

DATE: September 16, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-00759

## **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 May 7, 2004, 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 Paul J. Mason issued an unfavorable security clearance decision, dated June 29, 2005.

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 erred by not contacting a credit counseling organization to gather updated information concerning Applicant's financial situation; (2) whether the Administrative Judge erred by finding Applicant had not made payments toward a debt consolidation and repayment plan; and (3) whether the Administrative Judge erred by not concluding Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Conditions 4 and 6. 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 not contacting a credit counseling organization to gather updated information about Applicant's financial situation. In response to the File of Relevant Material, Applicant provided the name and telephone number of a person at a credit counseling organization that he said he was working with to consolidate and pay his outstanding debts. On appeal, Applicant contends the decision below shows the Administrative Judge did not contact that person to obtain an updated status of Applicant's financial situation. The Board construes Applicant's contention as raising the issue of whether the Judge erred by not contacting the credit counseling organization to gather updated information about Applicant's financial situation.

Under the Directive, the Administrative Judge has no obligation to gather information for either party in a case.<sup>(2)</sup> The Directive makes clear that it is the responsibility of each party to present evidence for a Judge to consider in a case.<sup>(3)</sup> Furthermore, the correspondence sent to Applicant with the File of Relevant material put him on adequate notice that it was his responsibility to gather and present evidence for the Judge to consider in his case.

2. Whether the Administrative Judge erred by finding Applicant had not made payments toward a debt consolidation and repayment plan. Applicant challenges the Administrative Judge's finding that he had not made payments toward a debt consolidation and repayment plan. Applicant's claim of error is based on a proffer of a document dated July 15, 2005 to support his claim that he has been making payments toward the debt consolidation and repayment plan.

Applicant's claim of error is not well founded. The Board cannot consider new evidence on appeal.<sup>(4)</sup> The July 15, 2005 document clearly constitutes new evidence. Applicant cannot fairly challenge the Administrative Judge's decision based

on a proffer of new evidence. Applicant had the opportunity to present evidence for the Judge to consider in his case. Applicant presented such evidence when he submitted a response to the File of Relevant Material. As discussed earlier in this decision, the Judge had no obligation to gather additional evidence about Applicant's financial situation. Furthermore, there is no right to have the record kept open so the parties can continuously provide new evidence for the Judge to consider.<sup>(5)</sup>

Given the record evidence that was available to the Administrative Judge, the Judge did not err by finding that Applicant had not made payments toward the debt consolidation and repayment plan. The Judge was not required to accept Applicant's stated intention to make such payments as proof that he would, in fact, make such payments.<sup>(6)</sup>

3. Whether the Administrative Judge erred by not concluding Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Conditions 4 and 6. Applicant contends the Administrative Judge should have concluded his history of financial difficulties was mitigated under Financial Considerations Mitigating Conditions 4<sup>(7)</sup> and 6<sup>(8)</sup> because: (a) he has been receiving financial counseling that has helped him meet his financial obligations; (b) he has paid off three creditors; and (c) he has made progress in paying off two other creditors.

Applicant's claim of error concerning Financial Considerations Mitigating Conditions 4 and 6 is based primarily on: (a) his proffer of new evidence on appeal; and (b) his argument that the Administrative Judge erred by not gathering updated information about his financial situation. For the reasons discussed earlier in this decision, neither of those two grounds demonstrates error by the Judge. What remains for the Board to decide is whether the Judge should have applied Financial Considerations Mitigating Conditions 4 and 6 based on the record evidence that was available to him.

Given the record evidence of Applicant's history of financial difficulties, the Administrative Judge properly concluded Applicant had the burden of presenting evidence of reform, rehabilitation, and changed circumstances sufficient to rebut or overcome the security concerns raised under Guideline F (Financial Considerations).<sup>(9)</sup> In response to the File of Relevant Material, Applicant provided the name and telephone number of a person at a credit counseling organization that he said he was working with to consolidate and pay his outstanding debts. Applicant's statement was relevant evidence that the Judge had to consider, but the Judge was not required, as a matter of law, to accept Applicant's stated intention as the evidentiary equivalent of a demonstrated track record of financial reform and rehabilitation. Considering the record evidence that was available to the Judge, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that application of Financial Considerations Mitigating Conditions 4 and 6 was not warranted in this case.

### **Conclusion**

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

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

1. The Administrative Judge found in Applicant's favor with respect to Guideline E (Personal Conduct). The Judge's findings and conclusions under Guideline E are not at issue on appeal.
2. *Cf.* ISCR Case No. 01-20579 (April 14, 2004) at p. 4 (because an Administrative Judge must be fair and impartial, an applicant does not have a right to expect the Judge will act as a surrogate advocate to help the applicant prepare and present the best possible case on his behalf).
3. *See* Directive, Additional Procedural Guidance, Items E3.1.7, E3.1.14, and E3.1.15.
4. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
5. *See, e.g.*, ISCR Case No. 03-17114 (November 29, 2004) at p. 3.
6. *See, e.g.*, ISCR Case No. 02-16631 (May 10, 2004) at p. 4.
7. "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).
8. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).
9. *See* Directive, Additional Procedural Guidance, Item E3.1.15.