

DATE: October 8, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-29696

**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 the Applicant a Statement of Reasons (SOR), dated January 23, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines F (Financial Considerations), E (Personal Conduct), and J (Criminal Conduct). Administrative Judge Elizabeth M. Matchinski, issued an unfavorable security clearance decision, dated July 18, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by not concluding that the security concerns raised by Applicant's indebtedness had been mitigated, (2) whether the security concerns raised by Applicant's indebtedness have been mitigated by post-hearing events, and (3) whether the Administrative Judge erred by not concluding that the security concerns raised by Applicant's falsification of his security clearance application had been mitigated. 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 Administrative Judge erred by not concluding that the security concerns raised by Applicant's indebtedness had been mitigated. On appeal, Applicant does not dispute the Administrative Judge's findings of fact with respect to the Applicant's financial history. Rather, Applicant contends the Judge should have concluded that the security concerns raised by his debts were successfully mitigated by application of Financial Considerations Mitigating Conditions 3 <sup>(2)</sup>

and 6. <sup>(3)</sup>

For the reasons set forth below, we disagree.

The application of Adjudicative Guidelines disqualifying and mitigating conditions is not a simple operation or reducible to a simple formula. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7 (discussing various considerations that must be taken into account by an adjudicator when applying Adjudicative Guidelines disqualifying or mitigating conditions). Accordingly, the Administrative Judge's finding that some of Applicant's debts had been paid, or were in the process of being paid, that Applicant had filed for bankruptcy, and that the income of the Applicant and his wife had recently increased, did not compel the Judge to make a favorable security clearance decision. Even if Applicant's financial difficulties initially arose due to circumstances outside his control, in deciding what weigh to give to Financial Considerations Mitigating Condition 3 the Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with his financial difficulties. *See, e.g.*, ISCR Case No.

99-0462 (May 25, 2000) at p. 4 ("Even if an applicant gets into financial difficulties because of circumstances beyond the applicant's control, the Judge must consider whether the applicant dealt with his or her financial difficulties in a reasonable manner."); ISCR Case No. 99-0012 (December 1, 1999) at p. 4 ("It was not arbitrary or capricious for the Judge to consider whether Applicant made timely, reasonable efforts to deal with the financial setbacks that resulted from conditions beyond his control."). In this case, it was not arbitrary or capricious for the Judge to consider Applicant's failure to resolve the debts after the conditions which had contributed to them becoming delinquent had passed and his financial situation had improved. Given the record evidence, the Judge could reasonably conclude that Applicant's payment on several debts and his filing for bankruptcy -- subsequent to the initiation of the security clearance process and the issuance of the SOR -- were not a substitute for a sustained record of timely financial payments. Accordingly, the Judge was not required to give great or dispositive weight to Financial Considerations Mitigating Condition 3.

Likewise, Applicant's argument concerning Financial Considerations Mitigating Condition 6 does not demonstrate the Administrative Judge erred. The Board has previously discussed what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

"In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' ISCR Case No. 99-0201 (October 12, 1999) at p. 4 (discussing concept of good-faith in connection with another provision of the Adjudicative Guidelines). Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6." ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6.

Given Applicant's history of financial problems, the sizable nature of the indebtedness, and the fact that the debts at issue had been incurred years earlier, but virtually no effort had been made to resolve them until after the invocation of the security clearance process and the issuance of the SOR, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for her to conclude that Applicant's efforts to otherwise resolve his debts were mitigated under Financial Considerations Mitigating Condition 6. The record evidence supports the Judge's conclusion that Applicant's efforts at financial reform were ongoing, incomplete, and insufficient to conclude that Applicant's financial problems were safely behind him.

Finally, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

The Administrative Judge made findings of fact and reached conclusions about Applicant's history of financial difficulties that reflect a plausible, legally permissible interpretation of the record evidence. Given the Judge's findings and conclusions, she had a rational basis to conclude Applicant's overall history of financial difficulties raised security concerns under Guideline F, and to conclude that Applicant had failed to present sufficient evidence of financial reform and rehabilitation to overcome those security concerns.

2. Whether the security concerns raised by Applicant's indebtedness have been mitigated by post-hearing events. On appeal, Applicant argues that the security concerns raised by his indebtedness have been mitigated by the fact that subsequent to the hearing his debts were discharged in bankruptcy and that he was given a pay raise. Even if true, such matters constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

3. Whether the Administrative Judge erred by not concluding that the security concerns raised by Applicant's falsification of his security clearance application had been mitigated. On appeal, Applicant does not dispute the fact that he provided false information on his security clearance application. Rather, Applicant contends that the security

concerns raised by his falsification of his security clearance application were mitigated by application of Personal Conduct Mitigating Condition 2. [\(4\)](#)

and Criminal Conduct Mitigating Condition 2. [\(5\)](#)

For the reasons set forth below, we disagree.

In this case, the Administrative Judge found Applicant had intentionally not disclosed his debts on his security clearance application because he did not want to adversely affect his chances of securing employment with a defense contractor. The Judge also found that in a subsequent interview, the Applicant had not denied his indebtedness, but it was not clear that he had volunteered information about it before being questioned about it. Given the record evidence, those findings are sustainable and provide a rational basis for the Judge to conclude that the serious security concerns raised by Applicant's falsification were not mitigated by the fact that the falsification was an ostensibly isolated incident.

### **Conclusion**

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

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

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.j and 1.m. Those favorable formal findings are not issue on appeal.

2. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive, Enclosure 2, Item E2.A6.1.3.3).

3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).

4. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Enclosure2, Item E2.A5.1.3.2).

5. "The crime was an isolated incident" (Directive, Enclosure 2, Item E2.A10.1.3.2).