

DATE: December 22, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-07751

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Peter R. Moughan, Jr. Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated October 15, 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) and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated August 5, 2004.

Applicant appealed the Administrative Judge's unfavorable 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 issues: (1) whether the Administrative Judge's decision with respect to the financial consideration allegations is arbitrary, capricious, or contrary to law, and (2) whether the Administrative Judge erred by finding the Applicant's falsification of his security clearance questionnaire was deliberate. 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's decision with respect to the financial considerations allegations is arbitrary, capricious, or contrary to law. Applicant contends the Judge's decision should be reversed because: (1) Applicant's federal and state tax indebtedness resulted from a circumstance beyond his control--problems with his wife's day care business, (2) his tax debts are not recent, not of security significance, and he is current on his other financial responsibilities, (3) prior to the receipt of the SOR, Applicant paid off, or made payments on, or otherwise attempted to resolve most of his unpaid federal tax debts, and (4) there is currently no outstanding demand for payment for his state tax debts. In support of his contentions, Applicant lists multiple purported errors in the Judge's findings and conclusions, including an assertion that the Judge erred by not finding that the Government failed to meet its burden of proving disqualifying conduct by substantial evidence. Applicant also argues that his conduct should have been extenuated or mitigated under Financial Considerations Mitigating Conditions 1, <sup>(2)</sup> 2, <sup>(3)</sup> 3, <sup>(4)</sup> 4, <sup>(5)</sup> and 6. <sup>(6)</sup> The Board interprets Applicant's appeal brief as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The Applicant has not met his burden of demonstrating that the Judge's material findings and conclusions either: (1) do not reflect a reasonable or plausible interpretation of the record evidence, or (2) are not a legally sufficient application of Directive provisions. Considering the record evidence as a whole, the Judge's material findings of fact are sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3.

In this case, the Applicant had a pattern of repeated federal and state tax indebtedness over multiple years. At the time the case was submitted for decision, he still had significant outstanding state tax debts. Applicant had only finalized his arrangements with respect to his federal tax debts several days before receipt of the SOR--well after the initiation of the

security clearance process. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and still ongoing. Likewise the Judge could also reasonably conclude that Applicant's promises to resolve his remaining state tax indebtedness and his recent efforts to resolve his federal tax indebtedness were not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required as a matter of law to conclude Applicant's efforts to address his financial difficulties warranted application of Financial Considerations Mitigating Conditions 1, 2, 3, 4 and 6.

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, decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and conclude whether Applicant had presented sufficient evidence to satisfy his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15.

(7) The Judge reasonably addressed the possible application of the relevant disqualifying and mitigating conditions, and explained why Applicant had not sufficiently mitigated the security concerns raised by his history of substantial, federal and state tax indebtedness. 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 conclusions.

2. Whether the Administrative Judge erred by finding the Applicant's falsification of his security clearance questionnaire was deliberate. The Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose his federal and state tax debts. Rather, he contends the omission of the information in question was the result of "excusable neglect and oversight."

In considering Applicant's challenge to the Administrative Judge's finding of falsification, the Board notes the Judge's decision contains a legally erroneous statement about Applicant's burden of proof. Specifically, the Judge stated that the Board decision in ISCR Case No. 02-23133 (June 9, 2004) held that proof of an omission is sufficient to shift the burden of proof to an applicant to prove the omission was not a falsification. The reasons why the Judge's statement reflects an incorrect reading of the Board's decision in ISCR Case No. 02-23133 are set forth in ISCR Case No. 03-09483 (November 17, 2004), and need not be repeated here.

The Board does not need to decide whether the Administrative Judge's legal error is harmful or not under the particular facts and circumstances of this case. The Judge's findings and conclusions under Guideline F are sufficient to support his unfavorable security clearance decision. Accordingly, whatever conclusion the Board might reach about Applicant's claim of error concerning the Judge's finding of falsification would not change the result of this appeal.

### **Conclusion**

Applicant has failed to demonstrate harmful error below. Therefore, 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: 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 paragraph 2.c. That favorable finding is not at issue on appeal.
2. "The behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).
3. "It was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.2).
4. "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, Adjudicative Guidelines, E2.A6.1.3.3).
5. "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, Adjudicative Guidelines, E2.A6.1.3.4).
6. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, E2.A6.1.3.6).
7. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."