

DATE: May 4, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13065

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 20, 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 Joseph Testan issued an unfavorable security clearance decision, dated January 28, 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 issue has been raised on appeal: whether the Board should reverse or remand the Administrative Judge's decision based on Applicant's proffer of new evidence concerning her financial situation. 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

Whether the Board should reverse or remand the Administrative Judge's decision based on Applicant's proffer of new evidence concerning her financial situation. The Administrative Judge found that: (a) Applicant had six past-due debts worth approximately \$17,000; (b) there was insufficient record evidence to find Applicant owed the debts alleged in SOR paragraphs 1.h, 1.i, and 1.j; and (c) Applicant had satisfied one of the six past-due debts, and was halfway through satisfying the past-due debt covered by SOR paragraph 1.a. The Judge concluded Applicant's financial difficulties were mitigated, in part, by Financial Considerations Mitigating Conditions 3⁽¹⁾ and 6⁽²⁾ but that an unfavorable security clearance decision was warranted because Applicant had not presented persuasive evidence that her financial condition would significantly improve anytime soon.

On appeal, Applicant does not challenge the Administrative Judge's findings or conclusions, but offers new evidence about her financial situation.⁽³⁾ Applicant's appeal submission raises the issue of whether the Board should reverse or remand the Judge's decision based on Applicant's proffer of new evidence concerning her financial situation.

The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, there is no right to have the record kept open indefinitely so that a party can continuously submit new evidence for consideration in a case. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)).

Moreover, absent a showing that a party was denied the opportunity to present evidence for the Administrative Judge to consider, there is no right to have a case remanded so that a party can have another opportunity to submit evidence for the Judge to consider. *See, e.g.*, ISCR Case No. 00-0593 (May 14, 2001) at p. 4. A review of the case file shows that: (i) Applicant had the opportunity to respond to the File of Relevant Material and present evidence for the Judge to consider in her case; (ii) Applicant submitted documentary evidence in response to the File of Relevant Material; and (iii)

Applicant's response to the File of Relevant material is in the case file and was available for the Judge to consider in making his decision. Applicant is not entitled to have the case remanded so that she can have another opportunity to submit evidence in her case.

Because there is no presumption of error below, and because the Board cannot consider new evidence on appeal, Applicant's proffer of new evidence on appeal does not demonstrate the Administrative Judge committed factual or legal error. Moreover, Applicant's proffer of new evidence does not provide any justifiable basis for the Board to remand the case to allow Applicant an opportunity to submit additional evidence for consideration in her case.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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 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. The Administrative Judge's favorable findings and conclusions about SOR paragraphs 1.h, 1.i, and 1.j are not at issue on appeal.