

DATE: December 14, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-06863

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 23, 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). Administrative Judge Christopher Graham issued a favorable security clearance decision, dated March 31, 2005.

Department Counsel appealed the Administrative Judge's favorable 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 made sustainable findings of fact, (2) whether the Administrative Judge properly applied Financial Considerations Mitigating Condition 3, and (3) whether the Administrative Judge properly applied Financial Considerations Mitigating Condition 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**

(1) Whether the Administrative Judge made sustainable findings of fact. On appeal, Department Counsel challenges the Administrative Judge's findings of fact with regard to debts cited in SOR allegations 1.b., 1.d., 1.e., 1.g., 1.i., 1.j., 1.m., 1.p., 1.q. and 1.r.

Department Counsel's claims of error in the Administrative Judge's findings of fact with regard to SOR allegations 1.b., 1.g., 1.i., 1.j., and 1.r. are not supported by the record. The Judge's findings are sustained.

Department Counsel's claims as to 1.e. for \$103.59 is sufficiently supported by the record to conclude that the Administrative Judge's finding of fact under that allegation was erroneous.

Department Counsel is correct that the Administrative Judge did not have a basis in the record for finding that Applicant's ex-husband is paying the debt alleged in 1.d.; however, that does not equate with showing that Applicant is responsible for the debt. The Judge's finding with regard to the ex-husband's responsibility for the debt in 1.m. is supported by sufficient record evidence to be sustainable.

Department Counsel's description of the Judge's finding under 1.p. (that Applicant is not legally obligated to pay the debt) is not an accurate characterization of the Judge's decision. The Judge's findings as written are sustainable.

The Judge's finding of fact as to 1.q. is sustainable.

Department Counsel has demonstrated two errors in the Administrative Judge's findings of fact. Taken together the errors are not of enough weight to be substantial.

(2) Whether the Administrative Judge properly applied Financial Considerations Mitigating Condition 3. Department Counsel challenges the Administrative Judge's application of Guideline F (Financial Considerations) Mitigating Condition 3 (MC 3). *See Directive, Adjudicative Guidelines, Item E2.A6.1.3.3.* ("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)"). Department Counsel relies to a significant extent on an inaccurate reading of an Appeal Board decision. In ISCR Case No 02-11419 (August 27, 2003) the Board discussed that the Judge had concluded MC 3 did not apply in that case, and the Judge had noted that Applicant's divorce had occurred more than 10 years before the hearing. Nowhere in that decision did the Board state any standard as to what an Applicant must show in order for MC 3 to be applicable. Yet, Department Counsel cites that case for the proposition that "Applicant must establish a nexus between the divorce and her financial difficulties, whether as a result of legal fees, child support alimony, etc." The Board did not set down such a standard in that case. Furthermore, the nature of the evidence necessary to apply MC 3 is likely to vary case-by-case. (It is not difficult to imagine that one applicant might be left with large bills such as a preexisting mortgage and an inadequate income to pay the bills, while another might have new expenses, not previously contemplated). Given the record evidence in this case it was not arbitrary and capricious for the Judge to apply MC 3 to Applicant's financial history.

(3) Whether the Administrative Judge properly applied Financial Considerations Mitigating Condition 6. Department Counsel challenges the Administrative Judge's application of Guideline F Mitigating Condition 6 (MC 6). *See Directive, Adjudicative Guidelines, Item E2.A6.1.3.6.* ("The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.")

Department Counsel's claim is impaired to an extent by the fact that it is based in part on a reliance on arguments regarding errors in the Administrative Judge's findings of fact. As noted earlier in this decision, the Board found many of those arguments unpersuasive.

The Administrative Judge did not conclude that all of Applicant's debts fit within the parameters of MC 6. He did conclude that Applicant had made sufficient progress on a portion of her debts to justify some application of the mitigating condition. The Judge gave Applicant credit even where the progress was the result of garnishment of her wages. To the extent that he included debts which were paid through garnishment the Judge's application of the mitigating condition is inconsistent with the plain language of that condition. However, given the totality of facts and circumstances in this case, the inconsistency is not harmful and the Administrative Judge's ultimate conclusion is not arbitrary and capricious.

### **Conclusion**

Department Counsel has demonstrated error by the Administrative Judge. However, the Board concludes that the errors demonstrated are not sufficiently harmful to justify remand or reversal. The Judge's March 31, 2005 decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board