

DATE: June 24, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-10880

## **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 the Applicant a Statement of Reasons (SOR), dated April 12, 2004, 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 January 12, 2005.

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 Applicant was given an adequate opportunity to prepare for his hearing, (2) whether Applicant was denied a timely decision in his case, (3) whether the Administrative Judge erred in making certain material findings, and (4) whether the Administrative Judge's 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 Applicant was given an adequate opportunity to prepare for his hearing. Applicant contends that the Administrative Judge's adverse clearance decision should be reversed because Applicant was not given an adequate opportunity to prepare for his hearing. In support of that contention, Applicant argues that the Judge waited 30 days after the assignment of the case to schedule it for hearing, and then waited another 63 days after scheduling the case, to send Applicant a notice for the hearing, which was to convene only 18 days after the date the notice was sent. Therefore, Applicant asserts that he was given only two weeks to find an attorney and prepare his case. The Board does not find Applicant's contention persuasive.

Applicant requested a hearing in his May 3, 2004, Answer to the Statement of Reasons. Applicant was notified at least 15 days in advance of the time and place of the hearing as required by the Directive. *See* Directive, Additional Procedural Guidance, Item E3.1.8. The hearing was held on August 24, 2004. At the beginning of the hearing, Applicant was given an opportunity to raise any procedural concerns and gave no indication that he had not had sufficient time to prepare his case. [\(1\)](#)

On the contrary, he proceeded with his case. Accordingly, the Board finds that Applicant was given a reasonable opportunity to prepare for his hearing.

2. Whether Applicant was denied a timely decision in his case. Applicant objects to the 141 day passage of time between his hearing and the issuance of the Administrative Judge's decision. It is his contention that because of the passage of that amount of time, the case was "no longer freshly imprinted in the Administrative Judge's memory and since the transcripts were not well read; there is little difference in a decision being fairly reached by simply reviewing documentation." [\(2\)](#)

The Board construes this argument as raising the issue of whether Applicant was denied a timely decision in his case.

Applicant's arguments do not demonstrate either error on the part of the Administrative Judge or authority for the Board to make any modifications. The Board has no supervisory authority over Hearing Office Judges and no basis to assume how large an individual Judge's caseload may be. There is no basis in the record to conclude that the Judge processed this case in a way that would constitute error. Absent a showing that a delay in the processing of a case prejudiced an applicant's rights in any meaningful way, mere proof of a delay is not sufficient to warrant remand or reversal of the Judge's decision. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 4. Without a showing of identifiable prejudice to the appealing party caused by the timing of the issuance of a Judge's decision, delay in the issuance of a Judge's decision does not warrant remand or reversal. *See, e.g.*, DISCR Case No. 93-1186 (January 6, 1995) at p. 5.

3. Whether the Administrative Judge erred in making certain material findings. Applicant contends that the Administrative Judge's adverse security clearance decision should be reversed because it is predicated on speculation, assumptions, and minor faulty findings of fact which, taken together, indicate that the "case was not given the full attention necessary to reach a fair decision." [\(3\)](#)

The Board does not find Applicant's contention persuasive.

The factual errors which Applicant identifies are either permissible characterizations on the part of the Administrative Judge or immaterial, in that they would not be reasonably likely to change the outcome of the case. [\(4\)](#)

Applicant has not met his burden of demonstrating that the Administrative Judge's material findings with respect Applicant's history of financial difficulties do not reflect a reasonable or plausible interpretation of the record evidence. As noted above, the Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

4. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant contends that the Administrative Judge's decision is arbitrary, capricious and contrary to law because: (1) Applicant's financial difficulties were an outgrowth of his divorce, (2) the Judge held against Applicant with respect to the debts Applicant had paid off and debts that were unenforceable because the statute of limitations had run on them, (3) the Judge's decision is in conflict with other Hearing Office decisions, and (4) since the hearing, Applicant has negotiated settlements with four creditors and one of three credit bureaus. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

(1) The Administrative Judge's finding that many of the Applicant's original financial problems could be traced in part to conditions that were largely beyond his control--his divorce--did not compel the Judge to make a favorable security clearance decision. Even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge could consider whether Applicant acted in a reasonable manner when dealing with his 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, it was not arbitrary or capricious for the Judge to consider such factors as: (1) the length of Applicant's history of financial difficulties, (2) the extent and nature of his indebtedness, (3) his uneven and/or unsuccessful efforts at paying off or compromising his indebtedness, (4) the fact that some of the debts were still unpaid, and (5) Applicant's involvement in bankruptcy, in reaching his adverse security clearance decision. Therefore, the Judge was not required to conclude, as a matter of law, that Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Condition 3.

(2) The Board has previously noted that an applicant must do more than merely show that he or she relied on a legally available option, such as the running of a statute of limitations, in order to claim the benefit of Financial Considerations Mitigating Condition 6. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at pp. 5-6. Therefore, the Judge was not required to find in favor of Applicant with respect to debts that were no longer legally collectible. Given Applicant's history of financial problems, his previous involvement with the bankruptcy process, and the fact that some of the debts at issue had been incurred years earlier, but had still not been resolved at the time of the hearing, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to otherwise resolve his debts had been made in "good-faith."

(3) The decisions in other DOHA cases cited by Applicant on appeal do not demonstrate error by the Administrative Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases. The cited cases are not legally binding precedent on the Board in this or any other appeal. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decisions by Hearing Office Judges).

(4) The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, there is no right to have the record kept open indefinitely so that a party can continuously submit new evidence for consideration in a case. *See, e.g.,* ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). Therefore, the Board may not consider the evidence of Applicant's debt resolution efforts subsequent to the close of the record.

### **Conclusion**

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

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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. *See* Transcript at pp. 1-18.

2. Applicant's Brief at p. 2.

3. Applicant's Brief at p. 1.

4. For example: (1) Applicant is 41 years-old, not 44 years-old; (2) Applicant is a "senior data collector," not a "data monitor"; (3) Applicant, rather than his ex-wife, was responsible for maintaining medical insurance on his child; (4) Applicant was terminated by a certain employer once, not twice; (5) Applicant's vehicle was repossessed in May 2002, not in June 2000; and (6) Applicant has not contacted a credit counseling service to explore debt consolidation.