

DATE: July 30, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22325

## 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 29, 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 Joan Caton Anthony issued an unfavorable security clearance decision, dated April 28, 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 issue has been raised on appeal: whether the Administrative Judge erred by concluding that Applicant's history of financial difficulties warranted an unfavorable security clearance decision. 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<sup>(1)</sup>

On appeal, Applicant submitted two character recommendation letters and a photocopy of a bank check. All three documents are new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had adequate opportunity during the proceedings below to present evidence for the Administrative Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on evidence that was not submitted for the Judge's consideration. The Board will address only those arguments made by Applicant that do not rely on new evidence.

Whether the Administrative Judge erred by concluding that Applicant's history of financial difficulties warranted an unfavorable security clearance decision. Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties.<sup>(2)</sup> However, Applicant does argue his history of financial difficulties should not outweigh his 20 years of military service, or the absence of any criminal activity during his lifetime. The Board construes Applicant's arguments as raising the issue of whether the Judge erred by concluding Applicant's history of financial difficulties warranted an unfavorable security clearance decision.

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). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960)(security requirements include consideration of a person's garrulity, honesty, judgment, sobriety, and high sense of one's obligations), *aff'd*, 367 U.S. 886 (1961). Even though security concerns would be raised if an applicant has engaged in criminal conduct, criminal conduct is not the only kind of behavior that can raise security concerns. Indeed, the Directive lists thirteen separate Guidelines (Directive, Adjudicative Guidelines, Items E2.2.3.1 through E2.2.3.13), with only one Guideline specifically dealing with criminal conduct. Nothing in the Directive indicates or suggests that the government can deny or revoke access to classified information only if it alleges and proves an applicant's actions or circumstances fall under the Guideline pertaining to

criminal conduct. Accordingly, even if there is no indication of any criminal conduct by an applicant, the government can consider an applicant's actions or circumstances that raise questions about an applicant's judgment, reliability, or trustworthiness. Therefore, the absence of any evidence that Applicant has engaged in criminal conduct did not preclude the Administrative Judge from evaluating Applicant's security eligibility based on the matters covered by the SOR issued to Applicant.

A history of financial difficulties raises security concerns that the government can consider in evaluating an applicant's security eligibility. *See, e.g.*, ISCR Case No. 96-0454 (February 7, 1997) at p. 2. In this case, the Administrative Judge's conclusions under Guideline F (Financial Considerations), follow rationally from her findings about Applicant's history of financial difficulties, and provide a rational basis for her unfavorable conclusions about Applicant's security eligibility.

The Administrative Judge also found that: (a) Applicant falsified a security clearance application by denying that he had delinquent debts; and (b) Applicant failed to provide relevant and material information to the government in response to written interrogatories about his financial situation. Those findings have not been challenged on appeal. The Judge's conclusions under Guideline E (Personal Conduct) follow rationally from her findings about Applicant's falsification and his failure to provide information. Falsification of a security clearance application provides a rational basis for an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification). Furthermore, failure to provide relevant and material information to the government also provides a rational basis for an unfavorable security clearance decision. *See Gayer v. Schlesinger*, 490 F.2d 740, 753-754 (D.C. Cir. 1973); *Clifford v. Shoultz*, 413 F.2d 868 (9th Cir. 1969), *cert. denied*, 396 U.S. 962 (1969). Accordingly, the Judge's conclusions under Guideline E provide a rational basis, independent of the Judge's conclusions under Guideline F, for her unfavorable security clearance decision.

Applicant's argument about his military record does not demonstrate the Administrative Judge erred. The record evidence about Applicant's military service is sparse. Furthermore, the fact that Applicant served honorably in the U.S. military did not preclude the Judge from evaluating the security significance of Applicant's overall history of financial difficulties. The presence of some favorable record evidence does not preclude an unfavorable security clearance decision. The Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence, and reach a reasonable conclusion as to whether the applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Considering the record as a whole, the Board concludes that the evidence concerning Applicant's military service did not compel the Judge, as a matter of law or logic, to reach a favorable security clearance despite the Judge's findings and conclusions under Guideline E and Guideline F.

### **Conclusion**

Applicant has not demonstrated error below. Therefore, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.a and 1.c. Those favorable findings are not at issue on appeal.
2. Applicant's assertion that his financial difficulties are now behind him is based on a proffer of new evidence. The Administrative Judge did not err by finding that, as of the close of the record evidence, Applicant still had unresolved debts.