

DATE: January 27, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-33057

## **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 November 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 Roger C. Wesley issued an unfavorable security clearance decision, dated October 19, 2004.

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's findings of fact about Applicant's financial situation and falsification of a security clearance application are supported by substantial record evidence; and (2) whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. 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 Administrative Judge's findings of fact about Applicant's financial situation and falsification of a security clearance application are supported by substantial record evidence. The Administrative Judge made findings of fact about Applicant's history of financial difficulties, which initially arose in 1996 and 1997 when Applicant suffered a reduction in pay and increased expenses due to complications with his wife's pregnancies. The Judge found that, as of the close of the record evidence, Applicant still had unresolved delinquent debts worth more than \$13,000.

Applicant makes factual assertions about the current status of certain debts and his efforts to deal with his creditors to address his remaining debts. Many of Applicant's assertions go beyond the record evidence that was before the Administrative Judge. Such assertions constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Some of Applicant's assertions about his financial situation do not appear to rely on a proffer of new evidence. The Board construes those assertions as challenging the Administrative Judge's findings of fact about the debts covered by SOR paragraphs 1.b, 1.c, and 1.d. <sup>(1)</sup> Given the record evidence of Applicant's financial difficulties, it was not arbitrary, capricious, or contrary to law for the Judge to take into account whether Applicant had presented documentary evidence to support his claims about his financial situation. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 5. Considering the record as a whole, Applicant has not shown that the Judge's findings of fact about the debts covered by SOR paragraphs 1.b, 1.c, and 1.d are erroneous. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

Applicant also challenges the Administrative Judge's finding that he falsified a security clearance application by not disclosing material facts about his delinquent debts. Considering the record as a whole, Applicant has not shown that the Judge's finding of falsification is erroneous. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. Applicant also asks the Board to reverse the Administrative Judge's decision so that he can continue to support his family and remain a productive citizen in his community. The Board construes Applicant's statements as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The possible adverse effects that an unfavorable security clearance decision could have on Applicant did not preclude the Administrative Judge from making an unfavorable security clearance decision. The security significance of Applicant's history of financial difficulties and his falsification of a security clearance application are separate from, and independent of, the possible adverse effects that an unfavorable security clearance decision might have on him. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8. Given the Judge's findings of fact about Applicant's history of financial difficulties and Applicant's falsification of a security clearance application, the Judge had a rational and legally permissible basis for his unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of history of financial difficulties); ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification).

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

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 Administrative Judge made findings and reached conclusions in favor of Applicant with respect to the debt covered by SOR paragraph 1.a. Those favorable findings and conclusions are not at issue on appeal.