

DATE: January 27, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23235

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 December 7, 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 J (Criminal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated July 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 issue raised on appeal is whether the Administrative Judge's security clearance 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⁽¹⁾

Whether the Administrative Judge's adverse security decision is arbitrary, capricious, or contrary to law. In his appeal, Applicant argues that the Judge's adverse findings and conclusions are in error. Applicant contends that the Judge should have found the two debts listed under Guideline F to be mitigated because they were beyond Applicant's control due to protracted divorce proceedings, because there are clear indications the problem is being resolved, and because Applicant has initiated a good-faith effort to repay or otherwise resolve the debts. Specifically, with regard to the state tax lien, he indicates that although the lien exists, he has paid enough in tax withholding to cover his debt to the state. Applicant does not deny the existence of the second debt, but denies that it is delinquent and argues that he has made significant payments toward the amount owed. With regard to Guideline J (Criminal Conduct), Applicant admits that the DUI arrest occurred, but contends that it should be mitigated because it was an isolated event which occurred over 12 years ago. He denies that he was ever arrested for battery, and he asserts that the government did not prove that allegation. He admits that he did not file state or federal income tax returns for six years, but he contends that his failure to do so was not willful. Applicant also asserts that the Judge did not consider the whole person concept in reaching his decision. The Board construes Applicant's arguments as a claim that the Judge's decision is arbitrary, capricious, or contrary to law.

In security clearance cases, the burden is on the government to prove disputed allegations.⁽²⁾ Once an allegation is proven, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the disputed facts. Applicant also has the ultimate burden of persuasion in obtaining a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant testified and submitted exhibits in mitigation of his financial situation and criminal conduct. He argues that the Judge should have applied Financial Considerations Mitigating Conditions 3, 4, and 6.⁽³⁾ He contends that his failure to file income tax returns should not be held against him because it was caused by his protracted divorce proceedings and because he paid sufficient tax withholding to cover his actual tax liability. With regard to the DUI, Applicant believes the Judge should have applied Criminal Conduct Mitigating Conditions 1, 2, and 6.⁽⁴⁾

There is no presumption of error below. The favorable evidence cited by Applicant is not sufficient to demonstrate that the Judge's decision is arbitrary, capricious, or contrary to law. As a trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. The Judge reasonably addressed the possible application of the relevant mitigating conditions and explained why he concluded that Applicant had not sufficiently mitigated the security concern raised by his financial situation and criminal conduct. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-01624 (November 23, 2004) at p. 4.

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). In evaluating an Applicant's security eligibility, the Administrative Judge must consider the conduct and circumstances of an applicant in light of the whole person concept⁽⁵⁾ and decide whether an applicant shows the high degree of judgment, reliability, and trustworthiness that must be exhibited by persons granted access to classified information. *See, e.g.*, *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). The Judge's findings and conclusions about Applicant's financial situation and criminal conduct provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility and the overall adverse security clearance decision.

Conclusion

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, 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. Portions of Applicant's appeal contain information regarding Applicant's financial situation not presented at the hearing or submitted while the record remained open after the hearing. This information constitutes new evidence, which the Board is not able to consider. *See Directive, Additional Procedural Guidance, Item 3.1.29.*

2. Applicant denied the SOR allegation that he was arrested for Battery. Applicant correctly points out that the government did not prove that allegation. However, the resulting error is harmless because the other adverse findings are sustainable.

3. The situation was beyond his control due to divorce, the problem is being resolved, and he has made a good-faith

effort to repay or otherwise resolve his debts. *See* Directive, Adjudicative Guidelines, Item E2.A6.1.2.3, -.4, and -.6.

4. Applicant points out that his DUI arrest was isolated incident which occurred over twelve years earlier and that there is evidence of successful rehabilitation. *See* Directive, Adjudicative Guidelines, Item E2.A10.1.3.1, -.2, and -.6.

5. *See* Directive, Sections 6.3 and 6.3.6; and Directive, Adjudicative Guidelines, Items E2.2.1 and E2.2.1.9.