

DATE: November 30, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02613

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 November 2, 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). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated August 15, 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 issues have been raised on appeal: (1) whether the Administrative Judge failed to consider evidence that Applicant was trying to work with the Internal Revenue Service about his unpaid federal taxes; and (2) whether the Board should remand the case to the Administrative Judge so that Applicant can present new evidence for consideration 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 Issues [\(1\)](#)

1. Whether the Administrative Judge failed to consider evidence that Applicant was trying to work with the Internal Revenue Service about his unpaid federal taxes. The Administrative Judge found that Applicant failed to file his state and federal income tax returns for 2002 and 2003 until May 2005, and still owed a total of more than \$5000 in delinquent state and federal taxes despite having a current income of more than \$90,000 a year. The Judge concluded that the security concerns raised by Applicant's unsatisfied tax liabilities warranted unfavorable formal findings under Guideline F (Financial Considerations) because Applicant had not demonstrated a good faith effort to deal with his unsatisfied tax liabilities despite the evidence that he had the financial means to deal with them.

On appeal, Applicant contends the Administrative Judge failed to consider the evidence showing he was trying to work with the Internal Revenue Service (IRS) about resolving the matter of his unpaid federal taxes. This claim of error lacks merit. In the decision below, the Judge specifically noted that Applicant had scheduled a meeting with an IRS agent to discuss the matter of resolving his unpaid federal taxes. Applicant's disagreement with the weight that the Judge gave to that evidence does not demonstrate the Judge simply ignored that evidence. Moreover, the Judge was not required, as a matter of law, to conclude that Applicant's scheduling a meeting with an IRS agent was sufficient to demonstrate mitigation of Applicant's unpaid federal taxes.

2. Whether the Board should remand the case to the Administrative Judge so that Applicant can present new evidence for consideration in his case. On appeal, Applicant makes factual assertions about his conduct after the hearing with respect to dealing with his unpaid federal and state taxes, and asks that his case be remanded to the Administrative Judge "for additional findings of fact and conclusions in light of the additional information." Applicant seeks relief that he is not entitled to receive.

Absent a showing that Applicant was denied a reasonable opportunity to present evidence for the Administrative Judge

to consider, Applicant is not entitled to receive another opportunity to present evidence on his behalf. *See, e.g.*, ISCR Case No. 02-30603 (February 25, 2004) at p. 3. A review of the record below shows that Applicant had a reasonable opportunity to present evidence for the Administrative Judge to consider in his case. Furthermore, Applicant's claim that his situation has changed since the hearing was held does not warrant a remand to the Judge with instructions to reopen the record so that Applicant can present additional evidence. If DOHA was required to reopen a case merely because a party claims there has been a change in circumstances since the hearing, there would be little chance of achieving administrative finality in security clearance cases. *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)).

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below, and seeks relief that he is not entitled to receive.

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

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.c through 1.i. Those favorable formal findings are not at issue on appeal. Because of those favorable findings, Applicant's arguments about the debts covered by those favorable formal findings are moot.