

DATE: April 5, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12862

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), dated March 22, 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) and Guideline E (Personal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated December 7, 2004.

Applicant appealed the Administrative Judge's unfavorable 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 issues: (1) whether the Administrative Judge erred by concluding Applicant's history of financial difficulties was not extenuated or mitigated, and (2) whether the Administrative Judge erred by finding Applicant's falsification of his security clearance application was deliberate. 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 erred by concluding Applicant's history of financial difficulties was not extenuated or mitigated. (1) Applicant contends the Administrative Judge should have concluded that the security concerns raised by his substantial indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 3 (2) and 6. (3) In support of that contention Applicant argues that: (1) he had either paid off, was making payments on, or had contacted creditors to make settlement arrangements with respect to, many of the debts, (2) subsequent to the hearing, but before the closing of the record in the case, he filed for Chapter 7 bankruptcy, and (3) his financial situation was adversely impacted by his divorce and his child's medical condition. Applicant also cites to several decisions by DOHA Administrative Judges in which security clearances were granted to applicants with financial histories similar to Applicant's. Applicant's claims have mixed merit.

The decision in another DOHA case cited by Applicant on appeal does not demonstrate error by the Administrative Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases. The cited cases are not legally binding precedent on the Board in this or any other appeal. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decisions by Hearing Office Judges).

The application of a disqualifying or mitigating condition by an Administrative Judge 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 arose from circumstances beyond his control, the Judge reasonably could consider whether Applicant acted in a reasonable manner more recently when dealing with those financial difficulties.

In this case, the Judge found and the record supports Applicant had a pattern of procrastination and half measures with regard to dealing with many years of significant debts, including debts for unpaid taxes and student loans. At the time the case was submitted for decision, he still had significant delinquent debts and had only recently filed for bankruptcy. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were ongoing and that Applicant's recent efforts to rectify his financial situation were not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required as a matter of law to conclude Applicant's efforts to address his financial difficulties warranted application of Financial Considerations Mitigating Conditions 6.

The Administrative Judge did not make any findings with respect to Applicant's divorce, the medical condition of Applicant's child, or the relation of either of those circumstances to Applicant's financial situation.⁽⁴⁾ In his conclusion, the Judge confused Financial Consideration Mitigating Conditions 2⁽⁵⁾ and 3, stating: "No Mitigating Conditions (MC) have been established . . . it is not an isolated incident (MC 3); . . ." ⁽⁶⁾ Given the facial significance of Applicant's divorce and his child's medical condition to his case in mitigation, the Judge erred in not making pertinent findings of fact and conclusions as required by the Directive. *See* Directive, Additional Procedural Guidance, Item E3.1.25. However, because the Judge's ultimate adverse decision is sustainable on other grounds (Guideline E), remand to the Judge has no significant chance of changing the outcome of the case, and is therefore inappropriate. *See* ISCR Case No. 02-17276 (March 15, 2005) at p.4.

2. Whether the Administrative Judge erred by finding Applicant's falsification of his security clearance application was deliberate. Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose his Federal Income Tax liens. Rather, he contends the omission of the information in question was the result of an oversight. Applicant's argument does not persuade us that the Judge erred.

The Administrative Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question. The Judge was not bound--as a matter of law--to accept or reject Applicant's explanation. Rather, the Judge had to consider Applicant's explanation in light of the record evidence as a whole. Considering the record as a whole, the Judge had a sufficient basis to find that Applicant's omissions were deliberate and intentional. Accordingly, the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

Conclusion

Applicant has failed to demonstrate error below which would change the outcome of the case. 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered a formal finding against Applicant with respect to Guideline J (Criminal Conduct), rather than Guideline F (Financial Considerations). However, it is clear from the Judge's decision that he is finding against Applicant with respect to Guideline F (Financial Considerations).
2. "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).
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
4. Decision at pp. 3-4.
5. "It was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.2).
6. Decision at p. 5.