

DATE: August 4, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-21046

## **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 December 5, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline F (Financial Considerations). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision, dated April 26, 2005.

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 issue has been raised on appeal: whether Applicant was deprived of her right to present evidence in her behalf for the Administrative Judge to consider. 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 Issue**

Whether Applicant was deprived of her right to present evidence in her behalf for the Administrative Judge to consider. On appeal, Applicant states that her financial situation has changed and all evidence was not submitted in the first hearing. The Board construes this statement as raising the issue of whether Applicant was deprived of her right to present evidence in her behalf for the Administrative Judge to consider.

As a preliminary matter, the fact that Applicant claims her financial situation has changed does not demonstrate error in the Administrative Judge's decision. The Board is precluded from considering new evidence on appeal, and a Judge's decision must be evaluated on appeal based on the record before him.

The Administrative Judge's adverse security clearance decision was based on his conclusion that Applicant failed to mitigate financial concerns arising from eleven delinquent debts totaling \$13,497.00. On June 1, 2004, ten days prior to the scheduled hearing date, Applicant submitted a written request to the Judge requesting a 30-day extension (continuance) in the case. Applicant indicated that she was waiting for letters from her creditors and she needed additional time to prepare her case. Department Counsel indicated in writing that it would be inclined to oppose the request for delay, but it would not object to keeping the record open for a few weeks after the hearing in order to allow Applicant time to get statements from her creditors. On June 2, 2004, the Judge issued a written order denying Applicant's request for a postponement of the hearing, but also indicating that the record would remain open following the conclusion of the hearing in order to permit Applicant the opportunity to submit responses from her creditors.

At the hearing held on June 10, 2004, Applicant submitted six documentary exhibits (Applicant's Exhibits A through F) and indicated that she was waiting to receive payment plans in the mail from various creditors. Upon inquiry by the Administrative Judge, Applicant indicated that she anticipated receiving the materials within 14 days. The Judge then agreed to give Applicant four weeks--until July 8, 2004--to submit any additional materials to him through Department Counsel. Applicant indicated her agreement with this proposal on the record. Despite this agreement, no additional

materials were submitted by Applicant for inclusion in the record in this case.

Considering the record below, the Board concludes that the Administrative Judge acted within the bounds of his discretion when he denied Applicant a postponement of the hearing. The Judge agreed to hold the record open for four weeks to allow Applicant to submit additional materials. There is no indication in the record that Applicant availed herself of the opportunity to submit additional evidence. Given these facts, the Board concludes Applicant was afforded a reasonable opportunity to present evidence in her behalf for the Judge's consideration. Applicant has failed to demonstrate error below and has failed to establish sufficient cause for a reopening of the record in her case.

### **Conclusion**

Applicant has not met her burden of establishing error below. Accordingly, the Board affirms the Administrative Judge's unfavorable 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board