

DATE: January 27, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-10004

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

#### **FOR APPLICANT**

William H. Sams, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 3, 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 Joseph Testan issued an unfavorable security clearance decision, dated May 31, 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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant's unresolved federal tax debt raised security concerns under Guideline F (Financial Considerations); (2) whether the Administrative Judge erred by finding that Applicant falsified a security clearance application; and (3) whether the Administrative Judge failed to apply the "whole person" concept when evaluating Applicant's security eligibility. 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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant's unresolved federal tax debt raised security concerns under Guideline F (Financial Considerations). The Administrative Judge found that: (a) Applicant currently owes about \$35,000 in unpaid federal taxes, interest, and penalties; (b) Applicant has not made payments to the Internal Revenue Service (IRS) since he stopped making payments in 2000 on a payment plan he had set up with the IRS in 1999; and (c) Applicant has not followed through with statements that he would make payments to the IRS to deal with his federal tax debt. The Judge concluded that the facts and circumstances of Applicant's unresolved federal tax debt reflected adversely on his judgment and reliability, and raised security concerns under Guideline F (Financial Considerations). The Judge also concluded that Applicant had not mitigated the security concerns raised under Guideline F.

On appeal, Applicant does not dispute that he has an unresolved federal tax debt of about \$35,000 (including unpaid federal taxes, interest, and penalties). However, Applicant does contend that the Administrative Judge erred by concluding his unresolved federal tax debts raised security concerns under Guideline F. In support of this contention, Applicant argues: (i) there is no evidence that he is financially overextended and at risk to engage in illegal acts to generate funds, or that he has demonstrated unexplained affluence; (ii) the mere existence of a tax liability does not raise a security concern under Guideline F; (iii) the Judge erred by stating he is unable to determine from the record evidence whether Applicant's current income is sufficient to meet his expenses and pay his federal tax debt; (iv) there is no evidence that Applicant's tax debt or financial situation is related in any way to gambling, drugs, alcoholism, or various other security-related issues; (v) the Judge erred by concluding Department Counsel met its burden of proof under Guideline F; and (vi) Applicant's unpaid federal tax debt is not onerous and the IRS can always decide whether to garnish Applicant's wages to collect it. For the reasons that follow, the Board concludes Applicant has not demonstrated

harmful error below.

Because security clearance adjudications under the Directive are civil, administrative proceedings,<sup>(1)</sup> the language of the Adjudicative Guidelines need not be interpreted and construed with the strictness of the criminal code. Furthermore, the provisions of the Directive (including the Adjudicative Guidelines) must be interpreted and construed in a manner that is consistent with the national security objectives of the industrial security program.<sup>(2)</sup> Moreover, each of the Guidelines listed in the Adjudicative Guidelines should be interpreted and construed in light of its wording considered in its entirety, not just one portion or the other of that language.<sup>(3)</sup> Accordingly, it is not persuasive for Applicant to argue that the Administrative Judge erred based on Applicant's citation of the Concern portion of Guideline F (Financial Considerations) in isolation from the rest of Guideline F. As Department Counsel notes on appeal, the Judge concluded that Applicant's conduct and circumstances warranted application of Financial Considerations Disqualifying Condition 1<sup>(4)</sup> and Financial Considerations Disqualifying Condition 3.<sup>(5)</sup> Given the record evidence in this case, the Judge's conclusion concerning the applicability of those two disqualifying conditions was not arbitrary, capricious, or contrary to law.

Applicant is correct that the existence of a tax liability, standing alone, is not sufficient to raise security concerns under Guideline F. After all, numerous persons and entities have tax liabilities under applicable law and the mere existence of such liabilities does not necessarily reflect adversely on their judgment, reliability, or trustworthiness for purposes of assessing their security eligibility. However, this case does not involve the mere existence of a tax liability, but rather with the Administrative Judge's findings that: (a) Applicant has failed to deal with a tax liability in a timely, reasonable manner; and (b) Applicant still has not dealt with his tax liability despite the passage of several years, and despite making prior statements that he would deal with it.

Applicant's contention that the Administrative Judge erred by stating he is unable to determine from the record evidence whether Applicant's current income is sufficient to meet his expenses and pay his federal tax debt has some persuasive force. Given the record evidence in this case, the Judge had sufficient evidence to make a finding on this matter. However, the Judge's failure to make such a finding is harmless error in this case. Even if the Judge had found -- as urged by Applicant on appeal -- that the record evidence shows Applicant is not currently financially overextended and that he is financially capable of paying his expenses and making payments toward his federal tax debt, such a finding would not have precluded the Judge from concluding that the facts and circumstances of Applicant's failure to deal with his federal tax debt reflected adversely on his judgment, reliability, and trustworthiness for purposes of assessing his security eligibility.

Error below is not demonstrated by the absence of record evidence that Applicant's federal tax debt or financial situation was related to gambling, drugs, alcoholism, or other security-related issues.<sup>(6)</sup> Applicant's ability to argue that his case does not involve various aggravating circumstances does not translate into error by the Administrative Judge. Just because Applicant's case does not involve worse conduct and circumstances, it does not follow that the Administrative Judge could not conclude that the record evidence of Applicant's conduct and financial circumstances raise security concerns under Guideline F.

The actions or inactions of the IRS with respect to Applicant's unresolved tax liability did not preclude the Administrative Judge from evaluating the record evidence as a whole to assess Applicant's judgment, reliability, and trustworthiness for security clearance purposes. Even if the IRS is not taking affirmative steps to collect from Applicant, the Judge reasonably could consider whether Applicant's conduct with respect to the unresolved tax liability reflected adversely on his security eligibility.

Considering the record evidence as a whole, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Department Counsel had met its burden of presenting evidence sufficient to establish a *prima facie* case under Guideline F (Financial Considerations).

2. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application by answering "NO" to Question 36 ("Your Financial Record - Tax Lien. In the last 7 years, have you had a lien placed against your property for failing to

pay taxes or other debts?") even though he had a federal tax lien filed against him in December 1999 and a state tax lien filed against him in February 1998. The Judge also found that Applicant falsified the same security clearance application by answering "NO" to Question 34 ("Your Financial Record - Wage Garnishments. In the last 7 years, have you had your wages garnished for any reason?") even though he had his wages garnished in 1998 and/or 1999 and again in 2002.

Applicant challenges those findings of falsification, arguing: (a) he was embarrassed about the fact that his wages had been garnished; (b) the federal government already knew about his federal tax lien; (c) a "YES" answer to Question 36 "would not have provided the Government with any more information than the government already had in its possession"; (d) he assumed that Question 36 covered only tax liens against real property, not tax liens placed against wages; and (e) he did not knowingly and intentionally falsify the security clearance application or try to deceive the government.

Even if Applicant was embarrassed about his wages being garnished, such embarrassment would not preclude the Administrative Judge from finding that Applicant's "NO" answer to Question 34 was a falsification. Indeed, the Judge noted that Applicant had admitted that his "NO" answer to Question 34 was intentional.

Applicant's argument about what the IRS knew about his federal tax lien is irrelevant to the Administrative Judge's finding that Applicant's falsification included his failure to disclose the state tax lien that was filed against him in February 1998. Furthermore, Applicant's argument about what the IRS knew about the federal tax lien does not demonstrate the Judge erred. Regardless of whether the IRS knew about the federal tax lien, Applicant was obligated to give complete and accurate answers to the questions of the security clearance application.

Furthermore, in making a finding of falsification, the Judge specifically noted Applicant's inconsistent explanations for his "NO" answer to Question 36 and considered them in light of the record evidence as a whole (Decision at p. 3). It was not arbitrary, capricious, or contrary to law for the Judge to consider Applicant's inconsistent explanations when evaluating the record evidence and making a finding as to Applicant's intent or state of mind when he answered "NO" to Question 36. Furthermore, Applicant's inconsistent explanations for his "NO" answer to Question 36 are not consistent with, and provide no rational support for, his appeal argument on this aspect of the case.

Considering the record as a whole, the Administrative Judge's findings of falsification reflect a plausible interpretation of the record evidence in this case. There is sufficient record evidence to allow the Judge to find that Applicant's "NO" answers to Questions 34 and 36 were deliberate falsifications despite Applicant's denials of any intent to falsify.<sup>(7)</sup>

3. Whether the Administrative Judge failed to apply the "whole person" concept when evaluating Applicant's security eligibility. Applicant also contends the Administrative Judge erred by not evaluating his case under the "whole person" concept, arguing that consideration of his case under the general factors of Directive, Adjudicative Guidelines, Item E2.2.1 should result in a favorable security clearance decision. In support of this contention, Applicant asserts the Judge failed to consider his case under any of the general factors listed under Item E2.2.1, and argues how he thinks his case should be evaluated under each of those general factors.

As noted earlier in this decision, there is no presumption of error below. Error is not demonstrated by Applicant's bare assertion that the Administrative Judge failed to consider his case under the general factors listed in Directive, Adjudicative Guidelines, Item E2.2.1. Applicant's disagreement with the conclusions the Judge reached is not sufficient to persuade us the Judge simply ignored the general factors. A reading of the decision below persuades the Board that the Judge evaluated Applicant's conduct and circumstances in light of the general factors listed under Item E2.2.1. Furthermore, Applicant's arguments for how he thinks his case should be evaluated under each of the general factors are misplaced. The Board does not re-try a case on appeal, but rather considers whether either party has identified factual or legal error below. Error below is not demonstrated by sidestepping the Judge's decision and asking the Board to review the record evidence and reach its own conclusions about the case.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below that

warrants remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. *See, e.g., Chesna v. U.S. Department of Defense*, 850 F. Supp. 110, 119 (D. Conn. 1994)(a security clearance adjudication is not a criminal sanction, and does not implicate any of the constitutional rights or safeguards associated with a criminal trial).
2. *See, e.g.,* ISCR Case No. 01-24356 (February 26, 2003) at pp. 4-5; ISCR Case No. 00-0317 (March 29, 2002) at p. 7 n.14.
3. *See, e.g.,* ISCR Case No. 02-22556 (June 7, 2004) at pp. 3-4; ISCR Case No. 02-10120 (February 24, 2004) at p. 4.
4. "A history of not meeting financial obligations" (Directive, Adjudicative Guidelines, Item E2.A6.1.2.1).
5. "Inability of unwillingness to satisfy debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.2.3).
6. Although Applicant's brief does not cite them specifically, it uses language that indicates he is arguing that there no evidence that his conduct falls under Financial Considerations Disqualifying Conditions 2, 4, and 5.
7. *See, e.g.,* ISCR Case No. 99-0194 (February 29, 2000) at p. 3 ("An intent to falsify can be shown by circumstantial evidence even in the face of denials of any intent to falsify.").