

DATE: April 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14542

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 October 27, 2003, 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), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated January 26, 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 erred by finding Applicant falsified a security clearance application in August 2001; and (2) whether the Board can reverse the Administrative Judge's decision based on Applicant's proffer that his debts will be resolved through a Chapter 7 bankruptcy. 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 finding Applicant falsified a security clearance application in August 2001. The Administrative Judge found that Applicant falsified a security clearance application in August 2001 by failing to disclose that he had delinquent debts, and by failing to disclose that he had been arrested in February 1999 and charged with driving under the influence. On appeal, Applicant makes statements that the Board construes as challenging the Judge's findings of falsification.

There is conflicting record evidence on the matter of whether the omissions in question were deliberate or inadvertent. The Administrative Judge had to consider the record as a whole, weigh the record evidence, and make findings of fact as to whether the omissions were deliberate or inadvertent. Considering the record as a whole, the Administrative Judge had sufficient evidence to find that Applicant's omissions were deliberate and not inadvertent. The Judge's finding of falsification reflects a legally permissible interpretation of the record evidence as a whole. Applicant's disagreement with the findings of falsification is not sufficient to demonstrate the Judge erred.

2. Whether the Board can reverse the Administrative Judge's decision based on Applicant's proffer that his debts will be resolved through a Chapter 7 bankruptcy. Applicant does not challenge the Administrative Judge's findings of fact about his unresolved debts. However, Applicant asserts that those debts will be handled through a Chapter 7 bankruptcy and he will provide documentation to show he has done so.

Because the Administrative Judge's findings of fact concerning Applicant's financial difficulties have not been challenged on appeal, the Board need not review those findings. Given the Judge's unchallenged findings of fact about Applicant's financial difficulties, the Judge had a rational basis for concluding Applicant's financial difficulties raise security concerns under Guideline F (Financial Considerations). *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004)

at p. 4 (discussing security significance of financial difficulties). Given the record evidence that Applicant's financial difficulties were -- with one exception -- unresolved as of the close of the record evidence,⁽¹⁾ the Judge had a rational basis for concluding Applicant had not mitigated the security concerns raised by his history of financial difficulties.

Applicant's assertion that he will handle his outstanding debts through Chapter 7 bankruptcy constitutes new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Apart from the Directive's prohibition on the consideration of new evidence, the Board will not hold that an Administrative Judge's decision is arbitrary, capricious, or contrary to law because of an applicant's statement that he or she will undertake remedial action in the future. A promise to take remedial action in the future is not the same as evidence of actual reform and rehabilitation. *See, e.g.,* ISCR Case No. 02-30603 (February 25, 2004) at p. 4. Moreover, Applicant does not have a right to have the record in his case kept open so that he can present evidence at some future date about changes in his financial situation. *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)).

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found that the debt covered by SOR paragraph 1.b had been satisfied before or by April 2004 (Decision at p. 2).