

DATE: February 24, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-20493

## **APPEAL BOARD DECISION AND REMAND ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jason R. Perry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated September 30, 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 Henry Lazzaro issued a favorable security clearance decision, dated August 26, 2004.

Department Counsel appealed the Administrative Judge's favorable 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.

The following issues are raised on appeal: (1) whether the Administrative Judge erred in his application of Mitigating Condition 3 under Guideline F; and (2) whether the Administrative Judge erred in his application of Mitigating Condition 6 under Guideline F. For the reasons that follow, the Board remands the case to the Judge for processing consistent with the Board's rulings and instructions.

#### **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 in his application of Mitigating Condition 3<sup>(2)</sup> under Guideline F. The Administrative Judge found that Applicant had financial delinquencies under Guideline F (Financial Considerations). The Judge also found: (a) a prior marriage of Applicant ended in divorce in 1993; (b) Applicant acknowledged that a particular credit card debt may have been paid off, but his ex-wife used the account while he and she were obtaining a divorce and he denied liability for her charges<sup>(3)</sup>; (c) in a 2001 statement given to the Defense Security Service, Applicant attributed his then existing financial problems to his divorce, lending money to his friends after the divorce, and his current wife's health problems; and (d) in response to financial interrogatories in May 2003, Applicant stated that he and his wife had both been off from work for periods of time because of health problems. The Administrative Judge concluded: (i) Applicant credibly attributed whatever financial problems he has experienced to his divorce, the health problems he and his present wife have experienced, and the loss of income that resulted from being out of work because of health problems; and (ii) Guideline F Mitigating Condition 3 applied to the case.

On appeal, Department Counsel argues that the Administrative Judge's application of Guideline F Mitigating Condition 3 was improper. In support of its contention, Department Counsel asserts: (a) Applicant's divorce was nearly ten years ago and the record evidence reveals that his financial problems have been ongoing since that time; (b) soon after his divorce, Applicant ended up paying bills for a number of close friends as well as his mother, and these people failed to repay him, leaving him with additional indebtedness; (c) a majority of Applicant's delinquent accounts are credit card accounts which became past due before 2001 and are therefore not related to medical expenses; (d) there is no indication from the record evidence that Applicant was out of work for any extended period of time; and (e) the Applicant provided no documentation to support his assertions that his divorce and medical problems have resulted in his current financial difficulties. For the most part, Department Counsel's assertions have merit.

The Applicant bears the burden of producing evidence that warrants the application of mitigating factors. The Judge's finding that Applicant's financial problems can be attributed, in part, to his divorce derives essentially from Applicant's very general assertion in a 2001 sworn statement that "some of my debts are from my divorce." There is no record evidence that further elaborates upon Applicant's statement or that reveals how the divorce caused or contributed to Applicant's financial delinquencies. There is also no record evidence that explains how Applicant's 1993 divorce continues to affect Applicant's financial delinquencies more than eight years later. Department Counsel points out that Applicant provided no documentation to support his assertion that his divorce resulted in his current financial difficulties. The Board need not rule that corroboration of an applicant's assertions regarding finances is generally required to rule that, in this case, the paucity of evidence, other than Applicant's broad assertion, undermines the Judge's finding that there was a significant connection between Applicant's divorce and his longstanding indebtedness. Other than Applicant's statement that some of his debts were from his divorce, the only evidence of record that establishes any connection between Applicant's divorce and his financial delinquencies is: (a) information on credit reports that four out of eleven delinquent debts listed on the SOR were opened prior to Applicant's divorce<sup>(4)</sup>; and (b) evidence that one of the four debts (the debt alleged in subparagraph 1.j. of the SOR) may have involved Applicant's ex-wife's incurring of an unspecified amount of debt at the time of the divorce.

Department Counsel persuasively argues that, aside from any consideration of Applicant's divorce and its possible effect upon his finances, there is evidence that Applicant compounded his debt problems by overextending himself financially and making a number of poor decisions in lending money to friends and family. The record evidence contains admissions from Applicant that, after his divorce: (a) he lent \$2,000-2,500 to a friend and the loan was never repaid; (b) he moved in with a girl friend and made the mistake of paying some of her bills and allowed her to use his credit cards, which resulted in some of the delinquent indebtedness he accumulated; and (c) he tried to help his mother with her finances. These voluntary actions undertaken by Applicant do not constitute conditions that were beyond his control for the purposes of applying Financial Considerations Mitigating Condition 3. Department Counsel correctly asserts that this voluntary activity, and the specific evidence of record as to how it affected Applicant's finances, significantly undercuts the Judge's application of Financial Considerations Mitigating Condition 3.

Regarding the Administrative Judge's finding that Applicant's health problems and those of his current wife contributed to Applicant's debt delinquencies, Department Counsel argues that the majority of Applicant's delinquent accounts became past due prior to the time Applicant and his wife experienced their health difficulties and are not related to medical expenses. Department Counsel also argues that there was no record evidence that Applicant was out of work for an extended period of time. A review of the record evidence reveals that Department Counsel's first argument has merit. Most of Applicant's delinquent debts precede the 2001-2002 time frame when Applicant claims he and his wife experienced medical and layoff problems. Moreover, only one of Applicant's debts is specifically identified in the record as being medically related. There is no record evidence that Applicant's or his current wife's medical problems created additional debt, other than a general statement by Applicant, not otherwise explained, that his wife had some health problems which had been a financial drain. Inasmuch as Applicant has the burden of proof to produce evidence justifying application of mitigating conditions, this lack of more specific evidence identifying substantial debt as being the result of medical expenses undermines the Judge's application of Financial Considerations Mitigating Condition 3. Regarding Applicant's loss of work because of health problems, the record evidence includes Applicant's statement that he missed approximately five months of work because of medical problems between April 2002 and mid-January 2003. In light of this evidence, Department Counsel's second argument that Applicant was not out of work for an extended period of time minimizes that factor to an extent not warranted by the record. However, there is a lack of record evidence indicating how much income, if any, Applicant lost as a result of his or his wife's layoffs. Additionally, when describing in the record what effect his layoffs had upon his financial situation, Applicant stated that his medical difficulties made it difficult to catch up with his old debts. As the available evidence describes a situation where the layoffs hampered Applicant's ability to pay old delinquent debts that had already accumulated, as opposed to creating new debt, the evidence surrounding the layoffs has very limited applicability to Financial Considerations Mitigating Condition 3, which speaks in terms of debts that arise out of circumstances beyond an applicant's control.

Considering the record evidence as a whole, the Administrative Judge failed to articulate a sustainable basis for applying Financial Considerations Mitigating Condition 3 to Applicant's overall history of financial difficulties. The totality of the record does not support the conclusion that Applicant's indebtedness resulted from conditions that were largely beyond his control.

2. Whether the Administrative Judge erred in his application of Mitigating Condition 6<sup>(5)</sup> under Guideline F. The Administrative Judge found that: (a) Applicant claimed that he did not know whom some of the creditors listed on his credit report were; (b) Applicant paid off one account in December 1998; (c) Applicant sought reinvestigation of a number of the listed accounts; (d) credit reports indicate that several of Applicant's debts were reinvestigated and deleted from his credit report; (e) Applicant is working to resolve a delinquent medical bill in the amount of \$188 (alleged in subparagraph 1.f. of the SOR) and some action was taken as the outstanding amount has been reduced to \$131; and (f) another delinquent credit account in the amount of \$12,853 remains outstanding, despite the creditor's offer to settle the account, because Applicant has chosen to rely on the fact that the account does not appear on two recent credit reports. The Administrative Judge concluded: (i) the \$131 debt remains delinquent but the evidence establishes that action is being taken to resolve it; (ii) although Applicant has not acted to resolve the \$12,853 debt, his inaction is the result of his mistaken notion that the fact that the debt is no longer listed on his credit report means he is no longer liable for the debt, and is not the result of any unwillingness or inability to satisfy the account; (iii) all the other debts listed in the SOR have either been satisfied, deleted from Applicant's credit report following a reinvestigation of his liability, or have not been shown to either belong to him, or be delinquent; and (iv) Financial Considerations Mitigating Condition 6 applies in this case.

On appeal, Department Counsel argues that the Administrative Judge improperly applied Financial Considerations Mitigating Condition 6. In support of its contention, Department Counsel argues: (a) the record evidence reveals that Applicant has demonstrated a lack of commitment toward repaying five outstanding debts totaling more than \$23,000; (b) Applicant has not provided any documentation to support his assertion that these five outstanding accounts have been satisfied or, alternatively, that he is not liable on these accounts; and (c) with regard to one of the five debts, the \$12,853 debt alleged in subparagraph 1.g. of the SOR, the Judge's conclusion that Applicant failed to take action to resolve this account due to a misunderstanding about his liability cannot be reconciled with Applicant's earlier admission of liability for the account, and is not supported by the record evidence.

On appeal, Department Counsel has limited its assignment of error regarding the Administrative Judge's application of Financial Considerations Mitigating Condition 6 to a consideration of five accounts. Those accounts relate to the allegations in subparagraphs 1.f., 1.g., 1.j., 1.l., and 1.m. of the SOR. Department Counsel has not challenged the Judge's findings and conclusions regarding the debts listed in subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.h., and 1.i. of the SOR. Therefore, the Board need not consider those findings and conclusions for purposes of resolving this appeal issue.

Upon consideration of Department Counsel's appeal arguments relating to the application of Financial Considerations Mitigating Condition 6 and the decision of the Administrative Judge, the Board finds that it is not now in a position to evaluate Department Counsel's arguments regarding the debts alleged in subparagraphs 1.j., 1.l., and 1.m. of the SOR. The Board is in a position, however, to address Department Counsel's arguments regarding the debts alleged in subparagraphs 1.f. and 1.g. of the SOR and will do so before addressing its inability to resolve the issues surrounding the other debts.

Regarding the debt listed under SOR subparagraph 1.f., the Administrative Judge found that the amount of the delinquent debt for medical services was initially \$188, but that Applicant worked to correct an incorrect insurance filing and the amount of the debt was subsequently reduced to \$131. The Judge then concluded that, although the debt was still delinquent, action was being taken to resolve the account. Although he does not say so explicitly in his decision, the Judge appears to rely on his findings and conclusions regarding debt 1.f. as part of his basis for applying Financial Considerations Mitigating Condition 6. In its appeal brief, Department Counsel does not address any of its arguments specifically to the Judge's findings and conclusions concerning debt 1.f. Rather, in challenging the Judge's findings and conclusions regarding all five debts raised on appeal, Department Counsel asserts generally that the evidence shows that Applicant displayed an unwillingness to pay debts, Applicant has not provided evidence that any of the five debts have been paid or that he is not liable on them, and Applicant has failed to show he initiated a good-faith effort to resolve his remaining debt. Department Counsel's general assertions lack merit and fail to establish error on the part of the Judge in his resolution of debt 1.f. The record evidence supports the Judge's findings that the Applicant made some effort to resolve the debt and that the amount of the debt was reduced. The Judge's conclusion that action is being taken to resolve debt 1.f. is also reasonably supported by the record evidence.

Department Counsel specifically argues that the Administrative Judge's conclusions regarding the debt listed at subparagraph 1.g. of the SOR are not supported by the record evidence. Department Counsel's contention has merit.

Regarding debt 1.g., the Administrative Judge found that: (a) Applicant admitted owing \$12,853 on the account; (b) the creditor offered to settle the account with either a greatly reduced lump sum payment or with monthly payments that were within Applicant's financial means to make; (c) Applicant failed to submit any proof of payment on the account and there was no indication that he had acted on either option presented by the creditor; and (d) Applicant chose to rely on the fact that debt 1.g. did not appear in the two credit reports he submitted with his SOR response. The Judge concluded that Applicant's failure to take action on the account was not because of any unwillingness or inability on his part to satisfy the account, but because he wrongly assumed that the fact that the account was not listed on his credit report meant that he was not liable on the debt. Department Counsel argues that the Administrative Judge's conclusion that Applicant failed to take action to resolve debt 1.g. due to a misunderstanding is contradicted by the Applicant's admission of liability for the account in March 2001. Department Counsel is correct. Applicant admits liability for debt 1.g. in a March 2001 statement and this fact significantly undercuts the Judge's conclusion that at a later time and after the creditor's proffers of compromise settlement offers, Applicant thought he wasn't liable for the debt. The only record evidence that provides any support for the Judge's conclusions about Applicant's state of mind after he received offers from the creditor to settle debt 1.g. is Applicant's December 30, 2003, response to subparagraph 1.g. of the SOR, wherein he makes the statement, without further explanation: "Deny-not on current credit report." There is no evidence of record that speaks directly to the issue of Applicant's state of mind in May 2003. Applicant's denial, made in December 2003, says little about Applicant's state of mind regarding the debt at the time settlement offers were made in May 2003. The Judge's conclusions about Applicant's reasons for not resolving debt 1.g., when he was given a clear opportunity to do so, are contrary to his own findings and are not supported by record evidence. Those conclusions are therefore not sustainable.

Department Counsel also argues that the debts alleged in subparagraphs 1.j., 1.l., and 1.m. of the SOR are still delinquent and Applicant has not demonstrated a commitment toward repaying these debts. Department Counsel asserts that the Administrative Judge improperly applied Financial Considerations Mitigating Condition 6 by considering the debts resolved and including them in his justification for invoking that mitigating factor. The Board's ability to address the claim of error regarding these three debts is greatly impaired by deficiencies in the Administrative Judge's decision.

An Administrative Judge has broad discretion and latitude in how to write a security clearance decision, subject to the legal constraints of the Directive and basic concepts of due process. See, e.g., ISCR Case No. 02-02528 (May 28, 2003) at p. 3. A Judge is required to issue a decision that sets forth "pertinent findings of facts, policies, and conclusions as to the allegations in the SOR." Directive, Additional Procedural Guidance, Item E3.1.25. In meeting that requirement, a Judge must set forth findings and conclusions with sufficient specificity and clarity so that the parties and the Board can discern what the Judge is finding and concluding. See, e.g., ISCR Case No. 98-0809 (August 19, 1999) at p. 2. The appeal rights of the parties and the ability of the Board to carry out its appellate functions are impaired when a decision contains findings and conclusions that cannot be understood. See, e.g., ISCR Case No. 98-0476 (July 22, 1999) at p. 4. In order to determine whether a Judge's findings are supported by substantial record evidence,<sup>(6)</sup> or whether the Judge's conclusions are arbitrary, capricious, or contrary to law,<sup>(7)</sup> the Board must be able to discern what findings the Judge made and what conclusions the Judge reached as to the SOR allegations.

In this case, the Administrative Judge's findings with regard to debts 1.j., 1.l., and 1.m. amount to little more than recitations of Applicant's representations on the record about those debts. They are therefore vague and unspecific. In his conclusions, the Judge states that, with the exception of debts 1.f. and 1.g., all of Applicant's remaining accounts have either been satisfied, deleted from his credit report following a reinvestigation of liability, or have not been shown to either belong to him or be delinquent. The Judge's decision does not indicate which of these categories debts 1.j., 1.l., and 1.m. fall into. Without more specific factual findings regarding these three debts, the Board cannot discern: (a) whether Department Counsel satisfied its initial burden of establishing that these three debts belonged to Applicant and were delinquent as alleged in the SOR; and (b) regarding mitigation, if applicable, what the Judge found about each of the three debts in terms of when and in what manner the debts were satisfied or otherwise resolved. The Board's current inability to answer these questions regarding each of the three debts precludes it from making a reasoned decision as to whether the Judge's conclusions regarding the applicability of Financial Considerations Mitigating Condition 6 are sustainable or are arbitrary, capricious, or contrary to law.

Because of the errors discussed above, and because of the vagueness and lack of specificity in the Administrative Judge's findings of fact regarding debts 1.j., 1.l., and 1.m., the appropriate remedy is to remand the case to the Judge to issue a new decision that is responsive to the Board's rulings on the appeal issues it was able to resolve, and that corrects the deficiencies in his findings of fact. *See, e.g.*, ISCR Case No. 93-0519 (August 25, 1994) at pp. 3-4 (concluding remand is appropriate when Board cannot discern what the Administrative Judge relied on in reaching his ultimate determination); DISCR Case No. 89-0806 (July 26, 1991) at p. 2 (concluding remand is appropriate when decision below does not contain clear and unambiguous findings regarding the various debts alleged in the SOR and the Board cannot discern what facts the Judge relied on in reaching his ultimate conclusions).

### **Conclusion**

Pursuant to Item E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the Administrative Judge with instructions to issue a new decision that complies with the rulings made in this Board decision and which eliminates the vagueness and uncertainty identified herein. Upon issuance of a new decision by the Judge, the parties retain their appeal rights. *See* Directive, Additional Procedural Guidance, Item E3.1.35.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made formal findings favorable to Applicant under subparagraphs 2.a. and 2.b. of the SOR. Those favorable findings are not at issue on appeal.

2. "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)."

3. This debt is the subject of subparagraph 1.j. of the SOR.

4. The SOR contains allegations concerning thirteen delinquent debts. In his decision, the Administrative Judge found that two of the debts were duplicated in other SOR allegations, thereby reducing the actual number of debts to eleven. Inasmuch as this finding has not been challenged on appeal, it is accepted by the Board for purposes of evaluating the arguments raised on appeal.

5. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

6. Directive, Additional Procedural Guidance, Item E3.1.32.1.

7. Directive, Additional Procedural Guidance, Item E3.1.32.3. See discussion of arbitrary and capricious standard in Scope of Review section of this decision.