

DATE: May 7, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-21030

## **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 the Applicant a Statement of Reasons (SOR), dated February 11, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline F (Financial Considerations). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated September 3, 2003.

Applicant appealed the Administrative Judge's unfavorable decision and, on January 13, 2004, we issued an Appeal Board Decision and Remand Order in the case.

Administrative Judge Ablard issued an unfavorable remand decision, dated January 22, 2004. Applicant appealed the Administrative Judge's unfavorable remand decision. The 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 following issue: whether the Administrative Judge erred by failing to give sufficient weight to applicable mitigating conditions. For the reasons that follow, the Board affirms the Administrative Judge's remand 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 erred by failing to give sufficient weight to applicable mitigating conditions. On appeal, Applicant contends the Judge should have concluded that the security concerns raised by her debts were mitigated by application of Financial Considerations Mitigating Conditions 3, <sup>(2)</sup> 4, <sup>(3)</sup> and 6. <sup>(4)</sup> In support of that contention, she also argues that the Judge erred in making formal findings against her with respect to debts which she disputed, or which she had paid off or settled, either right before the hearing, or after the hearing (during the period of time that the Judge had left the record open for her to submit additional evidence). For the reasons that follow, we affirm the Judge's remand decision.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on whether there is record evidence that might support their application in a particular case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Accordingly, even if Applicant's financial difficulties initially arose due to circumstances outside her control, the Administrative Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with those financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 99-0012 (December 1, 1999) at p. 4. In this case, it was not arbitrary or capricious for the Judge to consider Applicant's failure to resolve the debts after the conditions which had contributed to the debts becoming delinquent had passed and her financial situation had significantly improved. Therefore, the Judge was not required to conclude Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Condition 3.

Similarly, because the debts at issue had been incurred years earlier and had not been resolved until right before or just after the hearing, or were still in dispute, it was not arbitrary or capricious for the Judge to conclude that there was insufficient evidence to show clear indications that Applicant's financial problems were under control. Given the record evidence in this case, the Judge could reasonably conclude that Applicant's eleventh hour resolution of her financial problems was not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required to conclude Applicant's belated efforts to address her financial difficulties warranted application of Financial Considerations Mitigating Condition 4.

Likewise, the Board has previously discussed what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6 (citation omitted)

Given Applicant's history of financial problems, the sizable nature of the indebtedness, and the fact that the debts at issue had been incurred years earlier, but virtually no effort had been made to resolve them until the eve of hearing or just after the hearing--well after the invocation of the security clearance process and the issuance of the SOR--it was not arbitrary or capricious for the Administrative Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to otherwise resolve her debts warranted application of Financial Considerations Mitigating Condition 6.

Finally, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and whether Applicant had satisfied her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's adverse conclusions under Guideline F.

The Judge made findings of fact and reached conclusions about Applicant's history of financial difficulties that reflect a plausible, legally permissible interpretation of the record evidence. Given the Judge's findings and conclusions, he had a rational basis to conclude Applicant's overall history of financial difficulties raised security concerns under Guideline F, and to conclude that Applicant had failed to present sufficient evidence to overcome those security concerns.

### **Conclusion**

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance remand decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of the Applicant with respect to SOR paragraphs 1.a, 1.d, 1.e, and 1.g. Those favorable formal findings are not at issue on appeal.
2. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive, Enclosure 2, Item E2.A6.1.3.3).
3. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive, Enclosure 2, Item E2.A6.1.3.4).
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).