

DATE: March 16, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-29884

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

Jason Mills, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 2, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct) and Guideline F (Financial Considerations), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On August 29, 2005, after the hearing, Administrative Judge Claude R. Heiny denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of indebtedness had not been mitigated.<sup>(1)</sup> In support of that contention, Applicant argues that the debts were incurred along time ago and that Applicant has paid off several of them and is either contesting or attempting to settle the remaining ones.<sup>(2)</sup>

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the financial considerations allegations had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

Applicant makes arguments which rely on a mistaken promise. The Judge's decision did not focus on the amount of Applicant's debt (college-related or otherwise). Rather, the Judge focused on the quantity of Applicant's delinquent debts, which is clearly a pertinent consideration in analyzing eligibility to hold a security clearance.

In this case, the Judge found that the Applicant had financial problems since 1997, including five debts placed for collection and three that were charged off. The eight debts totaled approximately \$31,000. The Judge also found that at the time the case was submitted for decision, Applicant still had significant outstanding delinquent debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and still ongoing. The Judge also found that Applicant had made commitments to pay his debts only to return to a pattern of nonpayment or sporadic payment after a short interval. Thus, the Judge could reasonably conclude that Applicant's promises to resolve his indebtedness and his recent efforts to resolve that indebtedness were not a substitute for a consistent record of timely remedial action.

Although the Judge found in favor of Applicant with respect to several of the factual allegations, the Judge was not required, as a matter of law, to conclude that the security concerns raised by Applicant's history of financial difficulties had been fully mitigated. The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings and conclusions about Applicant's history of indebtedness are sustainable. Thus, the Administrative Judge did not err in denying Applicant a clearance.

### Order

The decision of the Administrative Judge granting Applicant a clearance is AFFIRMED.

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

### Concurring Opinion of Chairman Emilio Jaksetic:

In challenging the Administrative Judge's decision, Applicant cites to favorable decisions by Hearing Office Administrative Judges in other cases and argues that application of the reasoning used in those cases should result in a favorable decision in his case. Although it is legally permissible for a party to cite a decision by a Hearing Office Administrative Judge in support of an appeal argument, such a decision is only persuasive authority and not legally binding precedent. *See* ISCR Case No. 01-22606 at 3 (App. Bd. Jun. 30, 2003)(discussing precedential value of decisions by Hearing Office Administrative Judges). As to whether another Hearing Office Judge or the Board should follow a decision by a Hearing Office Judge, the party relying on such a decision bears the burden of articulating a cogent argument or reason why the cited decision should be followed. *Id.* at 4-5. In this case, Applicant does not satisfy that burden of persuasion because he merely assumes the cited decisions were correctly decided, and asserts -- without any supporting argument -- that the Judge in this case ought to have followed the reasoning used in the cited decision.

Applicant's argument concerning Financial Considerations Mitigating Condition 2 ("It was an isolated incident") is not persuasive. Given the record evidence in this case, the Administrative Judge was not compelled to conclude that Applicant's financial difficulties -- which involved several debts that were incurred, and became overdue, at different times -- involved merely "an isolated incident." The Judge's conclusion that this mitigating condition was not applicable does not reflect any arbitrary or capricious action by the Judge.

Applicant's argument concerning Financial Considerations Mitigating Condition 6 ("The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts") does not demonstrate the Administrative Judge erred. The Judge articulated a rational explanation for why he concluded Applicant had not presented evidence sufficient to warrant application of that mitigating condition. The Judge's conclusion that Applicant had not demonstrated "[a] systematic, concrete method of handling his debts" (Decision at p. 6) reflects a plausible interpretation of the record evidence. Although Applicant sets forth a plausible alternative interpretation of the record evidence concerning his efforts to deal with his outstanding debts, Applicant has not shown that the Judge's explanation was arbitrary or capricious in light of the record evidence in this case.

Applicant also contends the Administrative Judge ought to have applied in his favor Financial Considerations Mitigating

Condition 3 ("The conditions that resulted in the behavior were largely beyond the person's control . . ."). In support of this claim, Applicant cites to record evidence that his pay was garnished for child support and that the amount of child support was increased, and argues the Judge should have considered that evidence as mitigating under Financial Considerations Mitigating Condition 3. A Judge must apply pertinent provisions of the Adjudicative Guidelines.<sup>(3)</sup> If there is record evidence that appears to warrant application of a particular Adjudicative Guidelines disqualifying or mitigating condition, then a Judge should apply it<sup>(4)</sup> or give a rational explanation for why the Judge concluded its application was not warranted in the case at hand. Given the record evidence in this case, the Judge should have applied Financial Considerations Mitigating Condition 3 or explained why he decided the evidence was not sufficient to warrant its application. However, I conclude the Judge's failure to do so was harmless error in this case. Even if I were to assume -- solely for the sake of deciding this appeal -- that the Judge should have applied Financial Considerations Mitigating Condition 3, its application would not have compelled the Judge to render a favorable security clearance decision in light of his overall findings and conclusions about Applicant's overall history of financial difficulties.

Applicant's public policy argument concerning Applicant's college loans does not demonstrate the Administrative Judge erred. The pros and cons of public policy concerning leniency toward persons with college loan debts are outside the parameters of DOHA proceedings. And, in any event, even if Applicant had cited some legal authority supporting his public policy argument about college loans, such a public policy would not override or supersede the compelling interest of the federal government to protect classified information.<sup>(5)</sup> The national security interests of the United States cannot be subordinated to lesser public policy considerations.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, 1.c, 1.d, 2.b, and 2.e. Those favorable findings are not at issue on appeal.
2. Applicant also cites to prior Hearing Office decisions in support of his case. Neither the Administrative Judge nor the Board is bound by such decisions. Additionally, Applicant argues that the Judge erred by not relying on Applicant's expectations of increased income should Applicant be granted a security clearance. The Board cannot conclude that the Judge's decision not to rely on such expectations is error. Finally, Applicant argues that his child support obligations were a condition beyond his control. Again, the Board declines to hold that the Judge was obligated to reach such a conclusion.
3. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.
4. Depending on the record evidence in a given case, an Administrative Judge might have a rational basis for giving less than full weight to a particular provision of the Adjudicative Guidelines. *See, e.g.*, ISCR Case No. 02-09907 at 10 (App. Bd. Mar. 17, 2004)("The application of Adjudicative Guidelines for or against clearance is not reducible to a simple formula and requires the exercise of sound judgment, within the parameters of the Directive, after consideration of the record evidence as a whole."). In such a situation, the parties are entitled to an explanation for why a Judge decided to limit the weight given to the provision of the Adjudicative Guidelines applicable to the case.
5. *See Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).