

DATE: January 12, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-24719

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated December 19, 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 Martin H. Mogul issued an unfavorable security clearance decision dated September 9, 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 government has met its burden of proof; (2) whether the Administrative Judge erred in finding against Applicant on nine of the ten allegations in the SOR; and (3) whether the Judge's decision is otherwise 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. Whether the government met its burden in this case. As to most of the allegations in the SOR, Applicant's attorney argues that the government has not met its burden of proof because it has not shown that Applicant is likely to commit illegal acts to generate funds. <sup>(1)</sup>

The government had the burden to prove the allegations in the SOR that have been controverted. Directive, Additional Procedural Guidance, E3.1.14. Department Counsel entered Applicant's credit report into evidence to prove the allegations, and Applicant had already admitted seven of the ten allegations in his answer to the SOR. The government met its burden as to the allegations in the SOR concerning Applicant's excessive indebtedness and did not have to prove that each of the allegations made Applicant likely to commit illegal acts to generate funds. The burden then shifted to Applicant to rebut, explain, extenuate, or mitigate the facts already established. The ultimate burden of persuasion rests with the Applicant. Directive, Additional Procedural Guidance, E3.1.15. Applicant has not demonstrated that the government failed to meet its burden of proof in this case or that the Judge erred by concluding that the government had satisfied its burden.

2. Whether the Administrative Judge erred in finding against Applicant on nine of the ten allegations in the SOR. Nine of the allegations were debts which were listed on Applicant's credit report. In his Response to the SOR, Applicant admitted six of the nine debts, and the Administrative Judge therefore found against Applicant as to those six. Of the remaining three, the Judge found for Applicant on one and against him on two. <sup>(2)</sup> In his Appeal Brief, Applicant's attorney bases his primary argument on the Concern raised by an applicant's financial difficulties under Guideline F, as expressed in the Directive, E2.A6.1.1. <sup>(3)</sup> Applicant's attorney argues that most of Applicant's debts have been charged off by creditors and that Applicant is therefore not at risk of acting illegally to obtain funds. <sup>(4)</sup>

Each of the Guidelines in the Directive contains a Concern, or reason why behavior under that Guideline is considered a risk to national security. However, that stated Concern is not the only issue to be addressed under that Guideline. Beyond the Concern stated in the Directive, E2.A6.1.1, the 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 requirements include consideration of a person's judgment, reliability, and sense of his obligations. *Cafeteria Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. (1961). The fact that a debt has been charged off does not demonstrate that an applicant has met his responsibility with regard to the underlying obligation or that Applicant's actions in acquiring the debt and then failing to resolve it are not of continuing security significance. The Administrative Judge's formal findings are sustainable on the record below.

3. Whether the Administrative Judge's decision is otherwise arbitrary, capricious, or contrary to law. The Board will treat the remaining arguments made by Applicant's attorney as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law. In disputing the Judge's unfavorable security decision, the attorney argues that Applicant's financial problems were short-term problems which no longer exist. He points out that Applicant could have filed for bankruptcy and would be willing to seek financial counseling. He maintains that Applicant's financial difficulties arose primarily from his debt to the Internal Revenue Service, which he is now dealing with. He contends that Applicant earns sufficient income to handle any debts he may still have.

There is a rebuttable presumption that an Administrative Judge has considered all the record evidence unless the Judge states otherwise. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3. Here, the Judge discussed the record evidence, including Applicant's testimony about his financial situation. In a sworn statement to a Defense Security Service investigator, Applicant had agreed to settle any outstanding obligations by July 30, 2002. As of September 9, 2004, the date of the hearing he had done little to settle them. The Judge found that Applicant had sufficient income to deal with his other debts, even after the IRS garnishment is taken into account, but Applicant chose not to settle them. The Judge concluded that Applicant had not gained control of his financial affairs, in part because he was not able to explain the source of his financial difficulties.<sup>(5)</sup> Applicant's ability to argue for an alternate interpretation of the record evidence is not enough to demonstrate that the Judge made findings and conclusions that are arbitrary, capricious, or contrary to law. Moreover, the Board finds adequate support in the record for the Judge's conclusions.

### **Conclusion**

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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. The government's "Concern" under Guideline F is that "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive, E2.A6.1.1.
2. The favorable finding is no longer at issue.
3. See footnote 1, *supra*.
4. According to the SOR five of the debts have been charged off.
5. The fact that Applicant could have chosen to file for bankruptcy and chose not to do so is not relevant. Although he had indicated a willingness to do so, Applicant had not undertaken financial counseling as of the hearing. If he undertook it after the hearing, that information would constitute new evidence, which the Board is not able to consider. Directive, Additional Procedural Guidance, E3.1.29. Applicant's desire, expressed in his Appeal Brief, to show the Board his determination to resolve his debts through the mechanism of credit counseling cannot be entertained by the Board. The Board does not have supervisory or continuing jurisdiction over applicants or cases that come before it.