

DATE: August 3, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17743

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Jason R. Perry, Esq., Department Counsel

**FOR APPLICANT**

Strephon B. Treadway, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 17, 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 Elizabeth M. Matchinski issued a favorable security clearance decision, dated February 7, 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 erred by finding that Applicant was current with payments toward the debt covered by SOR paragraph 1.d; (2) whether the Administrative Judge erred by concluding Applicant's debts were mitigated under Financial Considerations Mitigating Condition 3; and (3) whether the Administrative Judge erred by finding that Applicant was likely to follow through on his stated commitment to seek the assistance of a debt counselor. 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 erred by finding that Applicant was current with payments toward the debt covered by SOR paragraph 1.d. Department Counsel challenges the Administrative Judge's finding that Applicant was current with payments toward the debt covered by SOR paragraph 1.d. This claim of error is not persuasive.

When reviewing a challenged factual finding, the Board does not have to agree with the Administrative Judge's weighing of the record evidence to conclude that the Judge's factual finding is sustainable. Given the record evidence before the Judge in this case, and giving due deference to the Judge's assessment of the credibility of Applicant's testimony, <sup>(1)</sup> the Board concludes the Judge had a sufficient basis to find that Applicant was current with payments toward the debt covered by SOR paragraph 1.d.

2. Whether the Administrative Judge erred by concluding Applicant's debts mitigated under Financial Considerations Mitigating Condition 3. Department Counsel challenges the Administrative Judge's conclusion that Applicant's debts were mitigated under Financial Considerations Mitigating Condition 3. <sup>(2)</sup> Although Department Counsel argues for a plausible interpretation of the record evidence that would militate against the application of Financial Considerations Mitigating Condition 3, the Judge was not compelled, as a matter of law, to accept that particular interpretation of the record evidence in this case. The Board does not have to agree with the Judge to conclude it was not arbitrary or capricious for the Judge to conclude that Applicant presented sufficient evidence to warrant the application of Financial Considerations Mitigating Condition 3.

3. Whether the Administrative Judge erred by finding that Applicant was likely to follow through on his stated commitment to seek the assistance of a debt counselor. Department Counsel also challenges the Administrative Judge's

finding that Applicant was likely to follow through on his stated commitment to seek the assistance of a debt counselor. This claim of error is not persuasive.

Given the record evidence before the Administrative Judge in this case, and giving due deference to the Judge's assessment of the credibility of Applicant's testimony, the Board concludes the Judge had a sufficient basis to find that Applicant was likely to follow through on his stated commitment to seek the assistance of a debt counselor. Department Counsel's ability to argue for a different weighing of the record evidence is not sufficient to show the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

## **Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Department Counsel has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. "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)," Directive, Adjudicative Guidelines, Item E2.A6.1.3.3.