

DATE: October 22, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-13281

## **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 February 9, 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 Roger C. Wesley issued an unfavorable security clearance decision, dated August 30, 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 had a rational basis for his unfavorable 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 Issue**

On appeal, Applicant makes assertions about what he has done since the hearing to deal with his financial situation. Such assertions constitute a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. A review of the proceedings below shows that Applicant had a reasonable opportunity to present evidence for the Administrative Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence. The Board will consider only those arguments made in Applicant's brief that do not rely on a proffer of new evidence.

Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. Because there is no presumption of error below, the Judge's unchallenged findings of fact stand without the Board needing to review them to determine whether they are supported by substantial record evidence.

Applicant does argue that: (1) the record evidence does not support the Administrative Judge's conclusion that his financial difficulties raise security concerns; and (2) the Judge should have given more weight to the record evidence of his efforts at addressing his financial difficulties. The Board construes these arguments as raising the issue of whether the Judge had a rational basis for his unfavorable security clearance decision.<sup>(1)</sup>

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information.<sup>(2)</sup> The federal government does not have to wait until an applicant mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision.<sup>(3)</sup> An unfavorable security clearance decision can be based on proof of conduct or circumstances that raises security concerns sufficient to preclude a determination that it is clearly consistent with the national interest to grant or continue a security clearance for a given applicant.<sup>(4)</sup>

The Directive presumes there is a nexus or rational connection between conduct or circumstances under any of the

Guidelines listed therein and an applicant's security eligibility.<sup>(5)</sup> Given the record evidence in this case, the Administrative Judge had a rational basis for concluding Applicant's history of financial difficulties falls within the scope of Guideline F (Financial Considerations). Furthermore, financial difficulties and financial irresponsibility have proven to be significant motivating forces for espionage or attempted espionage.<sup>(6)</sup> Finally, federal courts have accepted the principle that the government has a legitimate interest in protecting itself against bribery attempts aimed at its officers, employees, or agents.<sup>(7)</sup> Given that interest in areas not related to the national security, it follows that the federal government has a greater interest in avoiding or reducing the risk that persons granted access to classified information may be vulnerable to bribery or similar financial inducement that could jeopardize the security of classified information.<sup>(8)</sup> In light of the foregoing, the Board concludes the Judge had a rational basis for concluding that the facts and circumstances of Applicant's history of financial difficulties raised security concerns. Applicant's appeal argument to the contrary lacks merit.

In making a security clearance decision, the Administrative Judge must consider the record as a whole and weigh the evidence, both favorable and unfavorable. The Board will not disturb a Judge's weighing of the record evidence unless the appealing party shows that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.<sup>(9)</sup> Applicant's disagreement with the Judge's weighing of the record evidence, standing alone, is not sufficient to demonstrate the Judge weighed the evidence improperly. Applicant does not articulate any cogent reason or argument for how or why the Judge's weighing of the record evidence reflects action that is arbitrary, capricious, or contrary to law.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Field

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered a favorable formal finding with respect to the debt covered by SOR paragraph 1.e. That favorable formal finding is not at issue on appeal.
2. *Snepp v. United States*, 444 U.S. 507, 511 n. 6 (1980).
3. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

4. See *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988)(discussing predictive nature of security clearance decisions).
5. See, e.g., ISCR Case No. 02-07218 (March 15, 2004) at p. 5; ISCR Case No. 99-0424 (February 8, 2001) at p. 12 n.11.
6. See, e.g., *United States v. Pelton*, 835 F.2d 1067, 1069 (4th Cir. 1987)(individual sought to sell classified information to foreign power shortly after leaving National Security Agency with financial problems and bankruptcy); *United States v. Drummond*, 354 F.2d 132, 138 (2d Cir. 1965)(Navy yeoman in debt sold classified information), *cert. denied*, 384 U.S. 1013 (1966); *United States v. French*, 10 U.S.C.M.A. 171, 174 (1959)(Air Force officer in debt sought to sell classified information to alleviate his financial situation), *Gorin v. United States*, 111 F.2d 712, 715 (9th Cir. 1940) (Naval Intelligence investigator in financial straits accepted money from foreign power for providing information relating to national defense), *aff'd*, 312 U.S. 19 (1941).
7. See *Marshall v. District of Columbia Government*, 559 F.2d 726, 729-730 (D.C. Cir. 1977). *Accord Waide v. United States*, 229 Ct. Cl. 833, 835 (1982), *cert. denied*, 459 U.S. 836 (1982); *Detz v. Hoover*, 539 F.Supp. 532, 534 (E.D. Pa. 1982).
8. See *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973)(government may act on basis of lesser degree of risk to national security than it may on basis of risk to efficiency of civil service).
9. See, e.g., ISCR Case No. 02-01181 (January 30, 2004) at p. 5.