

DATE: December 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25346

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 31, 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). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated September 28, 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 erred by finding that Applicant had unpaid delinquent 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 Issue

Whether the Administrative Judge erred by finding that Applicant had unpaid delinquent debts. The Administrative Judge found that Applicant had a history of financial difficulties, including various unpaid delinquent debts as alleged in the SOR. The Judge noted that Applicant had claimed, in his answer to the SOR, that he had paid all of his past due creditors, but also noted that Applicant had not presented any documentation to support his claim. The Judge concluded that Applicant's history of financial difficulties warranted adverse conclusions under Guideline F (Financial Considerations) because Applicant had not presented persuasive evidence that he had addressed or otherwise resolved his delinquent debts.

On appeal, Applicant asserts he has paid all his past due debts and offers various documents in support of that assertion. The documents submitted with Applicant's appeal brief were not part of the record before the Administrative Judge. As such, those documents constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

A review of the case file shows the following: Applicant was provided with a copy of the File of Relevant Material (FORM) and given the opportunity to respond to the FORM and submit additional evidence for the Administrative Judge to consider in his case. Applicant was informed that if he did not submit any objections to the FORM or did not submit information for a Judge to consider in his case, his case would be assigned to a Judge for determination based solely on the FORM. No response to the FORM was received from Applicant. The case was assigned to the Judge for determination after Applicant's time to respond to the FORM had passed. In view of the foregoing, the Board concludes Applicant was provided a reasonable opportunity to respond to the FORM and to submit evidence for the Judge to consider in his case. Having failed to take advantage of the opportunity to respond to the FORM and submit evidence for the Judge to consider in his case, Applicant cannot fairly challenge the Judge's findings of fact based on his proffer of new evidence.

As noted earlier in this decision, there is no presumption of error below. Because Applicant's challenge to the

Administrative Judge's findings of fact is based solely on his proffer of new evidence, the Judge's findings of fact stand without the Board needing to review the record evidence and decide whether there is sufficient record evidence to support the Judge's findings of fact about Applicant's debts.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate 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