

DATE: October 7, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18172

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 June 29, 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 take into account evidence that mitigated Applicant's history of financial difficulties; (2) whether Applicant was denied the opportunity to present favorable evidence about his efforts to address the debts covered by the SOR; and (3) whether the Board should remand the case to the Administrative Judge to allow Applicant the opportunity to present updated evidence about his financial situation. 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 failed to take into account evidence that mitigated Applicant's history of financial difficulties. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties.⁽¹⁾ However, Applicant points to certain portions of the record evidence that he asserts are favorable to him and suggests that the Judge may have failed to take such evidence into consideration when deciding his case.

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, the Board notes that the Judge's evaluation of Applicant's history of financial difficulties reflects consideration of the favorable evidence that Applicant cites on appeal. The presumption that the Judge considered all the record evidence is not rebutted by a showing that the Judge did not give certain evidence as much weight as the appealing party would have liked. *See, e.g.*, ISCR Case No. 03-09485 (July 8, 2004) at p. 3.

The Administrative Judge had the responsibility of weighing the record evidence, both favorable and unfavorable, and making a reasoned decision as to whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Absent a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5. In this case, Applicant has not shown that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

2. Whether Applicant was denied the opportunity to present favorable evidence about his efforts to address the debts covered by the SOR. Applicant asserts that due to the scheduling of the hearing in his case, he was unable to complete

his efforts at addressing his financial difficulties in time to present evidence of financial reform and rehabilitation at the hearing. Making allowances for Applicant's *pro se* status, the Board construes Applicant's assertion as raising the issue of whether Applicant was denied the opportunity to present favorable evidence about his efforts to address the debts covered in the SOR.

A review of the hearing transcript shows the following: (a) Applicant appeared and participated in the hearing without asking for a continuance, and he did not indicate to the Administrative Judge that he was not ready to proceed with the hearing; (b) Applicant offered documentary evidence for the Judge to consider in his case; (c) Applicant testified about his financial situation (including his current efforts to address his outstanding debts); (d) Applicant had three witnesses testify on his behalf; and (e) Applicant rested his case without asking for additional time to present more evidence on his behalf. Considering the record as a whole, the Board concludes Applicant had a reasonable opportunity to appear and present his case, including the opportunity to present documentary and testimonial evidence for the Judge to consider, and the opportunity to make opening and closing arguments. Nothing in the record evidence indicates or suggests that the Judge precluded Applicant from having a reasonable opportunity to present his case.

3. Whether the Board should remand the case to the Administrative Judge to allow Applicant the opportunity to present updated evidence about his financial situation. Applicant refers to his hearing testimony about his efforts to deal with the debts covered by the SOR, and asserts that since the hearing he has completed the financial steps outlined in Applicant Exhibit A. Applicant asks the Board to: (a) accept his assertion about his post-hearing actions and reverse the Administrative Judge's decision based on it, or (b) remand the case to the Judge so that he can have an opportunity to present updated evidence about his financial situation.

Applicant's assertion about his post-hearing financial conduct constitutes new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board cannot reverse an Administrative Judge's decision based on a proffer of new evidence on appeal.

Applicant is not entitled to a remand so that he can have the opportunity to present new evidence in his case. As discussed earlier in this decision, Applicant had a reasonable opportunity to appear and present his case. Nothing in the record indicates or suggests that Applicant was denied the opportunity to present evidence for the Administrative Judge to consider in his case. Furthermore, nothing in Executive Order 10865, the Directive, or federal administrative law gives the parties a right to supplement the record evidence continuously. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (the right to present evidence in DOHA proceedings must be exercised within the provisions of the Directive and the practical need for administrative finality in these proceedings)(*citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). Applicant is not entitled to the relief he requests.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant correctly notes that the Administrative Judge erred by referring to him as being 33 years of age, instead of his true age of 43 years. However, reading the decision below in its entirety, the Board concludes the erroneous finding about Applicant's age did not undermine the Judge's evaluation of Applicant's security eligibility in any meaningful way.