

DATE: January 7, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-07014

## **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 April 28, 2003 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 Claude R. Heiny issued an unfavorable security clearance decision dated November 21, 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.

The following issues have been raised on appeal: (1) whether the Administrative Judge erred by finding Applicant falsified a security clearance application; and (2) whether the Administrative Judge's adverse conclusions about Applicant's overall history of financial difficulties are 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 Issues <sup>(1)</sup>

1. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in March 2001 by failing to disclose that he had several delinquent debts. On appeal, Applicant states that the omission "was not deliberate just an oversight on my part and for that I apologize." The Board construes Applicant's statement as raising the issue of whether the Judge erred by finding Applicant's omission was a falsification.

In responding to the File of Relevant Material (FORM), Applicant gave an explanation for why he did not disclose several delinquent debts when he completed the security clearance application in March 2001. Applicant's explanation is relevant and material evidence that the Judge had to consider. However, the Judge was not bound to accept Applicant's explanation at face value. Rather, the Judge had to consider Applicant's explanation in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0430 (July 3, 2001) at pp. 4-5; ISCR Case No. 99-0473 (May 12, 2000) at pp. 2-3. Given the record evidence in this case, the Judge could have accepted Applicant's explanation for the omission, or the Judge could have rejected Applicant's explanation. The Judge chose to reject Applicant's explanation as not credible. Considering the record as a whole, the Board concludes the Judge's choice was legally permissible and sustainable. Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge's adverse conclusions about Applicant's overall history of financial difficulties are arbitrary, capricious, or contrary to law. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about Applicant's history of financial difficulties. However, Applicant makes several statements about the facts and circumstances surrounding his history of financial difficulties, which the Board construe as raising the issue of whether the Administrative Judge's adverse conclusions about Applicant's overall history of financial difficulties are arbitrary, capricious, or contrary to law.

Given the Administrative Judge's findings of fact about Applicant's long history of financial difficulties, which remains unresolved as of the close of the record evidence, the Judge gave a reasonable explanation for why he concluded Applicant's history of financial difficulties was not extenuated or mitigated under Guideline F (Financial Considerations). Applicant's appeal statements fail to demonstrate that the Judge's analysis of this case under Guideline F is arbitrary, capricious, or contrary to law.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.a and 1.b. Those favorable formal findings are not at issue on appeal.