

DATE: December 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24741

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 22, 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 Arthur E. Marshall, Jr. issued an unfavorable security clearance decision, dated October 24, 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 Board can reverse the Administrative Judge's unfavorable decision based on Applicant's proffer of new evidence about his financial situation. 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⁾

The Administrative Judge found that Applicant had a history of financial difficulties that began to develop during 2002, and which resulted in delinquent debts that were still unresolved at the time of the hearing.⁽²⁾ The Judge concluded that Applicant had presented evidence that was not sufficient to extenuate or mitigate his history of financial difficulties to the degree that would warrant a favorable security clearance decision.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. Rather, Applicant makes factual assertions about what he has done since the hearing to address his delinquent debts and offers copies of documents in support of his claims of financial reform. Because there is no presumption of error below, the Board need not review the Judge's unchallenged findings of fact about Applicant's history of financial difficulties. Accordingly, the Judge's unchallenged findings of fact stand.

Applicant's factual assertions about what he has done since the hearing to address his financial difficulties constitute a proffer of new evidence. Similarly, the documentation submitted with Applicant's appeal brief also constitutes new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Absent a showing that a party was denied a reasonable opportunity to present evidence for the Administrative Judge to consider, a party is not entitled to another opportunity to present evidence on its behalf. *See, e.g.*, ISCR Case No. 02-30603 (February 25, 2004) at p. 3. A review of the record below shows that Applicant was provided a reasonable opportunity to present evidence for the Judge to consider in his case. Furthermore, there is no right to have the record kept open indefinitely so that a party can offer new evidence for consideration in a case. *See, e.g.*, ISCR Case No. 03-17114 (November 29, 2004) at p. 3 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). Accordingly, Applicant is not entitled to have the case remanded so that

he can present additional evidence for the Judge to consider.

Applicant's proffer of new evidence on appeal does not demonstrate error by the Administrative Judge, and does not provide a basis for remanding the case for further proceedings or reversing the Judge's decision.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

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 E (Personal Conduct). Those favorable formal findings are not at issue on appeal.
2. The Administrative Judge entered favorable formal findings with respect to the debts covered by SOR paragraphs 1.b, 1.d, 1.f, and 1.g. Those favorable formal findings are not at issue on appeal.