

DATE: April 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20638

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 30, 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 Robert Robinson Gales issued an unfavorable security clearance decision, dated January 27, 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 erred by finding that Applicant has an average remainder of \$220 a month after monthly expenses are deducted from monthly income; and (2) whether the Administrative Judge erred by finding that Applicant has failed to follow up on past promises to pay off his debts. 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

The Administrative Judge made findings of fact about Applicant's extensive history of financial difficulties, which spanned the period 1998-2004.⁽¹⁾ With two exceptions, the Judge's findings of fact are not challenged on appeal. Specifically, Applicant challenges: (1) the Judge's finding that he has an average remainder of \$220 a month after monthly expenses are deducted from monthly income; and (2) the Judge's finding that he has failed to follow up on past promises to pay off his debts.

In support of the first challenge, Applicant asserts that there is a mistake in one of the figures contained in Applicant's Exhibit A. Because Applicant offered Applicant Exhibit A for the Administrative Judge to consider in his case, Applicant is not in a strong position to complain that the Judge erred by relying on that exhibit in making his findings of fact. Furthermore, even if the Board were to conclude that Applicant's claim of factual error had merit, it would not be material to the outcome of this case. Given the totality of the Administrative Judge's unchallenged findings of fact concerning Applicant's long history of financial difficulties, there is not a significant chance that the Judge's decision would be different if he had made a finding of fact consistent with Applicant's claim concerning Applicant Exhibit A. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6) (discussing harmless error doctrine).

In support of the second challenge, Applicant asserts that he lacks discretionary income that would allow him to pay off his debts. Given the Administrative Judge's unchallenged findings of fact, it was not unreasonable for the Judge to conclude that Applicant has failed to follow through with his past promises to deal with his debts. As the Judge noted (Decision at p. 8), Financial Considerations Disqualifying Condition 3⁽²⁾ covers the inability or the unwillingness to satisfy debts. Given the Judge's unchallenged findings of fact about Applicant's long history of financial difficulties, it is not material to the outcome of this case whether Applicant is unwilling or unable to pay off his outstanding debts.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant's first claim does not demonstrated error below that warrants remand or reversal, and Applicant's second claim does not demonstrate any error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to the debts covered by SOR paragraphs 1.n and 1.p. Those favorable formal findings are not at issue on appeal.

2. Directive, Adjudicative Guidelines, Item E2.A6.1.2.3.