

DATE: September 26, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00974

**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 7, 2002 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) and Guideline E (Personal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision dated May 20, 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 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**

In his appeal brief, Applicant makes statements about changes in his financial situation. Any changes in Applicant's financial situation since May 7, 2003, when the Judge closed the evidentiary record, constitute new evidence. The Board cannot consider new evidence. Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the Board will address only those arguments made by Applicant that do not rely on new evidence.

The Administrative Judge entered formal findings in favor of Applicant with regard to four debts under Guideline F (Financial Considerations), and those debts are not at issue on appeal. With regard to the remaining portions of Guideline F, Applicant argues that the Judge misinterpreted the evidence before her. He objects to the Judge's characterization of his financial situation as involving excessive indebtedness, since he contends the debts at issue comprise less than 10 percent of his annual income. He argues that he is not financially irresponsible and has not overspent. He also contends that the Judge should have applied certain Adjudicative Guidelines Mitigating Conditions and should have considered his situation in light of the "whole person concept." With regard to Guideline E (Personal Conduct), he states that he did not deliberately falsify his security application form (SF 86). He disagrees with the Judge's statement that he knew or should have known of his overdue debts. The Board interprets Applicant's contentions as an argument that the Judge's decision is arbitrary, capricious, or contrary to law.

The Administrative Judge was not required to accept at face value Applicant's testimony about his debts without corroborating documentation as to their status. *See* ISCR Case No. 01-09781 (September 25, 2002) at p. 3. Furthermore, the Judge could assess Applicant's demeanor during his hearing testimony and reach conclusions about Applicant's credibility. The Appeal Board must give deference to an Administrative Judge's credibility determinations. Directive, Additional Procedural Guidance, Item E3.1.32.1. Significantly, the Administrative Judge found that Applicant still has an unresolved child support debt which undermines Applicant's claim that the debts at issue comprise less than 10 percent of his annual income.

With regard to both Guideline E and Guideline F, the findings and conclusions with which Applicant disagrees are

matters within the discretion of the Judge. While Applicant believes that the Judge should have applied the "whole person concept" and certain Adjudicative Guidelines Mitigating Conditions, the Judge, in reaching her decision, considered the "whole person concept" and weighed the appropriate Mitigating Conditions against the security concerns arising under both Guideline E and Guideline F. The Board views the Judge's findings and conclusions as sustainable in view of the record below. Furthermore, the Judge's findings and conclusions under Guideline E and Guideline F provide a rational basis for her adverse security clearance decision. Therefore, the decision below is not arbitrary, capricious, or contrary to law.

### **Conclusion**

Applicant has failed to demonstrate that the Administrative Judge erred. Therefore, the Board affirms the 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board