

DATE: June 18, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-20947

## **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 September 11, 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 Roger C. Wesley issued an unfavorable security clearance decision dated March 17, 2004.

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 pre-hearing investigation and processing of Applicant's case constituted a denial of procedural due process; (2) whether the Board should accept post-hearing evidence concerning the funding of Applicant's 401K account and his payment of debts from the account proceeds; and (3) whether the Administrative Judge's security clearance decision is 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 [\(1\)](#)

1. Whether the pre-hearing investigation and processing of Applicant's case constituted a denial of procedural due process. On appeal, Applicant makes the following assertions: (a) he did not receive the Judge's March 17, 2004 decision until March 27, 2004, resulting in a loss of ten days' time in which to appeal, and possibly representing an effort to deny him time to appeal; (b) his security clearance has already been taken from him even though the appeal process is not complete; and (c) government investigators failed to provide him the name of a person in authority to whom he could begin to make payments on his outstanding debts and stop the investigation. The Board construes these assertions as a claim that the pre-hearing investigation and processing of Applicant's case constituted a denial of procedural due process. For the reasons that follow, the Board concludes that Applicant has failed to demonstrate a denial of his procedural rights under the Directive.

Applicant states that he did not receive a copy of the Administrative Judge's decision until ten days after it was issued, and asks whether "this was an effort to deny me time to appeal?" Applicant's question fails to raise any colorable claim of error in his case. First, there is a well-established legal presumption that government officials carry out their duties properly and in good faith, and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See, e.g., National Archives and Records Administration v. Favish*, 541 U.S. --, slip op. at 16 (March 30, 2004). Applicant's speculation about the motives of DOHA personnel responsible for mailing Hearing Office decisions to applicants falls far short of raising any colorable claim of improper conduct. Second, Applicant's concern is moot. Applicant's notice of appeal was submitted in a timely manner, and he suffered no prejudice to his appeal rights.

Applicant complains that his security clearance has already been taken from him even though the appeal process is not complete. The procedure for the treatment of existing security clearances after an adverse decision by an Administrative

Judge is governed by the Directive, Additional Procedural Guidance, Item E3.1.27 (which provides for notification of an applicant's employer, through official channels, if a DOHA Hearing Office Administrative Judge issues an adverse security clearance decision in the applicant's case). Actions taken to revoke an applicant's access to classified information after issuance of an adverse decision by a DOHA Administrative Judge are taken by DoD personnel outside the scope of the Board's jurisdiction and authority. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 5. Lacking jurisdiction and authority in the matter, the Board cannot comment further.

Applicant complains that, during the period when his case was being investigated, the investigators would not or could not identify for him a person in authority who would allow him to start making payments on overdue debt and would stop the investigation. The methods and scope of DSS investigations are outside the scope of review of the Appeal Board. *See, e.g.*, ISCR Case No. 02-32606 (January 21, 2004) at p. 3. Furthermore, nothing in Executive Order 10865 or the Directive gives an applicant a right to have a security investigation stopped or suspended for the applicant's convenience.

2. Whether the Board should accept post-hearing evidence concerning the funding of Applicant's 401K account and his payment of debts from the account proceeds. Applicant asserts on appeal that after the hearing, his employer made a sizable contribution to his 401K account and that this contribution would allow Applicant to pay off all his debts at once. Applicant asks the Board to allow him sufficient time to demonstrate that he has paid off his debts, either through the submission of a credit report or account receipts.

Applicant's assertions concerning his 401K account were not part of the record below. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the Board cannot consider Applicant's appeal assertions about his 401K account and cannot grant his request to delay action on his case to allow him to augment the record before the Board.

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

On appeal, Applicant asserts the following: (a) there is no reason to believe that his debts are a cause for concern since he has had the debts for many years and he has never been a security problem; (b) he has been able to keep his bills current and up to date since returning to work from layoffs; (c) no consideration was given to his outstanding record; (d) no consideration was given to his willingness to take a polygraph examination to prove that he was not lying when he filled out his security clearance questionnaire; (e) he could have paid his bills earlier on his own but he was afraid he would lose his job anyway and he needed the money for his family; and (f) he could have gotten character references from everyone that he works for. The Board construes these various assertions as an argument that the Administrative Judge's decision is arbitrary, capricious and contrary to law. For the reasons that follow, the Board concludes that Applicant has failed to demonstrate error on the part of the Judge.

Applicant's argument that his unblemished work record establishes that his debts are no cause for concern is without merit. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). The federal government need not wait until an applicant actually mishandles or fails to safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No.98-0188 (April 29, 1999) at p. 4. The record evidence about Applicant's job performance did not preclude the Judge from making an adverse decision based on Applicant's history of financial difficulties. *See* ISCR Case No. 99-0123 (January 11, 2000) at p. 3.

"Under [Guideline] F, the security eligibility of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties. Furthermore, [f]inancial difficulties, financial

irresponsibility and greed have proven to be significant motivating forces for espionage or attempted espionage. It is clear that the United States must consider whether individuals granted access to classified information are, through financial irresponsibility, greed or financial misfortune, in a position where they may be more susceptible to mishandling or compromising classified information or material for financial gain." ISCR Case No. 96-0454 (February 7, 1997) at p. 2 (citations and internal quotation marks omitted). Given Applicant's overall history of financial problems, including several delinquent debts that were still unsatisfied as of the hearing date, the Administrative Judge had a rational basis for his doubts about Applicant's current security eligibility.

Applicant asserts that he was able to maintain timely payments on current accounts after returning to work after a layoff. This was favorable evidence that the Administrative Judge was required to consider, and a reading of the Judge's decision indicates that he did so. However, Applicant's ability to cite to favorable record evidence fails to establish error on the part of the Administrative Judge. The Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and decide whether Applicant has met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. Considering the record as a whole, the Judge did not weigh the record evidence in a manner that was arbitrary, capricious or contrary to law.

Applicant complains on appeal that no consideration was given to his twenty-nine-year outstanding record. He also states that, concerning the issue of his falsification of a security clearance questionnaire, no consideration was given to his hearing testimony that he would be willing to take a polygraph exam to establish he was telling the truth.

There is a rebuttable presumption that an Administrative Judge has considered all the evidence in a case record. Furthermore, an Administrative Judge need not discuss every single piece of record evidence in his decision. A review of the Judge's decision in this case reveals that the Judge discussed neither Applicant's work record nor his willingness to take a polygraph examination. These omissions do not constitute error however. The absence of these items from the decision does not establish that the Judge did not consider them. Additionally, given the totality of the record evidence, the evidence Applicant maintains was not considered is not of sufficient magnitude, either in terms of mitigation or refutation of the government's case, to render the Judge's ultimate conclusions arbitrary, capricious or contrary to law.

In his appeal brief, Applicant states that he could have paid his debts off earlier, but did not do so because he thought he would still lose his job and his family needed the money. He also states that he could have produced character witnesses for the record but did not feel they were necessary. Neither of these assertions establishes error on the part of the Administrative Judge.

An admission by Applicant that he had the ability to pay his debts off earlier but elected not to do so is not mitigating given the record evidence in this case and does nothing to undermine the Judge's ultimate conclusions concerning Applicant's financial history and its effect upon Applicant's security suitability. Regarding character references, Applicant's offer to produce such witnesses does not show the Judge erred. The hearing was the Applicant's opportunity to produce evidence rebutting, explaining, extenuating, or mitigating facts to which he has admitted to or which have been proven by Department Counsel. *See* Directive, Additional Procedural Guidance, Item E3.1.15. He cannot complain on appeal about foregoing opportunities to present favorable evidence below.

### **Conclusion**

Applicant has failed to demonstrate 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made formal findings in Applicant's favor for SOR paragraphs 1.g through 1.i. Those findings are not in issue in this appeal.