

DATE: February 27, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-33092

## 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 July 9, 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 James A. Young issued an unfavorable security clearance decision dated November 18, 2003.

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.

On appeal Applicant asks the Board to reconsider evidence he presented at his hearing. He restates examples of his efforts to settle some of his out-standing debts and notes again his overall attempt to improve his financial position through initiation of a supervised debt repayment plan. He reiterates that he is currently attending college to better himself and improve his earning capacity and that he served honorably in the United States Army for over eight years. The Board interprets Applicant's arguments as raising the issues of (1) whether the Administrative Judge erred in his factual findings against Applicant in light of the evidence Applicant submitted, and (2) whether the Administrative Judge's adverse 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 erred in his factual findings against Applicant in light of the evidence Applicant submitted. The Judge found against Applicant as to all eight debts listed in the SOR. Applicant asks the Board to reconsider five of those debts (SOR paragraphs 1.a, 1.c, 1.d, 1.e, and 1.g). With his appeal he has submitted documentation on the status of those five debts.

Applicant testified at the hearing regarding the status of the debts in SOR paragraphs 1.e and 1.g, but he did not provide documentation about them at the hearing. The Board cannot consider Applicant's documentation regarding those two debts because it constitutes new evidence, and the Board cannot consider new evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

At the hearing, Applicant provided documentation about his efforts to settle the debts referred to in SOR paragraphs 1.a, 1.c, and 1.d, and he has resubmitted that documentation on appeal. Because Applicant challenges the Administrative Judge's findings of fact, the Board must consider whether there is adequate evidence in the record to support the Judge's findings in light of any contrary evidence that detracts from those findings, with the Board giving deference to the Judge's credibility determinations. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. In this case, the Administrative Judge included in his decision a list of Applicant's debts in a chart which included columns for the status of each debt and the location in the record of information about each debt. There is adequate evidence in the record to support the Judge's findings about Applicant's debts. It was reasonable for the Judge to look at the debts outstanding at the time of the hearing and at the timing of Applicant's efforts to settle them. The Judge noted that Applicant had

established his debt repayment plan in October 2003, but that payments under the plan would not begin until December 2003. The Judge was not bound to accept testimony as to those debts for which Applicant did not provide documentation. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at p. 3 (Administrative Judge is not required to accept at face value uncorroborated claims about paying off debts). The Board concludes there is an adequate basis in the record for the Administrative Judge's findings of fact.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. In his appeal brief, Applicant restates a number of factors which he believes should have led the Judge to grant or continue his security clearance (*e.g.*, his military career and his current university enrollment with a 3.2 grade point average).

When an Administrative Judge's conclusions are challenged, the Board is to examine the decision to determine whether it reasonably reflects the evidence presented at the hearing and whether it articulates a satisfactory explanation for its conclusions. There is a rebuttable presumption that the Judge has considered all the evidence presented. In this case, the Judge cited the factors which Applicant restates on appeal, and there is no indication that he did not consider other evidence presented by Applicant. The fact that such evidence did not lead the Judge to the decision desired by Applicant is not indicative of error. The Judge must weigh the record evidence as a whole and decide whether the unfavorable evidence outweighs the favorable evidence or *vice versa*. The Judge articulated a reasonable connection between his findings under Guideline F and his adverse conclusions about Applicant's security eligibility.

The Administrative Judge is responsible for weighing the evidence in light of the record evidence as a whole. Applicant's disagreement with the Judge's assessment of the evidence is not sufficient to persuade the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Accordingly, the Judge's conclusions are sustainable.

### **Conclusion**

Applicant has failed to demonstrate error below. Accordingly, the Administrative Judge's security clearance decision is affirmed.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board