

DATE: August 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16888

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 August 6, 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) and Guideline E (Personal Conduct). Administrative Judge Claude R. Heiny issued an unfavorable security clearance decision, dated June 22, 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 there is a rational basis for the Administrative Judge's unfavorable security clearance decision. 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 there is a rational basis for the Administrative Judge's unfavorable security clearance decision. The Administrative Judge made findings of fact about Applicant's history of financial difficulties and concluded that Applicant had not presented evidence of extenuation or mitigation sufficient to warrant a favorable security clearance decision. ⁽¹⁾ On appeal, Applicant does not challenge the Judge's findings of fact about his history of financial difficulties. However, Applicant does argue the following: (1) the Board should "rethink the decision to revoke or deny a clearance for me"; (2) he did not try to hide his financial difficulties from the federal government; (3) his military service and work record with a defense contractor should weigh in his favor; and (4) he would do nothing to harm the United States or the U.S. military. The Board construes Applicant's arguments as raising the issue of whether there is a rational basis for the Judge's unfavorable security clearance decision.

Under the Directive, the Board does not re-try a security clearance case on appeal. Rather, the Board reviews an Administrative Judge's decision to determine whether an appealing party has raised an issue on appeal that demonstrates factual or legal error by the Judge. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Accordingly, the Board will not review Applicant's case in order to decide whether it would reach the same decision as the Judge did. The Board will consider whether Applicant's appeal identifies any factual or legal error by the Judge.

Applicant's argument about not hiding his financial difficulties from the federal government is moot. The Administrative Judge specifically found that Applicant did not falsify a security clearance application (as alleged in SOR paragraph 2.a) and entered a formal finding in Applicant's favor with respect to that aspect of the case.

The record evidence concerning Applicant's military service and employment with a defense contractor was relevant to his case, but it did not compel the Administrative Judge, as a matter of law, to make a favorable security clearance case. A Judge must consider the record evidence, both favorable and unfavorable, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a reasoned decision as to whether it is clearly consistent

with the national interest to grant or continue a security clearance for an applicant. *See, e.g.*, ISCR Case No. 02-00578 (April 6, 2004) at p. 3. Applicant's argument about his military record and employment history does not demonstrate the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law, or that the Judge reached conclusions about Applicant's overall history of financial difficulties that are not warranted in light of the record evidence as a whole.

The federal government does not have to wait until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). A history of unresolved financial difficulties raises security concerns. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of a history of financial difficulties). The Administrative Judge's unchallenged findings of fact about Applicant's history of financial difficulties provide a rational basis for his conclusion that security concerns were raised under Guideline F (Financial Considerations). Furthermore, Applicant's appeal fails to demonstrate the Judge erred by concluding that Applicant had not presented evidence of extenuation or mitigation sufficient to rebut or overcome the security concerns raised under Guideline F.

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 Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to five of the debts alleged in the SOR. Those favorable formal findings are not at issue on appeal.