

DATE: November 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13096

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 the Applicant a Statement of Reasons (SOR), dated June 3, 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 Jacqueline T. Williams issued an unfavorable security clearance decision, dated June 13, 2005.

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 that the security concerns raised by Applicant's history of indebtedness had not been mitigated, and (2) whether the Administrative Judge erred by finding the Applicant's falsification of her 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 that the security concerns raised by Applicant's history of indebtedness had not been mitigated. On appeal, Applicant contends the Administrative Judge should have concluded that the security concerns raised by her substantial indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 1, [\(1\)](#) 2, [\(2\)](#) and 3. [\(3\)](#) In support of that contention, Applicant: (a) argues the Judge erred with respect to several findings as to the nature and value of Applicant's assets, (b) offers new evidence about her financial situation, and (c) reargues her case with respect to the mitigating evidence she presented for the administrative record. For the reasons that follow, we conclude the Judge's decision is sustainable.

The factual findings which Applicant challenges are either permissible characterizations on the part of the Administrative Judge or immaterial, in that they would not be reasonably likely to change the outcome of the case. Applicant has not met her burden of demonstrating that the Administrative Judge's material findings with respect Applicant's history of financial difficulties do not reflect a reasonable or plausible interpretation of the record evidence. As noted above, the Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings about Applicant's history of indebtedness are sustainable.

The Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Therefore, we may not consider Applicant's additional explanations about her financial situation. *See* ISCR Case No. 03-01059 (September 24, 2004) at p. 4. Applicant's proffer of new evidence does not demonstrate error on the part of the Administrative Judge as her findings and conclusions cannot be reviewed by making reference to evidence that was not presented to the Judge during the proceedings below.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, the application of a disqualifying or mitigating

condition 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 initially arose due to circumstances outside her control--indebtedness incurred as a result of caring for a sick parent, as well as her own medical problems--the Judge could still consider whether Applicant acted in a reasonable manner when dealing with those financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 99-0012 (December 1, 1999) at p. 4.

In this case, the Administrative Judge made sustainable findings that: (a) Applicant had multiple, substantial debts that had remained unpaid over many years, and (b) at the time the case was submitted for decision, Applicant still had significant outstanding debts and had no current plan for resolving them. In light of the foregoing, the Administrative Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and ongoing. Therefore, the Judge was not required, as a matter of law, to conclude Applicant's history of financial difficulties was fully mitigated by application of Financial Considerations Mitigating Conditions 1, 2, and 3.

The favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. The Judge applied the relevant mitigating conditions and explained why she concluded Applicant had not sufficiently mitigated the security concerns raised by Applicant's history of substantial, outstanding indebtedness.⁽⁴⁾ Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's conclusions.

2. Whether the Administrative Judge erred by finding the Applicant's falsification of her security clearance application was deliberate. The Applicant contends that she did not deliberately falsify her security clearance application by failing to disclose multiple delinquent debts. In support of that contention, Applicant argues: (a) that several of the debts were disclosed in response to another question and that she didn't think that she had to disclose those debts again, (b) at the time she completed the application, she did not recall all of her delinquent debts, and (c) she assumed that the government would obtain the specifics as to her financial history when they conducted their investigation and obtained a credit report on her. Applicant's arguments do not persuade the Board that the Judge erred.

The Administrative Judge had the opportunity to consider Applicant's explanation for why she 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. 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. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

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 behavior was not recent"(Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).
2. "It was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.2).
3. "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).
4. Decision at p. 5.