

DATE: October 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06517

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 May 25, 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 Michael H. Leonard issued an unfavorable security clearance decision, dated April 25, 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 is arbitrary, capricious, or contrary to law. 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

On appeal, Applicant makes the following assertions: (a) because of the Administrative Judge's overwhelming case load, he did not give the case the attention it deserved and took six months longer to issue the decision than originally forecast; (b) Applicants have been granted clearances in other cases where they made an attempt to pay their debts; (c) the Judge made errors on his findings of fact; and (d) Applicant is successful and trusted in his field, and this establishes that the government should trust him as well. The Board construes these arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Applicant complains that the Judge's large caseload prevented the Judge from giving his case the attention it deserved and that the decision issued six months later than the Judge estimated at the hearing (the Judge indicated at the hearing that he would try to get the decision out within 60 days of the hearing date). Applicant's arguments do not demonstrate error on the part of the Administrative Judge or authority for the Board to make any modifications. The Board has no supervisory authority over Hearing Office Judges and no basis to assume how large an individual Judge's caseload may be. There is no basis in the record to conclude that the Judge processed this case in a way that would constitute error. Absent a showing that a delay in the processing of a case prejudiced an applicant's rights in any meaningful way, mere proof of delay is not sufficient to warrant remand or reversal of the Judge's decision. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 4. Without a showing of identifiable prejudice to the appealing party caused by the timing of the issuance of a Judge's decision, delay in the issuance of a Judge's decision does not warrant remand or reversal. *See, e.g.*, DISCR Case No. 93-1186 (January 6, 1995) at p. 5.

Applicant's brief contains a list of several DOHA decisions he argues are similar factually to his case in that they evidence efforts on the part of applicants to clear their debts. Applicant's brief contains a listing of case citations but does not describe or otherwise indicate how the cited cases relate to this case. Decisions of individual Hearing Office Judges are not binding on other Hearing Office Judges, nor are they binding on the Board. Because the decisions of Hearing Office Judges are not legally binding precedent in other cases, neither a Hearing Office Judge nor the Board is

required to distinguish them or justify why they are not persuasive authority. Rather, a party citing such decisions has the burden of demonstrating that the cited decisions addressed similar or identical issues and facts, articulated a rational basis for their conclusions, relied on reasoning or analysis that can be applied to the facts and circumstances of the current case, or that there are sound reasons the Board should follow the reasoning of the cited cases. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5. Applicant has satisfied none of these burdens by listing the citations of a group of cases in his appeal brief.

Applicant takes issue with two of the Administrative Judge's findings of fact and one of the Judge's conclusions. Specifically, he states: (1) The Judge found that an outstanding mortgage indebtedness had not been satisfied, but Applicant provided the Judge with evidence that the mortgage indebtedness should have been satisfied since the property in question, which had been foreclosed upon, was sold for an amount greater than the outstanding indebtedness; (2) the Judge found that Applicant had not made any attempt to divorce his wife when, in fact, Applicant obtained a divorce on June 3, 2005; and (3) a debt settlement company that Applicant had hired settled one debt for Applicant on May 24, 2005 and was helping him settle others, in contrast to the Judge's conclusion that none of Applicant's debts had been resolved under the company's program. The hearing in this case took place on October 27, 2004. Applicant's arguments (2) and (3) are based on factual assertions that go beyond, and seek to supplement the record evidence that was before the Administrative Judge. Such factual assertions constitute a proffer of new evidence on appeal, which the Board cannot consider. *See Directive, Additional Procedural Guidance, Item E3.1.29.* Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence on appeal. Regarding argument (1), the Board has reviewed the evidence described by Applicant and concludes that based on this evidence, the Judge was not required, as a matter of law, to find that the outstanding mortgage indebtedness had been satisfied. Applicant has failed to demonstrate error with regard to these findings and conclusion of the Judge.

Applicant asserts on appeal that he has a 27-year history in the security field, has customers that trust him and believe in him, and the government should be able to trust him as well. With regard to this argument, the Board notes that an applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. Although evidence about an applicant's job performance and employment history can be relevant to a whole person analysis of the applicant's security eligibility, such evidence is not dispositive of a case. *See, e.g.*, ISCR Case No. 01-26723 (November 30, 2004) at p. 3 (security clearance adjudications are not limited to consideration of an applicant's conduct on the job or during duty hours). A history of financial difficulties raises security concerns that can provide a rational basis for an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of a history of financial difficulties). Given the record evidence of Applicant's overall history of financial difficulties over many years, it was not arbitrary or capricious for the Judge to conclude that Applicant's history of financial difficulties raised security concerns under Guideline F that warranted an unfavorable security clearance decision. Considering the record as a whole, the Judge was not compelled, as a matter of law, to conclude that the evidence presented by Applicant concerning his job performance and employment history was sufficient to rebut, mitigate, or extenuate the security concerns raised by his overall history of financial difficulties.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board