

DATE: March 26, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28502

**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 January 14, 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 Kathryn Moen Braeman issued an unfavorable security clearance decision dated December 30, 2003.

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 should conclude Applicant has mitigated his history of delinquent debts; (2) whether the Administrative Judge erred by finding Applicant falsified a security clearance application; and (3) whether Applicant should have been granted a favorable decision because he does not have personal access to classified information. 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<sup>(1)</sup>**

1. Whether the Board should conclude Applicant has mitigated his history of delinquent debts. On appeal, Applicant offers new evidence about two debts of his that the Administrative Judge found were unresolved. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to respond to the File of Relevant Material (FORM) and to submit additional evidence about his financial situation for the Judge to consider in his case. Applicant cannot fairly expect the Board to ignore the Directive's prohibition against new evidence on appeal, or to find that the Judge erred based on evidence that was not submitted for the Judge's consideration during the proceedings below.

Apart from offering new evidence about his financial situation, Applicant: (a) does not challenge the Administrative Judge's findings of fact about his history of financial difficulties; and (b) does not raise any claim of error with respect to the Judge's conclusions under Guideline F. Because there is no presumption of error below, the Judge's unchallenged findings of fact and conclusions about Applicant's history of financial difficulties stand.

2. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found Applicant falsified a security clearance application in April 1999 by failing to disclose a 1994 worthless check charge, an unpaid 1995 civil judgment, and five delinquent debts when he completed that application. On appeal, Applicant argues his failure to fully disclose those matters on the security clearance application was the result of misunderstanding and not the result of any intent to mislead or deceive the federal government. For the reasons that follow, the Board concludes the Administrative Judge's finding of falsification is sustainable.

In responding to the SOR, Applicant denied that he falsified the security clearance application. Applicant's denials were

relevant and material evidence that the Administrative Judge had to consider. However, Applicant's denials were not binding or conclusive on the Judge. The Judge had to consider Applicant's denials in light of the record evidence as a whole, and make a finding about Applicant's intent or state of mind when he completed the security clearance application. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. The Judge was faced with deciding whether Applicant's explanations for the omissions were credible in light of the record evidence as a whole. Given the record evidence in this case, the Judge's decision to not accept Applicant's explanations is not arbitrary, capricious, or contrary to law.

3. Whether Applicant should have been granted a favorable decision because he does not have personal access to classified information. On appeal, Applicant states "in the past 7 years plus . . . I have never been exposed to classified material." The Board construes Applicant's statement as raising the issue of whether he should have been granted a favorable decision because he does not have personal access to classified information.

There is record evidence that Applicant was granted a Confidential-level security clearance in February 1999 (FORM, Item 4). However, there is no record evidence in this case as to whether Applicant has had personal access to classified information or merely access to secure areas. Even if the Board were to assume, solely for purposes of deciding this appeal, that Applicant has been granted access only to secure areas without direct personal access to classified material, such a situation would not entitle Applicant to a favorable security clearance decision. Under the Directive, an applicant's security eligibility is adjudicated under the same standards regardless of whether the applicant's position requires a security clearance for access to classified information or access to a secure area. *See, e.g.*, ISCR Case No. 98-0257 (January 22, 1999) at p. 3.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made favorable formal findings with respect to SOR paragraphs 1.a, 1.c, 1.d, and 1.e. Those favorable formal findings are not at issue on appeal.