DATE: September 23, 2005

In Re:

SSN: -----------

Applicant for Security Clearance

ISCR Case No. 03-24028

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 August 17, 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), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Kathryn Moen Braeman issued an unfavorable security clearance decision, dated August 5, 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 unfavorable security clearance decision can be reversed based on Applicant's proffer of new evidence on appeal. 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 unfavorable security clearance decision can be reversed based on Applicant's proffer of new evidence on appeal. The Administrative Judge made findings of fact about Applicant's history of financial difficulties. The Judge found Applicant had resolved two of his debts (SOR paragraphs 1.h and 1.i), but still had not resolved seven other debts (SOR paragraphs 1.a through 1.g). The Judge concluded that Applicant had not presented evidence showing that he was taking steps to address his outstanding debts, and therefore, that he had not presented evidence sufficient to overcome the security concerns raised under Guideline F (Financial Considerations) by his overall history of financial difficulties. The Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.h and 1.i, but entered formal findings against Applicant with respect to SOR paragraphs 1.a through 1.g.[2]

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. Rather, Applicant asserts that he has filed for Chapter 7 bankruptcy and asks the Board to reverse the Judge's unfavorable decision based on that assertion.[3]

There is no presumption of error below. Because Applicant has not challenged the Administrative Judge's findings of fact about his history of financial difficulties, those findings of fact stand and need not be reviewed to decide this appeal.

Applicant's assertion about filing for bankruptcy constitutes new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, Applicant's assertion pertains to action he claims to have taken several months after the hearing was held. As a practical matter, there must be finality to any judicial or administrative proceeding, and there is no right to have the record kept open indefinitely so a party can update the record evidence. *See, e.g.*, ISCR Case No. 03-17114 (November 29, 2004) at p. 3. Therefore, Applicant's

proffer about filing for bankruptcy does not demonstrate error below.

Conclusion

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

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. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Those favorable formal findings are not at issue on appeal.

2. The Administrative Judge's favorable formal findings with respect to SOR paragraphs 1.h and 1.i are not at issue on appeal.

3. Applicant's brief indicates he believes the Administrative Judge based her unfavorable decision entirely on his failure to file for bankruptcy. The Judge's decision was not based solely on that fact.