

DATE: March 12, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22163

## 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 July 21, 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), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision dated November 25, 2003.

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 Administrative Judge erred by finding against Applicant with respect to an allegation that was changed after the SOR had been issued to Applicant; (2) whether the Administrative Judge failed to consider evidence submitted by Applicant; (3) whether the Administrative Judge erred by finding Applicant falsified a security clearance application in November 2001; and (4) whether the Administrative Judge's findings and conclusions under Guideline F are erroneous. 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<sup>(1)</sup>

1. Whether the Administrative Judge erred by finding against Applicant with respect to an allegation that was changed after the SOR had been issued to Applicant. After Applicant responded to the SOR, Department Counsel prepared a File of Relevant Material (FORM) to be submitted to the Administrative Judge. In the FORM, Department Counsel asked the Administrative Judge to amend SOR paragraph 2.a to conform to the evidence.<sup>(2)</sup>

When responding to the FORM, Applicant objected to Department Counsel's request to amend SOR paragraph 2.a. The Administrative Judge's decision does not specifically note or discuss Department Counsel's motion to amend SOR paragraph 2.a, or Applicant's objection to that motion. However, the Judge's findings of fact and conclusions about SOR paragraph 2.a (Decision at pp. 2, 6) show the Judge made findings and reached conclusions about the amended SOR paragraph 2.a, not the original SOR paragraph 2.a. On appeal, Applicant challenges the fairness of the motion to amend and the Judge's decision to make findings and reach conclusions based on the amended SOR paragraph 2.a instead of the original SOR paragraph 2.a. Applicant's claim of error is not persuasive.

Applicant is entitled to: (a) an SOR that gives her adequate notice of the reasons why DOHA proposed to deny or revoke access to classified information; (b) an opportunity to respond to the allegations against her; (c) an opportunity to respond to evidence presented against her by Department Counsel; and (d) an opportunity to present evidence on her own behalf. *See* Directive, Section 4.3 and Additional Procedural Guidance, Items E3.1.3, E3.1.4, E3.1.7, E3.1.13, E3.1.14, and E3.1.15. However, an SOR may be amended "so as to render it in conformity with the evidence admitted or for other good cause." Directive, Additional Procedural Guidance, Item E3.1.17.<sup>(3)</sup>

In this case, Department Counsel's motion to amend SOR paragraph 2.a was legally permissible. Furthermore, Applicant received notice of the motion to amend SOR paragraph 2.a, had the opportunity to respond to the proposed motion, and had the opportunity to offer evidence for the Judge to consider in connection with the amended falsification allegation. Considering all the circumstances, the Judge did not act in a manner that is arbitrary, capricious, or contrary to law by making findings and reaching conclusions with respect to the amended SOR paragraph 2.a instead of the original SOR paragraph 2.a.

2. Whether the Administrative Judge failed to consider evidence submitted by Applicant. On appeal, Applicant claims the Administrative Judge did not give any consideration to her response to the SOR, or the evidence she presented about her conduct and circumstances. This claim of error is not persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's disagreement with the Judge's weighing of the record evidence in this case is not sufficient to rebut the presumption.

3. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application in November 2001. The Administrative Judge found that Applicant falsified a security clearance application in November 2001 by disclosing only one of three delinquent debts in response to question 39 of the application. In challenging that finding, Applicant argues: (a) the Judge improperly found against her based on the amendment to SOR paragraph 2.a instead of the original SOR paragraph 2.a; and (b) the record evidence shows she answered question 39 to the best of her knowledge at the time she completed the security clearance application. For the reasons that follow, the Board concludes Applicant has not demonstrated the Judge erred.

(a) As discussed earlier in this decision, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to accept Department Counsel's motion to amend SOR paragraph 2.a and make findings and reach conclusions concerning amended SOR paragraph 2.a.

(b) The Administrative Judge had to consider the record evidence as a whole and decide whether to accept Applicant's explanation for her incomplete answer to question 39 on the security clearance application. The Judge did not accept Applicant's explanation and, instead, found that Applicant's omission of two delinquent debts was a deliberate falsification. The Judge's finding of falsification is sustainable because it reflects a plausible interpretation of the record evidence as a whole. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.* Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification is erroneous.

4. Whether the Administrative Judge's findings and conclusions under Guideline F are erroneous. The Administrative Judge found that Applicant had delinquent debts totaling approximately \$20,000. The Judge noted that Financial Considerations Mitigating Conditions 4<sup>(4)</sup>

and 6<sup>(5)</sup>

had some applicability to Applicant's case, but that they had limited applicability because Applicant had not provided current information about her financial situation. The Judge concluded Applicant had failed to mitigate the security concerns under Guideline F that were raised by her delinquent debts because she had not presented any current documentation on the status of those debts. On appeal, Applicant contends the Judge erred by: (a) not accepting her explanations about her financial situation; and (b) not concluding her financial difficulties were mitigated under all six of the Financial Considerations mitigating conditions.

(a) Applicant's statements about her financial situation were relevant and material evidence that the Administrative Judge had to consider in making his findings of fact and reaching his conclusions about Applicant's security eligibility. However, the Judge was not legally required to accept Applicant's statements at face value. Rather, the Judge had to consider Applicant's statements in light of the record evidence as a whole. Furthermore, it was legally permissible for the Judge to take into account Applicant's failure to provide current documentation to corroborate her statements about her financial situation. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at p. 3 (Administrative Judge is not required

to accept an applicant's uncorroborated claims that delinquent debts have been satisfied). The Board concludes the Judge's findings about Applicant's financial situation are sustainable because they reflect a reasonable interpretation of the record evidence as a whole. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

(b) Applicant's contention that the Administrative Judge should have concluded her financial difficulties were mitigated under Financial Considerations Mitigating Conditions 1, [\(6\)](#)

2, [\(7\)](#)

and 5 [\(8\)](#)

lack merit. Given the record evidence concerning Applicant's overall history of financial difficulties, it is untenable for Applicant to claim the Judge should have applied Financial Considerations Mitigating Conditions 1 and 2. And Financial Considerations Mitigating Condition 5, which deals with apparently unexplained affluence, is totally irrelevant to the facts and circumstances of Applicant's case.

As to Financial Considerations Mitigating Conditions 4 and 6, the Administrative Judge explained why he concluded they were of limited applicability to Applicant's case. Applicant's argument that she was entitled to the full benefit of those two mitigating conditions is not persuasive. The application of Adjudicative Guidelines for or against clearance is not reducible to a simple formula and requires the Judge to exercise sound judgment, within the parameters of the Directive, after consideration of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-27371 (February 19, 2003) at pp. 3-4. Given the record evidence in this case, the Judge's reasoning concerning Financial Considerations Mitigating Conditions 4 and 6 was not arbitrary, capricious, or contrary to law.

The decision below is silent as to the Administrative Judge's reasoning about Financial Considerations Mitigating Condition 3. [\(9\)](#)

By not applying Financial Considerations Mitigating Condition 3, the Judge apparently concluded Applicant's explanation about the root cause of her financial difficulties was not sufficient in light of the absence of corroborating documentation. Applicant's appeal argument does not persuade the Board that, given the record evidence in this case, the Judge was compelled, as a matter of law or logic, to apply Financial Considerations Mitigating Condition 3.

Furthermore, even if the Board were to assume, solely for purposes of deciding this appeal, that the Administrative Judge should have applied Financial Considerations Mitigating Condition 3 to the origins of Applicant's financial difficulties, the Judge would not have been required to make a favorable security clearance decision. A conclusion that Financial Considerations Mitigating Condition 3 is applicable does not preclude a Judge from taking into consideration record evidence about an applicant's subsequent failure to successfully address and resolve financial difficulties that originated for reasons beyond the applicant's control. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4. Applicant's failure to present documentary evidence concerning her current financial situation was sufficient to support the Judge's conclusion that Applicant had failed to meet her burden of mitigating the security concerns raised under Guideline F.

### **Conclusion**

The Board affirms the Administrative Judge's decision because the Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 1.a. That favorable formal finding is not at issue on appeal.
2. SOR paragraph 2.a originally alleged that Applicant falsified a security clearance application in November 2001 by answering "NO" to question 39 despite having two delinquent debts that were more than 90 days past due. The proposed amendment sought to change SOR paragraph 2.a to allege that Applicant falsified that security clearance application by answering "YES" to question 39 and listing one delinquent debt despite Applicant having two other delinquent debts that were more than 90 days past due.
3. Although Item E3.1.17 refers to amending an SOR "at the hearing," the Board has ruled that Item E3.1.17 permits amending the SOR in cases that are adjudicated without a hearing, through the FORM process. *See* ISCR Case No. 99-0447 (July 25, 2000) at pp. 3-7.
4. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive, Enclosure 2, Item E2.A6.1.3.4).
5. "The individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).
6. "The behavior was not recent" (Directive, Enclosure 2, Item E2.A6.1.3.1).
7. "It was an isolated incident" (Directive, Enclosure 2, Item E2.A6.1.3.2).
8. "The affluence resulted from a legal source" (Directive, Enclosure 2, Item E2.A6.1.3.5).
9. "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)" (Directive, Enclosure 2, Item E2.A6.1.3.3).