

DATE: January 21, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-32606

## **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 March 3, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline F (Financial Considerations). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision, dated October 17, 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 government failed to conduct a fair and impartial investigation, and (2) whether the Administrative Judge misapplied the Adjudicative Guidelines and erred by concluding that the security concerns raised by Applicant's indebtedness had not 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**

1. Whether the government failed to conduct a fair and impartial investigation. On appeal, Applicant argues that the decision in his case should be reversed because the government's investigation consisted of only the retrieval of his credit report and an interview of him by the investigator. He further argues that the investigator failed to contact any of his creditors to determine if they were seeking repayment of his debts, and did not contact any of Applicant's character references.

The methods and scope of DSS investigations are outside the scope of review of the Appeal Board. *See, e.g.*, ISCR Case No. 99-0293 (May 5, 2000) at p. 4. The hearing is the Applicant's opportunity to produce other evidence beyond that developed by his background investigation for the purpose of rebutting, explaining, extenuating, or mitigating facts to which he has admitted or which have been proven by Department Counsel. *See e.g.* Directive, Enclosure 3, E3.1.15. The DOHA Judge is then duty bound to consider all of the evidence developed on the record of the case before him. Any attempt on the part of the judge to independently investigate allegations or develop facts would, of course, conflict with the judge's role as an impartial fact finder.

2. Whether the Administrative Judge misapplied the Adjudicative Guidelines and erred by concluding that the security concerns raised by Applicant's indebtedness had not been mitigated. On appeal, Applicant contends that the Administrative Judge should have concluded that the security concerns raised by his indebtedness were mitigated because: 1) the indebtedness resulted from his loss of employment, <sup>(1)</sup> 2) it was not recent, <sup>(2)</sup> 3) his creditors have taken no action to collect on the debts, an indication that they have no expectation of repayment, 4) he had made a good faith effort to resolve the debts, <sup>(3)</sup> and 5) he had presented substantial evidence of his good character. For the reasons set forth below, we disagree.

Applicant's Appeal Brief includes a Credit Report that was not part of the record below. The Board cannot consider new evidence on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29.*

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. 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, even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge reasonably could consider whether Applicant subsequently 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 inability or unwillingness to resolve the debts after the conditions which had contributed to them becoming delinquent had passed and his financial situation had improved. <sup>(4)</sup>

Similarly, given Applicant's previous involvements with the bankruptcy court, and the fact that some of the debts at issue had been incurred years earlier, but were still unresolved, it was not arbitrary or capricious for the Judge to conclude that Applicant's debts were recent, and that there was insufficient evidence for him to conclude that there were clear indications that the problem was under control. Given the record evidence in this case, the Judge's conclusions about the Applicant's security suitability were not unreasonable.

Likewise, 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. [Footnote 12]" ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6.

In footnote 12 of that decision, the Board stated the following: "For example, a person who decides not to honor his or her debts may be able to avoid paying those debts until they are legally uncollectible because the statute of limitations has run. Reliance on the running of a statute of limitations would be a legally permissible course of action. However, it would not demonstrate a good-faith effort to resolve one's debts that would fall under the meaning of Financial Considerations Mitigating Condition 6." <sup>(5)</sup> Given the Judge's findings with respect to the Applicant's history of indebtedness, his expressed unwillingness to pay most of the debts listed in the SOR, and his reliance on his creditor's unwillingness to pursue the collection of those debts, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to repay or otherwise resolve his debts had been made in "good-faith."

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. The Judge is not limited to consideration of an applicant's work performance or conduct during duty hours, but may also consider his past conduct in assessing his security suitability. *See e.g. ISCR Case No. 94-2009 (January 11, 1995) at p. 4; ISCR Case No. 94-0785 (April 12, 1995) at p.3.* Evidence of good character and personal integrity is relevant and material under the whole person concept. *See Directive, Section 6.3 and Item E2.2.1.1.* However, a finding that an applicant possesses good character and integrity does not preclude the government from considering whether the applicant's facts and circumstances still pose a security risk. *See e.g. ISCR*

Case No. 01-26893 (October 16, 2002) at p. 9. 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. There is ample record evidence to support the Judge's conclusions.

The Administrative Judge 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, he 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 to overcome those security concerns.

### Conclusion

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

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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "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, E2.A6.1.3.3).
2. "The behavior was not recent" (Directive, Enclosure 2, E2.A6.1.3.1).
3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, E2.A6.1.3.6).

4. In his brief, Applicant argues that his case should be adjudicated on the basis of his situation at the time he filed his application (Summer 2001), rather than as of the time of the hearing. He cites to no authority in support of this argument and we are unaware of any. In security clearance cases, a Judge may properly consider an applicant's conduct and/or any changes in his situation occurring between the date of his application and the date of his hearing insofar as they are relevant to matters properly alleged in the SOR. Typically, this practice works to the advantage of applicants, by allowing them to show beneficial changes in their situation which have occurred subsequent to the conclusion of their background investigation. In this case, the Judge properly considered all the record evidence which included the hearing

transcript (June 25, 2003). Further, the Judge left the record open beyond the hearing to give Applicant an opportunity to provide additional evidence beneficial to his case.

5. *See also* ISCR Case No. 01-09691 (March 27, 2003) at p. 3 ("[E]ven if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner."); ISCR Case No. 98-0349 (February 3, 1999) at pp. 2-3 (even though an applicant's delinquent debts were not legally collectible because of the statute of limitations, that fact did not preclude the Administrative Judge from considering the applicant's failure to resolve the delinquent debts before the statute of limitations ran). *Cf.* ISCR Case No. 01-04425 (May 17, 2002) at pp. 3-4 (it was not arbitrary or capricious for Administrative Judge to draw adverse conclusions under Guideline F when the record evidence showed the applicant chose to not pay her delinquent debts and waited until her creditors ceased trying to collect those delinquent debts and they were eventually dropped from her credit report).