

DATE: July 7, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16521

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 June 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 Matthew E. Malone issued an unfavorable security clearance decision, dated April 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 failed to consider record evidence concerning one of Applicant's debts; and (2) whether the Administrative Judge made an erroneous factual finding about another debt alleged in the SOR. 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⁾

1. Whether the Administrative Judge failed to consider record evidence concerning one of Applicant's debts. Attached to Applicant's appeal brief is a copy of a July 14, 2004 letter concerning a wage garnishment that pertains to the debt alleged in SOR paragraph 1.a. Applicant asserts that the July 14, 2004 letter shows she is dealing with that debt.⁽²⁾

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. Apart from that presumption, a review of the decision below shows the Judge found the debt covered by SOR paragraph 1.a was being dealt with through wage garnishment. Accordingly, Applicant has shown no factual error by the Judge concerning the debt covered by SOR paragraph 1.a.

2. Whether the Administrative Judge made an erroneous factual finding about another debt alleged in the SOR. On appeal, Applicant questions whether she is responsible for the debt covered by SOR paragraph 1.e. The Board construes this as raising the issue of whether the Administrative Judge erred by finding Applicant owed the debt alleged in SOR paragraph 1.e.

Considering the File of Relevant Material in its entirety, the Board concludes the Administrative Judge had sufficient evidence to support his finding that Applicant owed the debt alleged in SOR paragraph 1.e. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate any 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. On appeal, Applicant offers new evidence to support her claim that she is dealing with her debts. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.15. A review of the case file shows that: (a) Applicant was given the opportunity to respond to the File of Relevant Material and offer additional evidence for the Administrative Judge to consider in her case; (b) the correspondence sent to Applicant with the File of Relevant Material placed her on notice that if she did not submit a response to the File of Relevant Material, the Judge would make a decision in her case based solely on the File of Relevant Material; and (c) Applicant did not respond to the File of Relevant Material and did not offer additional evidence for the Judge to consider in her case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence on appeal.

2. The July 14, 2004 letter is not new evidence because a copy of that letter appears in the File of Relevant Material.