

DATE: February 26, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-21939

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Joseph Testan issued a decision, dated November 7, 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 issues of (1) whether the Judge failed to consider favorable record evidence of Applicant's debt payments; and (2) whether the Judge's decision was 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 August 8, 2002. The SOR was based on Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct). A hearing was held on October 23, 2002.

The Administrative Judge issued a written decision, dated November 7, 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 Issues<sup>(1)</sup>

1. Whether the Judge failed to consider favorable record evidence of Applicant's debt payments. On appeal, Applicant states, "It is my belief that the judge did not recognize my records of payment and supporting documents." Without specifying what specific evidence the Judge overlooked, Applicant listed five debts in his appeal brief that he had paid.

An Administrative Judge is presumed to have considered all the evidence unless he or she makes an explicit statement to the contrary. In this case, the Administrative Judge specifically discussed the five debts Applicant claimed he had paid, made specific reference to exhibits that Applicant submitted at the hearing, and indicated Applicant's satisfaction of the debts in his findings of fact. Applicant has failed to demonstrate the Administrative Judge did not consider evidence presented by Applicant.

2. Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law.

Applicant asserts that: (i) the hearing transcript erroneously quotes him as saying he is "...a felon or a drinker or a drunk driver or a smoker."; (ii) the transcript also states his unwillingness to pay his debts; (iii) he is very concerned about his debts and he has paid off the five debts listed in his appeal brief within the last year; (iv) he cannot pay his debts because he is unemployed as a result of losing his security clearance; and (v) his employer will reinstate him when he receives his security clearance and he will then be able to resolve his debts. The Board construes these arguments as raising the issue of whether the Administrative Judge's decision was arbitrary, capricious or contrary to law.

Concerning the assertion that the transcript erroneously depicts Applicant's characterization of himself, Applicant has pointed to a transcript error in his closing statement that likely arose from the omission of the word "not." Despite the transcript error, two facts militate against a conclusion that the transcript error resulted in factual or legal error by the Administrative Judge: (a) though it could have persuasive effect, Applicant's closing argument is not evidence that the Judge was bound to consider; and (b) there is no indication in the Administrative Judge's decision that his adverse conclusions regarding Applicant's financial profile were in any way based on a conclusion that Applicant was a felon, a drunk or a smoker.

Applicant also asserts that the transcript erroneously indicates that he is unwilling to pay his debts. Without more detail, the Board is unable to determine what portion or portions of the transcript Applicant is referring to. The Board notes that the transcript indicates Applicant made various statements about his willingness to pay his debts (*e.g.*, Hearing Transcript at pp. 13, 64, 65, 69, 70, 71, and 78). Applicant's claim about the transcript is not well-founded.

Applicant's appeal comments concerning his desire to pay his debts and his efforts toward debt retirement do not demonstrate error on the part of the Administrative Judge. The Administrative Judge is responsible for weighing the record evidence, both favorable and unfavorable, before reaching an ultimate conclusion concerning about granting or continuing an applicant's security clearance. In this case, Applicant has retired a number of debts but many remained outstanding at the time of the hearing. There is ample evidence in the record to support the Judge's conclusion that Applicant will be under financial duress for a foreseeable period into the future. Applicant has failed to demonstrate error on the part of the Administrative Judge.

Applicant's statements about his job loss, his current inability to pay and his confidence in his ability to retire his remaining outstanding debts once he is reinstated by his employer do not demonstrate the Administrative Judge erred. Indeed, the Judge specifically mentions the fact of Applicant's job loss in his findings of fact. However, the matters referred to by Applicant do not mandate an overall favorable security clearance decision by the Administrative Judge.

As indicated in the preceding paragraph, the Judge was required to consider the facts and circumstances of Applicant's overall history of financial difficulties. Applicant's appeal statements do not persuade the Board that the Judge failed to consider the record evidence as a whole in making findings and reaching conclusions about Applicant's history of financial difficulties. Applicant has failed to demonstrate that the Judge's overall evaluation of the record evidence as a whole was arbitrary, capricious or contrary to law.

### **Conclusion**

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

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 2 (Personal Conduct) and 3 (Criminal Conduct). The Judge's formal findings under these paragraphs are not at issue on appeal.