

DATE: February 17, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-12929

## 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 December 3, 2003, 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 Carol G. Ricciardello issued an unfavorable security clearance decision, dated October 20, 2004.

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 issue has been raised on appeal: whether the Administrative Judge should have concluded that Applicant had demonstrated that her history of financial difficulties was extenuated or mitigated sufficiently to warrant a favorable security clearance decision. 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>**

The Administrative Judge made detailed findings of fact about Applicant's history of financial difficulties, which includes: a pattern of spending beyond her financial means; failing to make timely payments on her debts; defaulting on some debts; having some debts referred to collection agencies; having a civil judgment entered against her for a past-due debt; and failing to address and resolve various debts despite repeated statements that she would do so. Applicant does not challenge the Judge's findings of fact on appeal. Because there is no presumption of error below, and because the Board is directed to address the material issues raised on appeal,<sup>(2)</sup> the Board need not review the Judge's unchallenged findings of fact.

However, Applicant: (a) takes exception to the statement in the Administrative Judge's decision that she spent too much money on entertainment; (b) asserts the Judge failed to give sufficient consideration to the evidence that she has been helping her seriously ill mother; (c) argues that she has been trying to deal with her debts as best she can under the circumstances; (d) asserts that she has improved her financial situation and is current with her recent debts; and (e) states she does not pose a security risk. The Board construes Applicant's arguments as raising the issue of whether the Judge should have concluded that Applicant had demonstrated that her history of financial difficulties was extenuated or mitigated sufficiently to warrant a favorable security clearance decision.

Given the Administrative Judge's findings of fact about Applicant's history of financial difficulties, the Judge had a rational basis for concluding that Applicant's financial history raised security concerns. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of a history of financial difficulties). Under the Directive, Applicant had the burden of presenting evidence to refute, extenuate, or mitigate security concerns raised by her history of financial difficulties. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge had the responsibility to consider the record as a whole, decide whether the favorable evidence outweighed the unfavorable evidence, and reach a conclusion as to whether

Applicant satisfied her burden of persuasion.

A review of the decision below shows that the Administrative Judge: (a) addressed the favorable and unfavorable record evidence (including the evidence cited by Applicant on appeal); (b) reached conclusions about Applicant's history of financial difficulties that rationally follow from the Judge's findings of fact; (c) evaluated the facts and circumstances of Applicant's case under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1; and (d) applied pertinent provisions of the Adjudicative Guidelines. Although Applicant strongly disagrees with the unfavorable conclusions that the Judge reached under Guideline F, she has not demonstrated the Judge committed any factual or legal error. Applicant's disagreement with the Judge's conclusions, standing alone, is not sufficient to satisfy her burden of demonstrating error below. Applicant has not made any persuasive argument that the Judge's conclusions are arbitrary, capricious, or contrary to law.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. During the pendency of this appeal, Applicant asked the Chairman if she could submit additional documentation about her financial situation for consideration in her case. The Chairman told Applicant that the Board was precluded from considering new evidence on appeal, based on Directive, Additional Procedural Guidance, Item E3.1.29.

2. *See* Directive, Additional Procedural Guidance. Item E3.1.32.