

DATE: July 26, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-21773

## **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 August 18, 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). Administrative Judge John Grattan Metz, Jr. issued an unfavorable security clearance decision, dated March 28, 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 issues have been raised on appeal: (1) whether the Board can reverse the Administrative Judge's decision based on its consideration of Applicant's current financial situation; and (2) whether the Administrative Judge erred by concluding Applicant had not presented sufficient evidence to mitigate her history of financial difficulties. 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**

1. Whether the Board can reverse the Administrative Judge's decision based on its consideration of Applicant's current financial situation. Applicant asks the Board to reverse the Administrative Judge's unfavorable decision based on consideration of her current financial situation.

The Board does not re-try an applicant's case on appeal. Rather, the Board reviews the Administrative Judge's decision to determine whether an appealing party has demonstrated factual or legal error below. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Furthermore, the Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity during the proceedings below to present evidence for the Judge to consider in her case. Applicant is not entitled to have the record reopened so that she can present additional evidence about her current financial situation. *See, e.g.*, ISCR Case No. 01-21274 (January 8, 2004) at p. 3.

2. Whether the Administrative Judge erred by concluding Applicant had not presented sufficient evidence to mitigate her history of financial difficulties. On appeal, Applicant states that she "cannot in good faith dispute the findings of the Administrative Judge" about her history of financial difficulties.<sup>(1)</sup> However, Applicant makes several statements that the Board construe as raising the issue of whether the Judge should have concluded that Applicant had mitigated her history of financial difficulties.

Given Applicant's admissions to the SOR allegations and the evidence presented by Department Counsel at the hearing, the burden shifted to Applicant to present evidence to rebut or otherwise overcome the security concerns raised by her history of financial difficulties.<sup>(2)</sup> There is a rebuttable presumption that the 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. Apart from that

presumption, the decision below shows the Judge specifically noted and took into account the favorable evidence referred to by Applicant on appeal. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. Apart from disagreeing with the Judge's adverse conclusions about her overall history of financial difficulties, Applicant has not shown that the Judge weighed the evidence improperly or reached conclusions that are arbitrary, capricious, or contrary to law.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Because Applicant does not challenge the Administrative Judge's findings of fact about her history of financial difficulties, those findings stand

2. *See* Directive, Additional Procedural Guidance, Item E3.1.15.