

DATE: August 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18668

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., 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 Roger C. Wesley issued an unfavorable security clearance decision, dated January 31, 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 the Administrative Judge's decision is arbitrary, capricious, or contrary to law. 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

In his Formal Findings, the Administrative Judge found against Applicant as to eight of nine debts alleged in the SOR. On appeal, we need not discuss the ninth debt, SOR paragraph 1.i, because the Judge found in Applicant's favor on that debt.

Whether the Administrative Judge's security clearance decision is arbitrary, capricious, or contrary to law. In his appeal, Applicant takes issue with four statements in the Administrative Judge's Findings of Fact. The Board will consider Applicant's arguments regarding the statements as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The first of the statements involves the Judge's characterization of the origin of Applicant's financial difficulties, and the third deals primarily with the debt in SOR paragraph 1.a. Applicant had explained his financial situation in his answer to the SOR. In reaching his Findings of Fact, the Judge was not required to accept Applicant's explanations at face value, but had a duty to look at the entire record before him. Applicant's disagreement with the Judge's characterizations is not sufficient to demonstrate error. Rather, the Board must consider whether Applicant has shown the Judge's material findings of fact are not supported by the record evidence. Applicant has not demonstrated harmful error as to the first and third cited statements. At most, Applicant identifies some minor flaws with the Judge's decision that constitute harmless error in light of the record as a whole.

In the second statement cited by Applicant, the Administrative Judge indicates that Applicant had made payments on only three of the debts alleged in the SOR (paragraphs 1.a, 1.h, and 1.i). Applicant is correct that the Judge listed SOR paragraph 1.h in error, since Applicant stated in his answer to the SOR that he had made no payments on that debt. ⁽¹⁾

In the statement under discussion here, the Judge was discussing the fact that Applicant had made no payments on a number of the debts listed in the SOR. Considering the evidence of Applicant's overall financial record, the Judge's basic point reflects a reasonable interpretation of the record evidence, and the fact that the Judge listed one debt

incorrectly is harmless error. *See, e.g.*, ISCR Case No. 02-17869 (December 21, 2004) at p. 3. Furthermore, Applicant's claim that the Judge erred by characterizing his payments toward two debts as "quite dated" and "relatively small" does not raise a material issue that the Board need discuss.

The fourth statement by the Administrative Judge challenged by Applicant concerns two of Applicant's debts. Given the record evidence, the Judge properly concluded Applicant had the burden on presenting evidence sufficient to demonstrate he had refuted, extenuated, or mitigated the debts covered by SOR paragraphs 1.b and 1.c. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Judge was not bound to accept Applicant's explanation about those two debts in the absence of documentation. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 5 (legally permissible for Administrative Judge to take into account the applicant's failure to provide current documentation to corroborate claims about applicant's financial situation). The Judge's Findings of Fact as to SOR paragraphs 1.b and 1.c reflect a reasonable interpretation of the record evidence.

With the exception of the harmless error noted above, Applicant has failed to demonstrate that the Administrative Judge's Findings of Fact are unsustainable; nor has Applicant shown that the Judge's security clearance decision is arbitrary, capricious, or contrary to law. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n. 6 (1980). An adverse security clearance decision can be based on proof of facts and circumstances that indicate an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons granted access to classified information. In this case, Applicant's overall history of unresolved financial difficulties provides a rational basis for the Judge's adverse decision concerning Applicant's security eligibility. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of a history of financial difficulties). Considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had not presented sufficient evidence to extenuate or mitigate the security concerns raised by his overall history of financial difficulties.

Conclusion

Applicant has failed to meet his burden of demonstrating harmful error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

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. As noted above, we will not address Applicant's comments on SOR paragraph 1.i, since the Judge found in Applicant's favor as to that debt.

