

DATE: August 27, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-11419

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Applicant has appealed the April 11, 2003, decision of Administrative Judge Michael H. Leonard, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 following issues: (1) whether the Administrative Judge erroneously concluded that additional time is necessary before Applicant can establish a track record of financial responsibility and stability sufficient to mitigate security concerns; (2) whether the Administrative Judge's decision is arbitrary, capricious or contrary to law because it is not supported by the weight of the evidence; and (3) whether Applicant can be granted a security clearance during a probationary period. For the reasons that follow, the Board affirms the Administrative Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated July 14, 2002. The SOR was based on Guideline F (Financial Considerations). The hearing was on December 18, 2002.

### **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 Issue**

(1) Whether the Administrative Judge erroneously concluded that additional time is necessary before Applicant can establish a track record of financial responsibility and stability sufficient to mitigate security concerns. On appeal, Applicant argues that for better than two years he and his spouse made no purchases unless they could pay cash; that they owe nothing on their vehicles, have minimum utilities (no extravagant cable bills), and pay bills like car insurance in lump sums to avoid interest. We construe Applicant's arguments to be that such conduct is evidence of responsible financial management that mitigates security concerns. <sup>(1)</sup> Applicant apparently believes that his failure to take action to resolve past due debts was complete once they became delinquent, and that his most current conduct should be viewed as the relevant conduct for security purposes. *See* Hearing Transcript (HT) at pp. 114-115.

Applicant testified that he and his wife are striving to put more security into their financial situation, and he cited the fact that they paid cash for their vehicles, rather than obtain credit even at low interest rates, as an example of how they changed their approach to finances. *See* HT at pp. 46-47. <sup>(2)</sup>

But the mere presence of favorable evidence does not mandate a favorable security decision. The Judge must weigh the evidence and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See* ISCR Case No. 02-14950 (May 15, 2003) at p. 6. Security clearance decisions are not exact science, but involve predictive judgments about a person's security eligibility based on consideration of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Moreover, Directive, Enclosure 2, Item E2.2.3 requires the Judge to make a security decision based on the "whole person," not just an applicant's most current activities. The Judge found that Applicant's recent pursuit of relief through bankruptcy (although a bankruptcy petition had not been filed at the time of the hearing) was the first step that Applicant had taken to try to resolve his financial problems. The Judge considered all the mitigating conditions and found no basis for serious consideration under Financial Considerations Mitigating Condition 1. That conclusion is supported by the record evidence. Applicant has failed to demonstrate error on the part of the Administrative Judge.

(2) Whether the Administrative Judge's decision is arbitrary, capricious or contrary to law because it is not supported by the weight of the evidence. Applicant requests the Board to consider three factors in deciding his appeal: (a) he has the complete confidence of company management; (b) he experienced several financial downturns that were completely beyond his control; and (c) he made a good faith effort to resolve his financial difficulties by filing for protection under Chapter 7 of the Bankruptcy Code on February 26, 2003. We construe Applicant's position to be that based on these three considerations it was erroneous for the Judge not to grant him a security clearance.

Opinions of an applicant's employer or supervisor about his suitability for a security clearance are not binding on the Administrative Judge or other federal officials who are responsible for making such decisions. *See* ISCR Case No. 99-9020 (June 4, 2001) at p. 7.

Applicant advised the Board of the post-hearing filing of his bankruptcy petition, presumably to urge us to find that Applicant initiated a good-faith effort to resolve his debts. <sup>(3)</sup>

As stated above, the Board cannot receive or consider new evidence; therefore, we cannot consider the effect, if any, that the filing of the bankruptcy petition would have had for purposes of Mitigating Condition 6.

Applicant urges the Board to find that the Judge erred because Applicant had experienced several financial downturns that were completely beyond his control. Security concerns can be mitigated when financial difficulties are the result of situations that are largely beyond an applicant's control (*e.g.*, loss of employment, a business downturn, an unexpected

medical emergency, death, divorce). *See* Directive, Enclosure 2, Item E2.A6.1.3.3 (Financial Considerations itigating Condition 3). There is a rebuttable presumption that the Judge considered all of the record evidence unless otherwise stated. *See* ISCR Case No. 01-22566 (June 26, 2003) at p. 3. Apart from that presumption, the Judge here specifically focused on evidence that could support Applicant's position under itigation Condition 3, noting that of all six mitigating conditions, this was "the only condition that deserves serious consideration."

The Judge concluded that Mitigating Condition 3 did not apply because Applicant's financial difficulties were not the result of circumstances outside his control. The Judge noted that Applicant's divorce had occurred more than 10 years before the hearing, and he did not show that he was burdened by debt or payment obligations as a result. The Judge also noted that Applicant's business failure did not result in business debts that he became obliged to satisfy. Applicant was unemployed in 2001 for about four months, but the Judge found that this was a relatively brief period considering the extent of Applicant's financial difficulties. Other record evidence supports the Judge's conclusion about Mitigating Condition 3.

Given the record evidence as a whole, Applicant's argument that circumstances beyond his control led to his financial difficulties is unpersuasive. He failed to meet his burden of presenting evidence sufficient to warrant application of the mitigating condition. Overall, there is sufficient evidence to allow the Judge to conclude that Applicant's history of financial irresponsibility raises unresolved security concerns. *See* ISCR Case No. 99-9020 (June 4, 2001) at pp. 8-9.

(3) Whether Applicant can be granted a security clearance during a probationary period. Applicant inquires in his brief about the possibility of using a probationary period in his case to allow him to keep his security clearance while the government periodically "checks up" on him. Applicant requests relief that is not authorized under the Directive and cannot be granted by the Board.

### **Conclusion**

Applicant has failed to meet his burden of demonstrating error below. The Board affirms the Administrative Judge's adverse security decisions for the reasons stated herein.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Conditions that could mitigate security concerns include: the behavior was not recent. *See* Directive, Enclosure 2, Item E2.A6.1.3.1 (Financial Considerations Mitigating Condition 1).

2. Some of Applicant's comments on appeal enhance this testimony and try to clarify his "full time" employment. To that extent, it is new evidence that the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

3. Another condition that could mitigate security concerns is an applicant's initiation of a good-faith effort to repay overdue creditors or otherwise resolve debts. *See* Directive, Enclosure 2, Item E2.A6.1.3.6 (Financial Considerations Mitigating Condition 6).