

DATE: August 18, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-19692

## **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 May 24, 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) and Guideline E (Personal Conduct). Administrative Judge Christopher Graham issued an unfavorable security clearance decision, dated March 31, 2005.

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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to render an unfavorable security clearance decision based on Applicant's 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 Issue<sup>(1)</sup>

Whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to render an unfavorable security clearance decision based on Applicant's history of financial difficulties. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. However, Applicant asks the Board to reverse the Judge's unfavorable decision because: (a) "I am currently working with a professional company to try [to] resolve some of the old debts and to bring my credit bureau reports to a good standing"<sup>(2)</sup>; (b) he would never misuse a security clearance to threaten or harm the national security; and (c) he is proud of his long record with his company, which produces products for the U.S. military.<sup>(3)</sup> The Board construes Applicant's statements as raising the issue of whether it was arbitrary, capricious, or contrary to law for the Judge to render an unfavorable security clearance decision based on Applicant's history of financial difficulties.

There is little record evidence about Applicant's work history. Moreover, Applicant fails to articulate any cogent reason why his work history demonstrates the Administrative Judge's decision is erroneous. Security clearance adjudications are not limited to consideration of an applicant's job performance or conduct during work hours. *See, e.g.*, ISCR Case No. 01-26723 (November 30, 2004) at p. 3. Nothing in the record evidence about Applicant's work history indicates or suggests the Judge's conclusions about the security significance of Applicant's history of financial difficulties are arbitrary, capricious, or contrary to law.

The federal government is not required to wait until an applicant has committed a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The Administrative Judge's findings of fact about Applicant's history of unresolved financial difficulties provide a rational basis for the Judge to reach unfavorable conclusions about his security eligibility. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4 (discussing security significance of a history of financial difficulties).

The record evidence of Applicant's efforts to deal with his delinquent debts was considered by the Administrative Judge, who concluded it was not sufficient to mitigate the negative security concerns raised by Applicant's history of financial difficulties. Applicant has not made any argument that persuades the Board that the Judge weighed the record evidence in a manner that is arbitrary or capricious, or reached conclusions about Applicant's history of financial difficulties that 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: 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

1. The Administrative Judge's favorable findings and conclusions under Guideline E (Personal Conduct) are not at issue.
2. Applicant's appeal brief could be construed as making an assertion about what he has been doing about his financial difficulties since the close of the record evidence. Such factual assertions would constitute a proffer of new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will consider Applicant's assertion only to the extent it relies on record evidence.
3. Applicant's brief also contains comments about the military records of his father and oldest brother. The military records of Applicant's father and his oldest brother are irrelevant to the Administrative Judge's findings and conclusions about Applicant's security eligibility.