declined to do in the cited case, namely disturb the Administrative Judge's weighing of the evidence without a showing that the weighing had been arbitrary, capricious or contrary to law. Department Counsel has not demonstrated that the Judge's application of Guideline F Mitigating Conditions 3 and 6 in this case was arbitrary or capricious.

(2) Whether the Administrative Judge erred in his favorable findings of fact under Guideline E (Personal Conduct). Department Counsel's appeal demonstrates that the Administrative Judge's finding that Applicant had not falsified his May 26, 2000 security clearance application because Applicant did not know his clearance had been suspended is not sustainable. The Judge found that Applicant's clearance was suspended on September 28, 1999, a few days after

Applicant had left his employment. Department Counsel notes that that finding is contrary to record evidence. On page 37 of Government Exhibit 1 it states that Applicant's clearance is suspended. That page is part of a document, dated May 14, 1999 which starts at page 35 of Government Exhibit 1. Applicant's signature acknowledging receipt of the document is at page 38 of Government Exhibit 1. Additionally, Government Exhibit 1 also contains a memorandum dated September 13, 1999 that is authored by Applicant (the document appears between pages 6 and 10 of Government Exhibit 1), wherein Applicant states, in part, "Since I believe that I clearly fall within the purview of subparagraph C, above, of DOD Directive 52206, in that my security clearance was suspended and I have provided a written request that the case continue..." (page 9 of Government Exhibit 1). In light of the two items in Government Exhibit 1 that contradict the Judge's premise (neither of which is mentioned in the Judge's decision) that Applicant did not know his clearance had been suspended, that premise is not sustainable.

Department Counsel also asserts on appeal that the record evidence does not support the Administrative Judge's finding that Applicant did not falsify his response to Question 38 of the security clearance application and that the Judge substituted a favorable credibility determination of Applicant for record evidence. Department Counsel asserts that Applicant's defense - that the government was already aware of his past due debts at the time he completed the questionnaire as evidenced by the government's action to suspend his clearance - indicates Applicant was aware of the status of the debts too.

Department Counsel's argument regarding Applicant's defense, developed at the hearing, to the Question 38 falsification charge fails to clearly articulate how it establishes his state of mind at the time he answered the question. However, it raises the issue of the Administrative Judge's treatment of this evidence. In that regard, the Administrative Judge fails to explain how the fact that the government knew about the extent of Applicant's indebtedness over 180 days at the time he filled out the security clearance application clarifies the question of Applicant's intent. Such failure was error. In light of this error, and in light of the errors identified in the preceding paragraph regarding the Question 32 falsification allegation, on remand, the Judge is instructed to reevaluate his findings regarding Question 38.

It is clear that the Judge's favorable assessment of Applicant's credibility was a significant part of his ultimate finding and conclusion that Applicant did not falsify his responses to Questions 32 and 38 of his application. On remand, the Judge must reassess Applicant's overall credibility in light of the errors discussed herein.

CONCLUSION

Pursuant to Item E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the Administrative Judge. The Judge should issue a new decision consistent with the rulings set forth in this Decision and Remand Order.

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

Concurring Opinion of Chairman Emilio Jaksetic:

I fully concur with my colleagues' discussion and resolution of the first appeal issue. Although I concur with my

colleagues' decision to remand the case, I write separately because I view the merits of the second appeal issue somewhat differently.

There are two distinct falsifications alleged in the SOR: (1) falsification of the answer to Question 38 of the security clearance application (pertaining to debts delinquent more than 180 days); and (2) falsification of the answer to Question 32 of the security clearance application (pertaining to whether Applicant had ever had a security clearance denied, suspended or revoked).

As to the alleged falsification pertaining to delinquent debts, Department Counsel argues the Administrative Judge erred by finding Applicant did not commit a falsification because the government was already in possession of information that Applicant had delinquent debts. However, I do not read the Judge's decision so narrowly. The Judge found that Applicant's omission was "an honest 'mistake'" and that the government was already aware of his delinquent debts (Decision at pp. 3 and 5). The Judge's characterization of Applicant's omission as "an honest mistake" is separate and distinct from the Judge's finding that the government already knew about Applicant's delinquent debts. Therefore, I do not find persuasive Department Counsel's claim that the Judge erred by finding Applicant did not commit a falsification (as alleged by SOR paragraph 2.a) based on the Judge's finding that the government already knew about Applicant's delinquent debts. Since the Judge did not commit such an error, ⁽³⁾ Department Counsel's claim of error is not persuasive.

As to the alleged falsification pertaining to denial, suspension or revocation of a security clearance, Department Counsel persuasively argues that there is significant record evidence that runs contrary to the Administrative Judge's finding that no falsification occurred. However, I concur with my colleagues' conclusion to remand the case, rather than reverse, because the record evidence that runs contrary to the Judge's challenged finding is not such that I can conclude, as a matter of law, that the Judge could only find that Applicant engaged in falsification as alleged in SOR paragraph 2.b. Even if I were to conclude that the record evidence was sufficient to allow the Judge to find that Applicant did not receive notification of the final action on his security clearance eligibility that occurred after he left employment in September 1999, such a finding would not be enough to sustain the Judge's finding of no falsification. What Applicant knew or did not know about actions that were taken concerning his security clearance eligibility after he left employment in September 1999 is separate and distinct from the record evidence that appears to show that Applicant knew or should have known before he left employment in September 1999 that his security clearance had been suspended. But, although record evidence of what Applicant knew or should have known about his security clearance status before he left employment in September 1999 is relevant and probative as to his intent or state of mind when he answered Question 32 of the security clearance application in May 2000, such evidence is not conclusive as to his intent or state of mind when he answered Question 32 in May 2000. Therefore, a remand is warranted, not the reversal sought by Department Counsel.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. "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 Adjudicative Guidelines, Item E2.A6.1.3.3).
2. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive Adjudicative Guidelines, Item E2.A6.1.3.6).
3. Whether or not the government knew about Applicant's delinquent debts when he completed the security clearance application is irrelevant to the question of whether Applicant's omission of his delinquent debts was a falsification. A deliberate falsification by an applicant would be no less a deliberate falsification merely because the government is not deceived or misled by the falsification. On the other hand, an omission based on accident, inadvertence,

misunderstanding, simple forgetfulness, or some other benign reason would not be rendered any less an innocent omission merely because there is evidence that the government was not aware of the omitted information. Absent evidence showing otherwise, what the government knows or does not know about an applicant does not have any apparent probative value as to an applicant's intent or state of mind when the applicant completes a security clearance application.