

DATE: October 28, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-32006

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Francisco J. Mendez, Jr., Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 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). Administrative Judge Kathryn Moen Braeman issued a favorable security clearance decision dated June 29, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 issue has been raised on appeal: whether the Administrative Judge's application of Financial Considerations Mitigating Conditions 1, 2, 3, 4, and 6 was contrary to the weight of the evidence and thus arbitrary and capricious. 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 Issue**

Whether the Administrative Judge's application of Financial Considerations Mitigating Conditions 1, 2, 3, 4, and 6 was contrary to the weight of the evidence and thus arbitrary and capricious. The Administrative Judge issued a favorable decision based on her conclusion that Applicant had demonstrated extenuation or mitigation of a debt of over \$13,000 which arose from a mortgage foreclosure. Department Counsel argues that the Judge's decision is not sustainable because its reliance on various Financial Considerations mitigating conditions is contrary to the weight of the evidence.

Two aspects of Department Counsel's appeal brief can be disposed of before the Board turns to the main thrust of Department Counsel's appeal arguments. First, the Board does not find persuasive Department Counsel's contention that the Administrative Judge erred by implicitly relying on Financial Considerations Mitigating Condition 4. <sup>(1)</sup> The Judge did not cite that mitigating condition in her decision, and a reading of her decision in its entirety does not persuade the Board that the Judge relied on it.

Second, Department Counsel's attack on the Administrative Judge's credibility determination is not well founded. Although the SOR did not allege falsification, although Department Counsel's argument in the File of Relevant Material did not assert that the evidence showed Applicant engaged in falsification, and although Department Counsel did not seek to amend the SOR to allege Applicant engaged in falsification, Department Counsel asserts -- for the first time on appeal -- that the Judge erred by not taking into account evidence that Department Counsel claims shows Applicant falsified a security clearance application. Department Counsel's argument on this point is little more than a variation of "hearing by ambush," which is not proper in these proceedings. <sup>(2)</sup> If Department Counsel wanted to accuse Applicant of falsification, it had ample opportunity to do so during the proceedings below in a manner that would have provided Applicant with fair notice and a reasonable opportunity to respond. Having failed to raise an allegation of falsification in a timely and proper manner during the proceedings below, Department Counsel is foreclosed from raising it for the first time on appeal. <sup>(3)</sup> The remainder of Department Counsel's challenge to the Judge's credibility determination does not

persuade the Board that Judge erred by accepting Applicant's explanation about his financial situation. Department Counsel's strong disagreement with Applicant's explanation is not sufficient to demonstrate it was arbitrary, capricious, or contrary to law for the Judge to accept Applicant's explanation.

Department Counsel persuasively argues that the Administrative Judge erred by applying Financial Considerations Mitigating Condition 1.<sup>(4)</sup> Given the Administrative Judge's findings of fact, it was arbitrary and capricious for the Judge to characterize Applicant's mortgage debt as being not recent. The Judge's decision to apply Financial Considerations Mitigating Condition 1 does not rationally follow from the Judge's findings of fact.<sup>(5)</sup>

Department Counsel's challenges to the Administrative Judge's application of Financial Considerations Mitigating Condition 2<sup>(6)</sup> and Financial Considerations Mitigating Condition 3<sup>(7)</sup> are not persuasive. Given the Administrative Judge's unchallenged findings of fact,<sup>(8)</sup> the Board need not agree with the Judge to conclude that it can discern a plausible basis for the Judge to conclude that those two mitigating conditions can be applied to Applicant's case.

Department Counsel's challenge to the Administrative Judge's application of Financial Considerations Mitigating Condition 6<sup>(9)</sup> is partially persuasive. To the extent that Department Counsel's argument seems to be asking the Board to review the record evidence *de novo*, make its own factual findings, and use those findings to reach a conclusion about the applicability of Financial Considerations Mitigating Condition 6, the Board does not find it persuasive. However, Department Counsel's argument is persuasive to the extent it shows that the Judge failed to articulate a discernable rational basis for applying Financial Considerations Mitigating Condition 6 in light of the Judge's findings of fact. Since the Judge failed to articulate a discernable rational basis for her conclusion that Financial Considerations Mitigating Condition 6 applies in light of her own findings of fact, the Board declines to sustain the Judge's application of that mitigating condition.<sup>(10)</sup>

Although Department Counsel has shown that the Administrative Judge erred with respect to the application of Financial Considerations Mitigating Conditions 1 and 6, it does not follow that those errors necessarily require reversal or remand. First, it is well settled that the Board does not consider just whether an appealing party has demonstrated error, but whether the errors demonstrated are harmful or harmless under the particular facts and circumstances of the case under review. Second, Department Counsel's brief is not persuasive to the extent it is predicated on the implicit assumption that the application of Adjudicative Guidelines disqualifying and mitigating conditions is dispositive of a case. A Judge is not required to apply the Adjudicative Guidelines in a rigid, mechanical manner, and the application of Adjudicative Guidelines disqualifying and mitigating conditions must be undertaken in conjunction with the Judge's obligation to evaluate an applicant's case under the general factors of Directive, Section 6.3 and Directive, Adjudicative Guidelines, Item E2.2.1.<sup>(11)</sup> Accordingly, even if an appealing party shows that a Judge erred with respect to the application of Adjudicative Guidelines Disqualifying or Mitigating Conditions, such error does not foreclose the need for the Board to consider whether the portions of the Judge's decision unaffected by the errors are sufficient to sustain the Judge's conclusions -- favorable or unfavorable -- about an applicant's security eligibility.

Considering the record as a whole, the Administrative Judge's errors concerning Financial Considerations Mitigating Conditions 1 and 6 do not warrant reversal. In deciding whether those errors warrant remand, the Board must consider whether there is a significant chance that, but for those errors, the Judge would reach a different result.<sup>(12)</sup> Considering the record as a whole, the Board concludes that there is not a significant chance that elimination of the two errors on remand would lead to a different result. Accordingly, no useful purpose would be served by remanding this case to the Judge for issuance of a new decision that corrects the errors identified by Department Counsel.

### **Conclusion**

The Board need not agree with the Administrative Judge's favorable decision to conclude that Department Counsel has failed to demonstrate the Judge committed harmful error. Accordingly, the Judge's decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.4).
2. *See, e.g.*, ISCR Case No. 01-23356 (November 24, 2003) at p. 5.
3. *Cf.* ISCR Case No. 95-0705 (May 16, 1997) at pp. 3-4 (Department Counsel cannot change its position on appeal and argue a different theory of the case from the one it advanced during the proceedings below).
4. "The behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).
5. As noted earlier in this decision, one indication of arbitrary and capricious action is an Administrative Judge's failure to articulate a satisfactory explanation for the Judge's conclusions, including a rational connection between the Judge's findings of fact and the Judge's conclusions.
6. "It was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.2).
7. "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, Adjudicative Guidelines, Item E2.A6.1.3.3).
8. Because there is no presumption of error below, when an appealing party does not challenge an Administrative Judge's findings of fact, the Board is not required to consider whether the Judge's findings are supported by substantial record evidence. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 3.
9. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
10. As noted earlier in this decision, one indication of arbitrary and capricious action is an Administrative Judge's failure to articulate a satisfactory explanation for the Judge's conclusions.
11. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4.
12. *See, e.g.*, ISCR Case No. 98-0380 (March 8, 1999) at p. 4 (citing federal case).