

DATE: October 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-01047

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 3, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline F (Financial Considerations). Administrative Judge Jacqueline T. Williams issued an unfavorable security clearance decision, dated August 17, 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 Applicant can have another hearing in his case. 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 Applicant can have another hearing in his case. The Administrative Judge issued a decision, dated August 17, 2005. In that decision, the Judge: (a) made findings of fact about Applicant's history of financial difficulties and his falsification of a security clearance application; (b) entered formal findings against Applicant under Guideline E (Personal Conduct) and Guideline F (Financial Considerations); and (c) concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On appeal, Applicant has not raised any claim of factual or legal error concerning the Administrative Judge's findings and conclusions under Guideline E (Personal Conduct) or Guideline F (Financial Considerations). However, Applicant does ask for another hearing in his case.

There is no presumption of error below, and the appealing party has the burden of identifying factual or legal error that warrants remand or reversal. Because Applicant has not challenged any of the Administrative Judge's findings and conclusions under Guideline E (Personal Conduct) and Guideline F (Financial Considerations), those findings and conclusions stand on appeal.

Applicant had a hearing before the Administrative Judge on February 22, 2005. Applicant's request for a new hearing does not identify any error by the Administrative Judge, or offer any argument as to why Applicant believes he is entitled to another hearing. The right to hearing is an important one under the Directive. However, the right to a hearing does not mean that an applicant is entitled to receive multiple hearings in his or her case. Absent a showing that an applicant was denied a reasonable opportunity to prepare for the hearing or was denied a reasonable opportunity to present evidence on his or her behalf, an applicant is not entitled to receive a new hearing just so the applicant can have another chance to present his or her case. *See, e.g.*, ISCR Case No. 02-30603 (February 25, 2004) at p. 3; ISCR Case No. 02-20403 (April 7, 2003) at p. 4. Applicant has not claimed, or made any colorable showing, that he was denied a reasonable opportunity to prepare for his hearing or denied a reasonable opportunity to present evidence at his hearing. Under the circumstances, the Board has no legitimate basis to remand the case for a new hearing as requested by

Applicant. *See* ISCR Case No. 00-0250 (February 13, 2001) at p. 4 (absent a showing that the applicant was denied her right to a hearing or her right to present evidence on her behalf, ordering a remand for a new hearing would give the applicant special treatment and deny other applicants their right to receive equal treatment under Executive Order 10865 and the Directive).

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated any factual or legal error below, and because Applicant seeks relief to which he is not entitled.

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