

DATE: June 16, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18523

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jason R. Perry, Esq., Department Counsel

Peregrine D. Russell-Hunter, Chief Department Counsel

#### **FOR APPLICANT**

Alexander M. Laughlin, Esq.

Rebecca L. Saitta, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 18, 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 Darlene Lokey Anderson issued an unfavorable security clearance decision, dated December 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 issues have been raised on appeal: (1) whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Department Counsel had met its burden of presenting sufficient evidence to raise security concerns under Guideline F (Financial Considerations); and (2) whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Applicant had not mitigated the security concerns raised by his history of financial difficulties. 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 Department Counsel had met its burden of presenting sufficient evidence to raise security concerns under Guideline F (Financial Considerations). The Administrative Judge concluded that Department Counsel met its burden of persuasion under Guideline F, and that the burden of persuasion had shifted to Applicant to present evidence to rebut, explain, or mitigate Department Counsel's case against him (Decision at p. 5). Applicant contends the Judge's conclusion was arbitrary, capricious, or contrary to law because: (a) the Judge ignored the facts and circumstances surrounding Applicant's indebtedness and his response to the SOR; (b) Applicant's financial difficulties do not rise to a level sufficient to raise security concerns; and (c) the Judge impermissibly penalized Applicant for making good faith efforts to pay his debts rather than seek to discharge them in bankruptcy.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. <sup>(1)</sup> Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to rebut or overcome that presumption. Apart from the rebuttable presumption, a review of the decision below shows the Judge considered the facts and circumstances of Applicant's history of financial difficulties, including Applicant's explanations.

There is conflicting record evidence as to whether Applicant had satisfied the debt covered by SOR paragraph 1.f. In a written statement Applicant gave to an investigator, he indicated he still owed \$2,666 on that debt. In response to the SOR, Applicant admitted the debt but stated "[I] do believe this debt was satisfied thru a garnishment" and "I am

currently trying to get the necessary papers to prove this debt was paid." In response to the File of Relevant Material, Applicant made no statements about the status of the debt alleged in SOR paragraph 1.f and presented no documentation about the status of any of the debts listed in the SOR. Given the conflicting record evidence, the Judge had to make a finding of fact about the debt alleged in SOR paragraph 1.f. Given the absence of any documentation in the record that corroborated Applicant's claim about satisfaction of the debt covered by SOR paragraph 1.f,<sup>(2)</sup> it was not arbitrary, capricious, or contrary to law for the Judge to find that debt was still unsatisfied.<sup>(3)</sup>

When responding to the SOR, Applicant admitted he owed all the debts alleged in the SOR, except for the debt alleged in SOR paragraph 1.f. The File of Relevant Material contained information that would allow the Administrative Judge to find that Applicant owed all the debts alleged in the SOR. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Department Counsel had met its burden of proof under the Directive, and that the burden of persuasion had shifted to Applicant.<sup>(4)</sup>

Department Counsel is not required to present evidence that an applicant presents a clear and present danger to the national security.<sup>(5)</sup> Moreover, proof of facts and circumstances that fall under one or more of the Guidelines gives rise to a presumption of nexus.<sup>(6)</sup> Nothing in the Directive indicates or suggests that Department Counsel must prove, or an applicant must admit, that the applicant has a particular level of unresolved indebtedness before an Administrative Judge can conclude that security concerns have been raised under Guideline F (Financial Considerations). To resolve this appeal, the Board need not decide whether there is some *de minimis* level of indebtedness that must be exceeded before a Judge can conclude security concerns have been raised under Guideline F. In this case, the Judge found Applicant had delinquent debts worth approximately \$10,000. Considering the record evidence as a whole, it was not arbitrary or capricious for the Judge to conclude that amount of delinquent debts was sufficient to raise security concerns under Guideline F.<sup>(7)</sup>

Applicant places too much significance on the Administrative Judge's use of the phrase "financially irresponsible" at one point in her decision (at p. 5). First, the Board does not review isolated sentences in a Judge's decision, but rather considers the decision in its entirety to ascertain what findings the Judge made and what conclusions the Judge reached.<sup>(8)</sup> Second, nothing in the language of Guideline F limits its reach to only those cases involving financial irresponsibility. Guideline F is broad enough to encompass cases involving a history of unresolved financial difficulties unrelated to any act of financial irresponsibility.<sup>(9)</sup> The federal government can consider whether an applicant poses a risk under Guideline F through financial irresponsibility, greed, *or* financial misfortune.<sup>(10)</sup>

There is nothing in the decision below that indicates or suggests the Administrative Judge was "penalizing" Applicant for not dealing with his financial difficulties through bankruptcy. Applicant's argument is predicated on speculation about the mental processes of the Judge. Moreover, Applicant's argument makes the unwarranted assumption that seeking relief through bankruptcy would provide a "safe harbor" in Guideline F cases. Seeking relief in bankruptcy does not immunize an applicant's history of financial difficulties from review under Guideline F, nor does it preclude a Judge from making an unfavorable security clearance decision under Guideline F.<sup>(11)</sup>

2. Whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Applicant had not mitigated the security concerns raised by his history of financial difficulties. The Administrative Judge concluded that Applicant had not presented evidence sufficient to warrant application of any of the Financial Considerations mitigating conditions. Applicant challenges that conclusion on appeal, arguing: (a) the Judge should have applied Financial Considerations Mitigating Condition 3<sup>(12)</sup> and Financial Considerations Mitigating Condition 6;<sup>(13)</sup> (b) the Judge incorrectly referred to Financial Considerations Mitigating Condition 6 as Financial Considerations Mitigating Condition 3; and (c) the Judge should have reached favorable conclusions under Guideline F by applying the whole person concept to Applicant's case.

Applicant's second argument can be disposed of quickly. The Administrative Judge used language from Financial Considerations Mitigating Condition 6, but incorrectly referred to it as "MC 3" [Mitigating Condition 3] (Decision at p. 5). Such an error is a typographical error that is harmless in nature and which does not warrant remand or reversal.

As discussed earlier in this decision, Applicant had the burden of presenting evidence to refute, explain, extenuate or mitigate his history of unresolved financial difficulties. Considering the record evidence in this case, including the absence of documentation to corroborate Applicant's claim that he was dealing with his financial difficulties, it was not arbitrary or capricious for the Administrative Judge to conclude Applicant had failed to present evidence sufficient to warrant application of Financial Considerations Mitigating Condition 6.

Applicant's argument concerning Financial Considerations Mitigating Condition 3 is not persuasive. The Administrative Judge took note of Applicant's explanation concerning the circumstances under which his financial difficulties arose (*i.e.*, his divorce in 1999). The Judge also noted that the consequences of Applicant's divorce had an adverse effect on his financial situation beyond the divorce itself (Decision at pp. 2-3, 5). However, the Judge concluded that Applicant had not demonstrated financial stability since his divorce in 1999 and had not shown that he had gotten his financial difficulties under control in the years since his divorce (Decision at p. 5). Considering the record as a whole, the Judge's conclusion is not arbitrary or capricious. The extenuating or mitigating effect of circumstances outside an applicant's control does not preclude consideration of how the applicant reacts or responds to those circumstances, and whether the applicant's conduct in response to outside events is reasonable. <sup>(14)</sup>

Applicant's argument concerning the whole person concept is not persuasive. To the extent that Applicant's argument relies on factual assertions about what Applicant is currently doing to address his financial difficulties, it is based on a proffer of new evidence. As noted earlier in this decision, the Board cannot consider new evidence on appeal. Applicant had the opportunity to present evidence for the Administrative Judge to consider in his case. To the extent Applicant's argument is based on the record evidence below, it does not demonstrate the Judge erred. A review of the decision below persuades the Board that the Judge considered the overall facts and circumstances of Applicant's history of financial difficulties in a manner consistent with the whole person concept.

### **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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.

2. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 5 (legally permissible for Administrative Judge to take into

account an applicant's failure to provide documentation to corroborate claims about improvements in the applicant's financial situation).

3. On appeal, Applicant asserts that the debt covered by SOR paragraph 1.f was satisfied and refers to the caption of a state court case. Applicant's assertion constitutes a proffer of new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity during the proceedings below to present documentation about the status of his debts for the Administrative Judge to consider in his case.

4. *See* Directive, Additional Procedural Guidance, Item E3.1.15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.").

5. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 7.

6. *See, e.g.*, ISCR Case No. 02-07218 (March 15, 2004) at p. 5.

7. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of a history of financial difficulties).

8. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 6 n.4.

9. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 5 (even in the absence of evidence that the applicant engaged in misconduct, evidence that financial misfortune left the applicant with unresolved financial difficulties is sufficient for Administrative Judge to conclude security concerns were raised under Guideline F).

10. *See, e.g.*, ISCR Case No. 02-20947 (June 18, 2004) at p. 5; ISCR Case No. 00-0378 (August 15, 2001) at p. 4.

11. *See, e.g.*, ISCR Case No. 02-06703 (February 25, 2004) at p. 3 (citing other Board decisions); ISCR Case No. 97-0016 (December 31, 1997) at p. 4 (discussing why evidence that applicant was seeking financial relief through bankruptcy did not preclude the Administrative Judge from making an unfavorable security clearance decision).

12. "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).

13. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).

14. *See, e.g.*, ISCR Case No. 02-21282 (August 5, 2004) at p. 4 (even if an applicant's financial difficulties initially arose because of circumstances outside the applicant's control, the Administrative Judge can consider whether the applicant acted in a reasonable manner when dealing with those financial difficulties, or whether the applicant failed to resolve the debts after the conditions which gave rise to them had passed).