

DATE: August 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22889

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 January 14, 2005, 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 Barry M. Sax issued an unfavorable security clearance decision, dated June 20, 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 findings and conclusions under Guideline F (Financial Considerations) contain errors that render his unfavorable security clearance decision 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

Whether the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations) contain errors that render his unfavorable security clearance decision arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's unfavorable security clearance decision on the following grounds: (1) Applicant contends the Judge erred by finding that he paid his tax debts as a requirement of the home refinancing process, and argues that he refinanced his home for the purpose of paying his outstanding tax debts; (2) Applicant asserts the synopsis of the Administrative Judge's decision erroneously states "No mitigation has been shown"; (3) Applicant argues the Judge's adverse formal finding with respect to SOR paragraph 1.j is not supported by the record evidence, which shows Applicant has satisfied the majority of his outstanding debts; and (4) Applicant claims there is no basis in the record for the Judge to conclude his financial situation poses a security risk.

To decide this appeal, the Board need not decide whether Applicant's claims of error have merit. The Administrative Judge's unfavorable security clearance decision is not based solely on the Judge's findings and conclusions about Applicant's history of financial difficulties. The Judge's unfavorable decision is also based on the Judge's findings and conclusions about Applicant's falsification of a security clearance application. None of the Judge's findings and conclusions about Applicant's falsification of a security clearance application have been challenged on appeal.

Falsification of a security clearance application provides a sufficient basis for an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification). The Administrative Judge's unchallenged findings and conclusions about Applicant's falsification of a security clearance application are sufficient to support his unfavorable security clearance decision, independent of his findings and conclusions about Applicant's history of financial difficulties. Regardless of what the Board might conclude about the merits of Applicant's claims of error, the Board would affirm the Judge's unfavorable security clearance decision because the Judge's findings and conclusions under Guideline E (Personal Conduct) are not challenged on appeal, and those findings and conclusions provide a sufficient, independent basis for the Judge's

unfavorable security clearance decision. Accordingly, the Board need not decide whether there is any merit to Applicant's claims of error concerning the Judge's findings and conclusions under Guideline F (Financial Considerations).

Conclusion

The Board affirms the Administrative Judge's decision because Applicant's claims of error do not raise any material issue on appeal.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board