

DATE: February 3, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-27156

## **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 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), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Kathryn Moen Braeman issued an unfavorable security clearance decision, dated November 17, 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 falsified a security clearance application by failing to disclose a particular delinquent debt; (2) whether the Administrative Judge erred by finding Applicant is financially responsible for certain debts; and (3) whether the Administrative Judge failed to take into account evidence pertinent to understanding Applicant's financial situation. 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 falsified a security clearance application by failing to disclose a particular delinquent debt. The Administrative Judge found that Applicant falsified material facts about his financial situation by failing to disclose on a security clearance application that he had several delinquent debts (SOR paragraphs 2.a through 2.c). With respect to the omission of the debt covered by SOR paragraph 1.a, Applicant asserts it was more than seven years old, and therefore, not relevant to the financial questions on the security clearance application. The Board construes Applicant's argument as raising the issue of whether the Judge erred by finding he falsified the security clearance application by not disclosing the debt covered by SOR paragraph 1.a.

The Board need not decide whether the Administrative Judge erred by finding Applicant falsified the security clearance application by not disclosing a repossession debt covered by SOR paragraph 1.a. Applicant's claim of error does not raise any challenge to the Judge's findings that he falsified the security clearance application by failing to disclose three other delinquent debts (*i.e.*, the delinquent debts covered by SOR paragraphs 1.b through 1.d). Even if the Board were to assume -- solely for purposes of deciding this appeal issue -- that Applicant's claim of error had merit, the Judge's unchallenged findings of falsification with respect to the three other delinquent debts stand because there is no presumption of error below, and the Board need not review unchallenged findings of fact. *See* Directive, Additional Procedural Guidance, Item E3.1.32 (Board must address the material issues raised by the parties).

2. Whether the Administrative Judge erred by finding Applicant is financially responsible for certain debts. The Administrative Judge found that Applicant was financially responsible for the delinquent debts covered by SOR paragraphs 1.a through 1.d, and that he failed to present documentary evidence showing that he had addressed or otherwise resolved those delinquent debts, even though there was record evidence that he had the financial means to

deal with them. The Board construes Applicant's appeal brief as challenging the Judge's findings that he is financially responsible for the debts covered by SOR paragraphs 1.a through 1.d.

Considering the record as a whole (including Applicant's answer to the SOR and the record evidence in the File of Relevant Material), the Administrative Judge had a legally sufficient basis to find that Applicant was financially responsible for the debts covered by SOR paragraphs 1.a through 1.d. Applicant's appeal brief fails to make any argument that shows the Judge's findings about those debts are erroneous. Furthermore, given the record evidence of Applicant's financial difficulties, it was not arbitrary, capricious or contrary to law for the Judge to take into account Applicant's failure to present documentary evidence to support his claims about the status of those debts and his financial situation. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 5.

3. Whether the Administrative Judge failed to take into account evidence pertinent to understanding Applicant's financial situation. Applicant also argues the Administrative Judge did not take into account the fact that most of his assets are not liquid and that some of his assets cannot be easily accessed to use for dealing with his debts. This argument relies on factual assertions about the nature of Applicant's assets that were not before the Judge. As such, those assertions constitute new evidence, which the Board cannot consider on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29.* There is a rebuttable presumption that a 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 has not made any argument that rebuts or overcomes that presumption in this case.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate any error that would warrant remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board