

DATE: May 15, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-14950

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Roger C. Wesley issued a decision, dated December 30, 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 following issues: (1) whether the Administrative Judge erred in making certain findings; (2) whether the Administrative Judge failed to apply appropriate mitigating factors under Guideline F (Financial Considerations); (3) whether the Administrative Judge erred by relying on unenforceable debts to draw adverse conclusions under Guideline F; and (4) whether the Administrative Judge's adverse security clearance decision is 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 to Applicant a Statement of Reasons (SOR) dated June 27, 2002. The SOR was based on Guideline F (Financial Considerations). A hearing was held on October 9, 2002.

The Administrative Judge issued a written decision, dated December 30, 2002, in which he concluded that 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." *See* 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).

### **Administrative Judge's Findings and Conclusions**

The Administrative Judge found that Applicant has a history of financial difficulties that resulted in numerous delinquent debts, most of which were unresolved as of the date of the hearing.<sup>(1)</sup> The Judge considered the facts and circumstances under which Applicant's financial difficulties arose and the steps Applicant took to deal with these financial difficulties and concluded that Applicant had not demonstrated sufficient extenuation or mitigation to warrant favorable conclusions under Guideline F. The Judge concluded Applicant's overall history of financial difficulties precluded a favorable security clearance decision.<sup>(2)</sup>

### **Appeal Issues**

1. Whether the Administrative Judge erred in making certain findings: Applicant challenges several of the Administrative Judge's findings of fact: (a) the Applicant's monthly take home pay is about \$1,800; (b) the Applicant's assets (including the equity in his home) total in excess of \$200,000; (c) Applicant accrued more than \$85,000 in debts; (d) the Administrative Judge incorrectly assumed that Applicant's creditors would have benefitted from his filing a bankruptcy petition; and (e) Applicant relied on credit cards to meet housing and other family necessities after leaving the employ of Company 1. For the reasons that follow, the Board concludes that, with two exceptions that are harmless error, Applicant's claims fail to demonstrate error below.

(a) The Administrative Judge erred by finding Applicant's monthly take home pay is around \$1,800 per month. Applicant testified that his take home pay was \$1,800 every two weeks, not \$1,800 monthly (Hearing Transcript at p.107). This does not help Applicant's position because it indicates that he had more disposable income to satisfy delinquent debts than what the Administrative Judge found. This mistake in Applicant's favor is harmless error because, reviewing the entire record, there is no significant chance that, but for the error, the Judge would have reached a different result. *See* ISCR Case No. 00-0250 (July 11, 2001) at p.6.

(b) There is record evidence supporting the Administrative Judge's finding that Applicant's assets now are in excess of \$200,000 (including the equity in his house). This finding is supported by Applicant's most recent financial statement (Government Exhibit 3, page 7, dated October 4, 2000) in which he stated that his assets total \$212,500. Considering the record evidence as a whole, the Judge's finding is sustainable.

(c) The Administrative Judge did not err in finding that the total amount of Applicant's debts exceeds \$85,000. On cross-examination, Department Counsel drew Applicant's attention to the fact that the total of all non-disputed, recognized debts exceeds \$85,000. Applicant claims that some of these are duplications caused by the transfer of the same debt from one collection agency to another. Applicant also believes that some of the amount involves interest and fees. However, when Department Counsel invited him to identify the duplications, Applicant admitted that he had no evidence to support his position about the duplication (Hearing Transcript at pp. 113-114). Accordingly, no record evidence supports the claim of duplication. The statement in Applicant's appeal that approximately nine debts are duplicates is not supported in the record.

(d) The Board finds nothing in the record to indicate that the Administrative Judge assumed that Applicant's creditors would have benefitted from his filing of a bankruptcy petition. Department Counsel's cross-examination, as well as the Administrative Judge's questions to the Applicant, suggest an effort to determine whether Applicant initiated any good-

faith efforts to repay the overdue creditors or otherwise resolve these outstanding debts. This is directly relevant to Financial Considerations Mitigating Condition 6 (individual initiated good-faith efforts to repay overdue creditors or otherwise resolve debts). Contrary to Applicant's assertion, the Judge did not merely focus on bankruptcy as an option.

(e) As to the last alleged error, we agree that the record does not support the Administrative Judge's finding that Applicant came to rely on credit card debt to meet housing and other family necessities following the 1995 loss of the high paying job at Company 1. However, the Administrative Judge's focus was on Applicant's behavior after the credit card debt accrued, not on Applicant's behavior that lead to the debt. Accordingly, we find that, to the extent that the Administrative Judge erred, the error was harmless.

2. Whether the Administrative Judge failed to apply appropriate mitigating factors. The Administrative Judge concluded that two Financial Considerations disqualifying conditions applied: a history of not meeting financial obligations (Disqualifying Condition 1) and inability or unwillingness to satisfy debts (Disqualifying Condition 3). *See Directive, Enclosure 2, Items E2.A6.1.2.1 and E2.A6.1.2.3.* The Administrative Judge also specifically considered Financial Considerations Mitigating Conditions 3 (conditions that resulted in the behavior were largely beyond person's control; e.g., loss of employment, unexpected medical emergency) and 6 (individual initiated good-faith effort to repay overdue creditors or otherwise resolve debts). *See Directive, Enclosure 2, Items E2.A6.1.3.3 and E2.A6.1.3.6.* Applicant contends that the Administrative Judge erred in not considering his situation under Financial Considerations Mitigating Conditions 1 (behavior not recent) and 2 (isolated incident). *See Directive, Enclosure 2, Items E2.A6.1.3.1 and E2.A6.1.3.2.*

The Administrative Judge is required to weigh the evidence of record, both favorable and unfavorable, before reaching his ultimate security clearance decision. Absent a showing by Applicant that the Administrative Judge weighed the evidence in a manner that was arbitrary, capricious or contrary to law, the Judge's evaluation will not be disturbed on appeal. *See ISCR Case No. 98-0349 (February 3, 1999) at p. 3.* When so weighed, it is not arbitrary or capricious for the Judge to conclude that Applicant's financial difficulties were neither isolated nor remote. Multiple acts of financial mismanagement that occur over a period of several months or more cannot reasonably be characterized as "an isolated incident." *Compare ISCR Case No. 99-0296 (April 18, 2000) at p. 4.* Moreover, we disagree with Applicant's apparent assumption that his failure to take action to resolve the debts once they were incurred was complete at the point in time that he stopped making payments. His failure to properly resolve the debts continued up to the close of record evidence. *See ISCR Case No. 99-0296 (April 18, 2000) at pp. 3-4; ISCR Case No. 98-0111 (November 13, 1998) at p.4.* The Administrative Judge had a reasonable basis for not applying Mitigating Conditions 1 and 2 in this case.

3. Whether the Administrative Judge erred by relying on unenforceable debts to draw adverse conclusions under Guideline F. Applicant argues that he had the legal right under state law to resolve his debts by allowing the applicable statute of limitation to bar them. Applicant also suggests that it is arbitrary to require him to list delinquent credit information "slightly under seven years old" but not require it when just over seven years. However, it is not arbitrary, capricious or contrary to law for the Administrative Judge to consider, under Guideline F, all of Applicant's delinquent debts, including those that may be unenforceable by his creditors.

Security clearance decisions are not controlled or limited by any statute of limitation. Absent an explicit act of Congress to the contrary, the federal government is not bound by state law in carrying out its functions and responsibilities. A security clearance adjudication focuses on evaluating an applicant's judgment, reliability and trustworthiness. Even if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. *See ISCR Case No. 01-09691 (March 27, 2003) at p. 3.*

Moreover, Applicant's contention that the debts will be removed from his credit history in the near future does not preclude their review for security purposes. Even if Applicant's reading of the Fair Credit Reporting Act were correct, the removal of those debts from his credit report does not make them disappear as if they never existed or preclude the Judge from considering other record evidence that shows those debts exist. The security significance of Applicant's financial history does not turn on whether Applicant's debts could or could not be legally listed on a credit report after the passage of seven years. *See ISCR Case No. 98-0111 (November 13, 1998) at p.3.*

4. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant also asserts there are other factors that are relevant to the whole person concept which, when combined with his other claims of error, required the Administrative Judge to reach a different outcome. The Board construes this contention as raising the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. The factors cited by Applicant include: he is meeting current financial obligations; his credit was "sterling" prior to the events of 1995/1996; he engaged in "whistle blowing" because it would have been unethical and illegal to do otherwise; he served the country for over 20 years on active duty; he demonstrated through the whistle blowing incident that he can be trusted to protect classified information; and the government did not meet its burden of proof that he is a security risk.

The Board finds Applicant's challenge to the Administrative Judge's adverse formal findings unpersuasive. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. A history of excessive indebtedness or recurring financial problems raises legitimate concerns about an applicant's security eligibility. Applicant's history of delinquent debts, even after he secured his current employment, provides a rational basis for the Judge's adverse formal findings under Guideline F and his overall adverse security clearance decision.

There is a rebuttable presumption that the Administrative Judge considered all of the record evidence unless the Judge specifically states otherwise. *See* ISCR Case No. 96-0544 (May 12, 1997) at p. 3. Apart from the presumption, a reading of the decision shows that the Judge considered the evidence cited by Applicant on appeal. For example, the Judge accepted Applicant's explanation that he reported contract fraud against the government by Company 1, and the Judge noted that such behavior merited acknowledgment and commendation. But the Judge also found that Applicant's whistle blowing efforts were not enough to absolve him of the financial risks associated with the debts. 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. *See* ISCR Case No. 98-0111 (November 13, 1998) at p. 4.

Finally, the Directive clearly places the burden of proof on Applicant for presenting evidence to rebut, explain, extenuate, or mitigate facts admitted by him or proven by Department Counsel, and Applicant has the ultimate burden of persuasion as to obtaining a favorable security clearance. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Considering the record as a whole, it was not arbitrary or capricious for the Judge to conclude Applicant had failed to demonstrate extenuation or mitigation sufficient to warrant a favorable security clearance decision.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error below that warrants remand or reversal. The Board affirms the Administrative Judge's adverse security clearance decision for the reasons stated herein.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's findings and conclusions in favor of Applicant with respect to SOR subparagraph 1.b are not at issue on appeal.
2. Applicant's appeal brief contains factual assertions that go beyond the record evidence. As such, those assertions constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.