

DATE: March 18, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11627

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 15, 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 Michael H. Leonard issued an unfavorable security clearance decision, dated January 14, 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 the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law; and (2) whether Applicant can be allowed to retain a security clearance at the Confidential level. 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

1. Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. The Administrative Judge made findings of fact about Applicant's history of financial difficulties, which include outstanding delinquent child support payments and a delinquent student loan debt, all totaling more than \$50,000. On appeal, Applicant does not challenge the Judge's findings of fact about his history of financial difficulties. However, Applicant does argue: (a) the Judge failed to consider Applicant's past military service, and his employment with a shipyard without a security violation; and (b) it is unfair and prejudicial to hold his history of financial difficulties against him. The Board construes Applicant's arguments as raising the issue of whether the Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted merely because Applicant can cite to some record evidence that he believes the Judge should have given more weight when evaluating Applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-01494 (May 28, 2003) at p. 3. Applicant's appeal argument is not sufficient to rebut the presumption that the Judge considered all the record evidence, both favorable and unfavorable, in this case.

There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Moreover, the federal government is not required to wait until an applicant commits a security violation before it can make an unfavorable security clearance decision. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and 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 particular applicant. *See* Directive, Adjudicative Guidelines (setting forth thirteen different categories of conduct and circumstances that raise security concerns). A history of financial difficulties raises security concerns that can form the basis of an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4

(discussing security significance of financial difficulties). Given the Administrative Judge's findings of fact about Applicant's history of financial difficulties, the Judge had a rational and legally permissible basis for concluding that Applicant's overall history of financial difficulties raised security concerns under Guideline F (Financial Considerations). Moreover, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant had not presented evidence sufficient to extenuate or mitigate the security concerns raised by his history of financial difficulties.

2. Whether Applicant can be allowed to retain a security clearance at the Confidential level. Applicant asks that he be allowed to have a security clearance at the Confidential level. Applicant asks for relief to which he is not entitled. Section 3.2 of the Directive specifically states the following: "An unfavorable clearance decision denies any application for a security clearance and revokes any existing security clearance, thereby preventing access to classified information at any level and the retention of any existing security clearance." *See also* ISCR Case No. 99-0260 (April 12, 2000) at p. 4 (no authority under the Directive to deny a security clearance at one level, but then allow the applicant to retain a security clearance at a lower level). Because the Board is affirming the Judge's unfavorable security clearance decision, there is no authority for the Board to allow Applicant to have a security clearance at any level.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate error below, and because Applicant seeks relief to which he is not entitled under the Directive.

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

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Administrative Judge

Member, Appeal Board