

DATE: March 29, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26706

**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 June 9, 2004, 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 Thomas M. Crean issued an unfavorable security clearance decision, dated December 30, 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 Administrative Judge erred by finding Applicant was delinquent with certain debts; and (2) whether there is sufficient record evidence to support the Administrative Judge's findings of falsification. 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 Administrative Judge erred by finding Applicant was delinquent with certain debts. The Administrative Judge found that Applicant had satisfied the debts covered by SOR paragraphs 1.b and 1.g, but that she still was responsible for the delinquent debts covered by SOR paragraphs 1.a, 1.c, 1.d, 1.e, and 1.f. On appeal, Applicant makes factual assertions about the status of the five delinquent debts, and attaches documentation concerning the status of two of them. [\(1\)](#)

Applicant's factual assertions in her appeal brief, and the documentation submitted on appeal, constitute new evidence about the status of her delinquent debts, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity during the proceedings below to offer evidence about her financial situation for the Administrative Judge to consider in her case. Applicant cannot fairly challenge the Judge's findings about her financial situation based on her proffer of new evidence. Given the record evidence in this case, the Judge had sufficient evidence to find that Applicant was responsible for the five delinquent debts covered by SOR paragraphs 1.a, 1.c, 1.d, 1.e, and 1.f, and that she had not satisfied them as of the close of the record evidence.

2. Whether there is sufficient record evidence to support the Administrative Judge's findings of falsification. The Administrative Judge found that Applicant falsified a security clearance application in October 2000 by failing to disclose she had unpaid judgments against her and debts that were over 180 days delinquent. On appeal, Applicant challenges the Judge's findings of falsification, asserting her omissions were the result of misunderstanding and not any intent to falsify.

The Administrative Judge has to consider the record evidence as a whole, including Applicant's statements about her intent or state of mind when she completed the security clearance application, and make findings of fact as to whether Applicant's omissions were deliberate or not. Considering the record evidence as a whole, the Judge's findings that Applicant deliberately failed to disclose her unpaid judgments and delinquent debts are sustainable. *See* Directive,

Additional Procedural Guidance, Item E3.1.32.1.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to the debts covered by SOR paragraphs 1.b and 1.g. Those favorable formal findings are not at issue on appeal.