

DATE: November 29, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-32842

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

Samuel G. Hayward, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated November 25, 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 Roger C. Wesley issued an unfavorable security clearance decision, dated August 5, 2004.

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 Administrative Judge erred by failing to give sufficient weight to an applicable mitigating condition; and (2) whether the Administrative Judge should have granted Applicant a security clearance while he negotiates and works with the Internal Revenue Service to resolve his outstanding tax debt. 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 failing to give sufficient weight to an applicable mitigating condition. Applicant contends the Judge should have concluded that the security concerns raised by his substantial indebtedness were mitigated by application of Financial Considerations Mitigating Condition 6.<sup>(2)</sup> In support of that contention he argues that: (1) subsequent to the hearing, he filed his back federal income tax returns, (2) he is currently working with an accountant to establish the exact amount of his federal tax indebtedness, and (3) he is attempting to arrange for a home equity loan to pay-off all his indebtedness, but cannot yet obtain the loan because of "the failure of . . . the Internal Revenue Service, to clearly and adequately define the indebtedness." For the reasons set forth below, we conclude the Judge's decision is sustainable.

The application of an Adjudicative Guidelines disqualifying and mitigating condition does not turn simply on whether there is some evidence that might support its application in a particular 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. Accordingly, even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge reasonably could consider whether Applicant acted in a reasonable manner when dealing with those financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 99-0012 (December 1, 1999) at p. 4.

In this case, the Administrative Judge found Applicant had pattern of repeated indebtedness over many years--including repeated instances of unpaid taxes. At the time the case was submitted for decision, Applicant still had significant outstanding debts and had only recently filed his back federal income tax returns. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent and ongoing. Likewise, the Judge could also reasonably conclude that Applicant's promises to satisfy his remaining debts and his recent efforts to work with an

accountant were not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required to conclude Applicant's current efforts to address his financial difficulties warranted application of Financial Considerations Mitigating Condition 6.

The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. 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*. The Judge reasonably addressed the possible application of the relevant mitigating condition and explained why he concluded Applicant had not sufficiently mitigated the security concerns raised by his history of substantial, outstanding indebtedness. 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 sufficient record evidence to support the Judge's conclusions. 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.

2. Whether the Administrative Judge should have granted Applicant a security clearance while he negotiates and works with the Internal Revenue Service to resolve his outstanding tax debt. Applicant also contends that he is unable to resolve his outstanding tax debt because the Internal Revenue Service has not provided him with answers to his questions, and that as a result he is unable to resolve his outstanding federal tax liability. Applicant asks that he be granted a security clearance to allow him to continue to work with the Internal Revenue Service to resolve his federal tax liability. As noted earlier in this decision, the Board does not review cases *de novo*. The Board will construe this contention as raising the issue of whether the Administrative Judge should have granted Applicant a security clearance while he works with the Internal Revenue Service to resolve his outstanding tax debt.

Applicant asks for relief that essentially constitutes a conditional or probationary security clearance. There is no authority under the Directive for granting a conditional or probationary security clearance. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 7. Accordingly, the Administrative Judge did not act in a manner that is arbitrary, capricious, or contrary to law by not granting Applicant a security clearance under the terms or conditions suggested by Applicant.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Although the appeal brief states Applicant challenges the synopsis and statement of the case in the decision below, Applicant's brief does not raise any identifiable challenge to those portions of the Administrative Judge's decision. As noted earlier in this decision, the appealing party must raise claims of error with specificity.
2. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).