

DATE: June 10, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-31959

## **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 December 4, 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 Joan Caton Anthony issued an unfavorable security clearance decision, dated March 30, 2005.

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 that Applicant had not satisfied certain debts; and (2) whether the Administrative Judge erred by concluding that Applicant's efforts at addressing his financial difficulties were not sufficient to mitigate the security concerns raised by Applicant's history of financial difficulties. 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 finding that Applicant had not satisfied certain debts. The Administrative Judge found that Applicant owed the delinquent debts covered by SOR paragraphs 1.a through 1.e, and that his delinquent debts totaled approximately \$21,000. On appeal, Applicant asserts that: (a) he has paid the debts covered by SOR paragraphs 1.a, 1.c, 1.d, and 1.e; and (b) he is trying to work out a payment plan to deal with the debt covered by SOR paragraph 1.b. Applicant's assertions raise the issue of whether the Judge erred by finding Applicant had not satisfied certain debts.

Considering Applicant's admissions to the SOR allegations pertaining to his financial difficulties, the documentary evidence in the File of Relevant Material (FORM), and the statements contained in Applicant's response to the FORM, the Administrative Judge's findings about Applicant's delinquent debts are sustainable. Applicant's assertions about paying off various debts are not supported by the record evidence, and appear to be a proffer of new evidence about the status of those debts. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. If Applicant had information about those debts earlier, then he should have submitted it in response to the FORM so that the Judge could take it into consideration. If the status of those debts changed after the record closed, Applicant does not have a right to have the record kept open so that he can provide updates on his financial situation on an ongoing basis. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4.

2. Whether the Administrative Judge erred by concluding that Applicant's efforts at addressing his financial difficulties were not sufficient to mitigate the security concerns raised by Applicant's history of financial difficulties. In a written statement Applicant gave to an investigator in September 2002 (FORM, Item 6), Applicant discussed his financial situation and explained how he was dealing with his various financial difficulties. In response to the FORM, Applicant described his efforts at dealing with his delinquent debts. The Judge considered the facts and circumstances of Applicant's history of financial difficulties (including the adverse financial impact caused by the serious illness of

Applicant's wife in 2001), and concluded that Applicant had not demonstrated extenuation or mitigation that warranted a favorable security clearance decision.

On appeal, Applicant makes statements that raise the issue of whether the Administrative Judge erred by concluding that Applicant's efforts at addressing his financial difficulties were not sufficient to mitigate the security concerns raised by Applicant's history of financial difficulties.

The government does not have to wait until an applicant commits a security violation before it can deny or revoke an applicant's access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). A history of financial difficulties raises security concerns. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4. Given Applicant's admissions to the SOR and the record evidence about his history of unresolved financial difficulties, Applicant had the burden of presenting evidence to refute, explain, extenuate, or mitigate the security concerns raised by his history of unresolved financial difficulties. *See* Directive, Additional Procedural Guidance, Item E3.1.15. A reading of the decision below shows that the Administrative Judge evaluated the record evidence as a whole and explained why she concluded that Applicant had not satisfied his burden of persuasion. Applicant's appeal arguments fail to show the Judge's analysis is arbitrary, capricious, or contrary to law.

### **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: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Even making allowances for Applicant's *pro se* status, nothing in Applicant's appeal brief raises any challenge to the Administrative Judge's findings and conclusions under Guideline E (Personal Conduct). Because there is no presumption of error below, those unchallenged findings and conclusion stand.