

DATE: August 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21012

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 July 20, 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 Thomas M. Crean 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 security clearance decision is arbitrary, capricious, or contrary to law.⁽¹⁾ 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 ⁽²⁾

Applicant does not challenge the findings that he did not pay the four debts and the civil judgment described in SOR paragraphs 1.c through 1.g, but contends that the Administrative Judge erred in number of respects. Applicant's brief raises errors in three general categories: (a) error in weighing the evidence Applicant presented to support rebuttal, explanation, extenuation or mitigation; (b) error in weighing the evidence Applicant presented which focuses on Applicant's employment history and personal circumstances; and (c) other errors by the Judge and Department Counsel. Overall, we construe Applicant's brief as claiming that all of these errors, individually and collectively, caused the Judge to make a security clearance decision that was arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes that Applicant's claims of error are not persuasive.

(a) Applicant contends that a serious medical event prevented him from resolving the medical co-pay debts that he owes that total between \$600 and \$700. He argues that he acknowledged his debts and agreed to repay them, but that he requested to delay payment until he is employed in order to do so. He claims that he must be allowed time to regain his life and return to his past career field. Applicant contends that his existing funds were his only monies available for his living expenses, other than Social Security disability, and that the Judge did not understand Applicant's style of employment, *i.e.*, movement between contractors with unemployment or underemployment between jobs.

An applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

To the extent that Applicant contends that the Administrative Judge ignored evidence favorable to Applicant, his appeal arguments are insufficient to overcome the rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See* ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Moreover, Applicant's ability to proffer an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred. Here, the

Judge specifically considered Financial Considerations Mitigating Conditions 1 ⁽³⁾, 2 ⁽⁴⁾, 3 ⁽⁵⁾, and 6 ⁽⁶⁾ as well as the "whole person" factors. ⁽⁷⁾ The Judge concluded that Applicant's debts are long-standing (some outstanding for approximately seven years) and are not isolated in nature. The Judge acknowledged that initially Applicant may not have been able to pay the debts for reasons beyond his control, but concluded that, by the time of the hearing, Applicant had the ability to pay the remaining debts yet refused to do so until he determined it to be appropriate. The Judge's conclusions that Applicant was unwilling to satisfy his debts and that he had not mitigated financial consideration security concerns were reasonable, plausible interpretations of the record evidence as a whole and are sustainable. *See* ISCR Case No. 02-22556 (June 7, 2004) at p. 4.

(b) Applicant contends that the Administrative Judge also erred because he did not consider: (1) Applicant's employment history which includes more than 30 years of outstanding service in support of the government, with letters of accommodation and a perfect security record; and (2) the hardship to Applicant and his family by failing to grant a favorable security clearance to the single parent of two blind children. Assuming for purposes of this appeal that Applicant's employment history is outstanding, the government's security concerns are not necessarily mitigated by an applicant's favorable professional and work record. *See* ISCR Case No. 01-01642 (June 14, 2002) at p. 6. Moreover, it is irrelevant that the Administrative Judge's unfavorable decision will have an adverse effect upon Applicant. An applicant is not made more or less suitable for a security clearance based on how a security clearance decision might affect the applicant. *See* ISCR Case No. 98-0743 (October 15, 1999) at p. 3.

(c) Applicant contends his case has other errors or irregularities. He claims that the Administrative Judge was on temporary duty travel "with other possible priorities" aside from this case, and that the Judge failed to adequately rule over a youthful and inexperienced Department Counsel. In this regard, Applicant's brief does not specify what rulings were inadequate and why they were inadequate; how the Judge's travel status affected his rulings; or how Department Counsel's alleged inexperience may have substantially affected Applicant's right to a fair hearing. In view of this record, Applicant's speculation about the Administrative Judge and Department Counsel is lacking in substance sufficient to raise a colorable question about the Judge's good faith. In any case, there is a rebuttable presumption that agency officials carry out their duties in good faith, and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See, e.g., National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004), and ISCR Case No. 02-19136 (June 2, 2005) at p. 4. Furthermore, as described earlier in this decision, the Judge specifically considered various mitigating and "whole person" factors, and made some formal findings favorable to Applicant.

Conclusion

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The basis of Applicant's appeal is in his brief that the Board received on March 28, 2005. For reasons explained by the Chairman of this Appeal Board in correspondence to Applicant dated April 21, 2005, the Board will not consider Applicant's April 18, 2005, correspondence, received by the Board on April 20, 2005, which attempts to supplement the March 28, 2005, appeal brief.
2. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, 1.h, 1.i and 2.
3. "The behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).
4. "It was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.2).
5. "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 death, divorce or separation)" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.3).
6. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
7. Directive, Section 6.3 and Adjudicative Guidelines, Items E2.2.1.1 through E2.2.1.9.