

DATE: September 24, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-01812

## 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 October 29, 2002 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 Claude R. Heiny issued an unfavorable security clearance decision dated June 17, 2003.

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.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse 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<sup>(1)</sup>

Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant's appeal brief contains numerous factual assertions that go beyond the record evidence below that seek to introduce new evidence for the Board to consider. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to present evidence for consideration by the Administrative Judge in his case. Applicant cannot fairly challenge the Judge's decision based on evidence that was not presented to the Judge. Accordingly, the Board will address only those appeal arguments Applicant makes that do not rely on new evidence.

Applicant appeals on the ground that he has always acknowledged a child support debt owed to County A. However, his contention has been that he has been paying child support to County B and has never received a court order or garnishment request from County A. Applicant asserts that he is financially sound and capable of taking immediate action to pay the child support debt, but he has questions about the legitimacy of the debt. Applicant believes the Administrative Judge's conclusions concerning the debt should not be accepted.

The fact that Applicant disagrees with the Administrative Judge's findings and conclusions fails to demonstrate that the Judge erred. The question is whether the Judge's findings are supported by substantial record evidence and whether the Judge's conclusions do not reflect arbitrary or capricious reasoning.

The Administrative Judge's finding that Applicant owes an outstanding child support debt reflects a reasonable interpretation of the record evidence. The record evidence outlines Applicant's overall history of financial difficulties concerning his child support obligations, that started in the late 1980's. The Administrative Judge acknowledged the Applicant's desire to investigate the child support debt. The Judge pointed out that the mere desire to do so is insufficient; a systematic, concrete method of handling past due liabilities is needed to mitigate the Government's security concerns. Applicant's appeal argument fails to demonstrate that the Administrative Judge's decision is arbitrary,

capricious, or contrary to law.

Applicant asserts that he previously held a Department of Defense top-secret clearance for nearly 30 years. This does not demonstrate the Administrative Judge's findings and conclusions about Applicant's history of delinquent debts are arbitrary, capricious, or contrary to law.

In his appeal brief, Applicant requests an extension of time so that he can settle the outstanding indebtedness and forward proof of settlement to the Appeal Board. In the alternative, he requests an interim clearance to continue his employment. Neither of Applicant's requests can be granted. Because it cannot receive and consider new evidence, there is no legitimate basis upon which the Board could allow an extension of time to afford Applicant an opportunity to take actions that, in his perception, would mitigate his case. Furthermore, there is no provision in the Directive authorizing the Board to grant interim clearance to an applicant.

### **Conclusion**

Applicant has failed to meet his burden of demonstrating error by the Administrative Judge. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings favorable to the Applicant under Guideline E (Personal Conduct). Those formal findings are not at issue on appeal.