

DATE: January 21, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-12147

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Joseph Testan issued a decision, dated October 2, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

This Board has jurisdiction on appeal 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 decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated January 25, 2002. The SOR was based on Guideline J (Criminal Conduct) and Guideline F (Financial Considerations).

Applicant submitted an answer to the SOR, in which she stated, "I do not request a hearing." A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, and she was given an opportunity to submit a response to the FORM. Applicant did not file a response to the FORM.

The case was then assigned to the Administrative Judge for consideration. The Judge issued a written decision, dated October 2, 2002 in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse 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. *See* 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 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. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

### Appeal Issue

On appeal, Applicant asserts: (a) her financial difficulties were the result of job layoffs and her family struggled for two-and-a-half years to recover their financial footing before finally resorting to bankruptcy; (b) the period of financial difficulty was over eight years ago and does not reflect in any way on her financial standing today; (c) Applicant filed her state and federal income tax returns for the years 1997, 1998 and 1999 on March 15, 2002 and April 13, 2002 and it was her belief that the Department of Defense would automatically obtain confirmation of her filings; and (d) Applicant has held security clearances for the performance of her duties for the past fifteen years. The Board construes Applicant's assertions as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Regarding her financial history, which encompasses assertions (a) and (b) listed previously, Applicant merely repeats on appeal the arguments and evidence she presented in the case below. A review of the record evidence establishes that the Administrative Judge took into consideration Applicant's attempts to settle her debts before declaring bankruptcy and also took into account the effects of the bankruptcy and the passage of time upon Applicant's current financial posture. Notwithstanding this potentially mitigating evidence the Administrative Judge concluded that Applicant had provided insufficient evidence of current financial responsibility to warrant the granting of a security clearance. The Judge's conclusion was reasonable given the record evidence and, in the absence of error established by Applicant, that conclusion will be sustained on appeal.

Applicant's assertion (c) which involves her claim that she filed her delinquent tax returns in March and April of 2002 goes beyond the record evidence below. As such, it constitutes new evidence which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant argues that her submission of evidence of the tax return filings on appeal does not constitute new evidence as it merely substantiates evidence that she assumed the Department of Defense had already obtained as part of her case. Applicant had the opportunity to present such evidence for consideration by the Administrative Judge after she received the FORM in May 2002, but she did not do so. The record was devoid of any evidence of Applicant's income tax filings. The Administrative Judge's decision cannot be fairly challenged based on information that was not submitted to him by Applicant. Applicant fails to establish error on the part of the Judge.

Applicant's assertion (d) makes reference to her long history of duty performance and employment while in possession of a security clearance. Her assertion fails to demonstrate that the Administrative Judge erred. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C.Cir. 1960), *aff'd*, 367 U.S. 886 (1961). The Administrative Judge made findings of fact about Applicant's history of financial difficulties and tax return filing delinquencies. The Judge's findings provided an adequate basis for his adverse security clearance decision, notwithstanding Applicant's longstanding possession of a security clearance. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)(government need not wait until a security violation occurs before it can deny or revoke access to classified information), *cert. denied*, 397 U.S. 1039 (1970).

### Conclusion

Because Applicant has failed to demonstrate error below, the Board affirms the Administrative Judge's adverse security

clearance decision.

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

**Separate opinion of Chairman Emilio Jaksetic, concurring**

I concur with my colleagues' discussion and resolution of Applicant's appeal issues with one exception. Applicant challenges the Administrative Judge's adverse conclusions under Guideline F, noting her financial difficulties occurred several years ago and asserting they do "not reflect in any way on my financial standing today." Applicant's argument raises a challenge to the sufficiency of the Judge's decision. Although a Judge has broad discretion in writing a decision, a Judge must issue a decision that has sufficient clarity to permit the parties and the Board to discern the Judge's findings and conclusions, and the Judge's reasoning. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3. In this case, the Judge noted that Applicant's financial difficulties were not recent (Financial Considerations Mitigating Condition 1) and that they were caused, in part, by factors beyond her control (Financial Considerations Mitigating Condition 3). However, the Judge then failed to articulate an adequate explanation for why he concluded Applicant's past financial difficulties had current security significance. The Judge's failure to do so leaves me unable to decide whether the Judge's adverse conclusions under Guideline F had a rational basis or were based on arbitrary and capricious reasoning.

I concur with my colleagues' conclusion to affirm the Administrative Judge's adverse decision. Even though I conclude the Judge's adverse conclusions under Guideline F are inadequately explained, the Judge's findings and conclusions under Guideline J are sustainable and provide a sufficient basis for his adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board