

DATE: November 3, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17479

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 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 Kathryn Moen Braeman issued a favorable security clearance decision, dated March 10, 2005.

Department Counsel appealed the Administrative Judge's favorable 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 Administrative Judge erred by concluding that Applicant's history of financial difficulties was mitigated. 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⁽¹⁾

The Administrative Judge found that Applicant had a history of financial difficulties, but concluded that it was mitigated under Financial Considerations Mitigating Conditions 3 and 6, and Applicant had demonstrated sufficient evidence of financial reform to warrant a favorable security clearance decision. Department Counsel contends the Judge's favorable decision should not be affirmed because: (a) the Judge's favorable credibility determination is not warranted; (b) the Judge failed to take into account the absence of documentary evidence to support Applicant's claims about the origins of his financial difficulties; (c) the record evidence does not support the Judge's application of Financial Considerations Mitigating Condition 3; and (d) the record evidence does not support the Judge's application of Financial Considerations Mitigating Condition 6.

An Administrative Judge's credibility determination is entitled to deference on appeal.⁽²⁾ Although Department Counsel makes a plausible argument in support of its contention that the Judge should have found Applicant's testimony to be not credible in some respects, Department Counsel has not met its heavy burden of persuading the Board that the Judge's credibility determination is arbitrary, capricious, or contrary to law.

Department Counsel correctly argues that the Board has held that an Administrative Judge can take into account the absence of corroborating documentation in support of an applicant's claim that he or she has satisfied particular debts. However, Department Counsel's argument does not demonstrate the Judge erred in this case. First, Department Counsel's argument has the practical effect of trying to turn a permissible inference into a mandatory one. Although the Board has held that the Judge can take into account the absence of corroborating documentation in evaluating an applicant's claim that he or she has satisfied particular debts, the Board has not held that a Judge cannot, as a matter of law, make findings of fact about the satisfaction of such debts without such documentation. Whether a Judge's findings of fact about an applicant's debts are sustainable will depend on a consideration of the record evidence as a whole in each case, with the presence or absence of corroborating evidence being a relevant consideration that a Judge should

take into account, subject to review under the standards set forth in the Directive. Second, Department Counsel's argument conflates the difference between (i) documentation about the satisfaction of debts, and (ii) documentation about how an applicant's debts came into being. While it is reasonable to expect applicants to have documentation about the satisfaction of specific debts, it is not so obvious to expect that applicants will necessarily have documentation about how they got into financial difficulties, which may develop gradually over periods of time rather than in easily identifiable incidents, or which may involve incremental degradation of their financial situation rather than abrupt, acute financial difficulties. Moreover, in these cases, it is not unusual for the applicant's financial difficulties to have begun several years ago, while claims of satisfaction of debts alleged in the SOR involve recent events. Considering the record as a whole, the Board does not have to agree with the Judge's findings to conclude Department Counsel has not demonstrated the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Department Counsel's argument concerning Financial Considerations Mitigating Condition 3⁽³⁾ is premised on the notion that an Administrative Judge cannot apply that mitigating condition unless the applicant demonstrates the delinquent debts became delinquent as a direct result of the circumstances beyond the applicant's control. The Judge is not required to construe or interpret Financial Considerations Mitigating Condition 3 so narrowly. Given the wording of itigating Condition 3, it would not be unreasonable for a Judge to construe it as covering situations where the record evidence shows that events beyond an applicant's control resulted in, or significantly contributed to: (a) the applicant's debts becoming delinquent; (b) the applicant becoming unable to deal with or otherwise address debts that had become delinquent previously; and (c) the applicant incurring new, unforeseen debts that aggravate or exacerbate the applicant's financial situation. In this case, the record evidence is mixed: some of Applicant's debts became delinquent before September 11, 2001, some of Applicant's debts became delinquent after September 11, 2001. Clearly, the delinquency of the debts that became delinquent before September 11, 2001 was not caused by the aftermath of September 11, 2001, but Applicant's ability to address them could have been impaired by the financial aftermath of September 11, 2001. Indeed, the Judge found that Applicant's income dropped off sharply after September 11, 2001 (Decision at p. 3). To the extent the record evidence supports the Judge's finding that Applicant's income dropped off sharply after September 11, 2001, it would not be arbitrary or capricious for the Judge to conclude that part of Applicant's inability to deal with his delinquent debts could be attributed to the aftermath of September 11, 2001. Similarly, although the divorce action in 2002 did not cause the delinquency of debts that became delinquent before it arose, the Judge could find that the divorce action in 2002 contributed to Applicant's financial difficulties and impaired his ability to deal with his debts (delinquent and current). The Board need not agree with the Judge's findings and conclusions to decide that Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Judge to apply Financial Considerations Mitigating Condition 3 in this case.

As to Financial Considerations Mitigating Condition 6,⁽⁴⁾ Department Counsel argues the Administrative Judge failed to articulate a rational basis for applying it because the Judge failed to do a whole person analysis of Applicant. Also, Department Counsel argues the record evidence shows Applicant was not as diligent about dealing with his financial problems as he could have been. Since the Judge concluded Applicant was not as diligent as he could have been (Decision at p. 6), it cannot be said the Judge did not take that aspect of the case into account. Furthermore, although Department Counsel makes a plausible argument for a different interpretation of the record evidence, the Board does not have to agree with the Judge to decide Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Judge to apply Financial Considerations Mitigating Condition 6 in this case.

Conclusion

The Board affirms the Administrative Judge's decision because Department Counsel 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant's reply brief contains factual assertions and documentation that seek to supplement the record evidence that was before the Administrative Judge. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

2. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

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. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).