

DATE: June 23, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-20002

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Eric H. Borgstrom, Esq., Chief Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 28, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 25, 2005, after the hearing, Administrative Judge Kathryn Moen Braeman granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge erred by concluding Applicant had not intentionally falsified his security clearance application and had mitigated the security concerns under Guideline E; whether the Administrative Judge erred by concluding the security concerns under Guideline F had been mitigated.

### **Whether the Record Supports the Administrative Judge's Factual Findings**

#### **A. Facts**

Applicant is a 45-year-old employee of defense contractor. At the time the SOR was issued, Applicant had 11 bad debts totaling approximately \$129,000. A number of the debts had been placed for collection, charged off, or reduced to a judgement. Applicant's financial difficulties were partially the result of medical problems and marital difficulties. Applicant filed a petition for Chapter 13 bankruptcy in November 2002. However, that petition was dismissed in ay 2004 when Applicant failed to make timely payments. Applicant recently made some small payments toward several of the larger debts and testified that he planned to pay the remainder.

Applicant answered "No" to question 38 on his Security Clearance Application (SCA), Standard Form 86, executed on December 21, 2000, which asked: "In the last 7 years, have you ever been over 180 days delinquent on any debt?" At the time he answered the question, Applicant had six debts that had been delinquent for over 180 days. However, the Administrative Judge found Applicant had no intention to falsify when he answered "No" because Applicant had not reviewed his credit report and he believed he had addressed those debts when he refinanced his house in 1997.

## B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

To the extent necessary to resolve the issues raised on appeal, the Administrative Judge's findings of fact will be discussed below in conjunction with the analysis of her ultimate conclusions. The Hearing Transcript (HT) will be cited when appropriate.

### Whether the Record Supports the Administrative Judge's Ultimate Conclusions

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency . . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel contends that the Administrative Judge erred in concluding Applicant did not intend to falsify his SCA when he answered "No" to question 38. Applicant had maintained that he was unaware of any financial problems from 1997 until 2002, and that from September 2000 he "was out of the picture" and had no information about household financial matters because they became his current spouse's responsibility. However, Department Counsel argues that during the hearing, on cross-examination, Applicant admitted that he knew or should have known that he had past due balances on two credit card accounts prior to September 2000 while he still managed household financial matters<sup>(1)</sup> and that Applicant did access his checking account on-line between September 2000 and August 2002<sup>(2)</sup>. Department Counsel also contends that Applicant, who had testified that he used his late spouse's insurance proceeds after she died in 1995 to address outstanding debts, knew that the outstanding debts were within 7 years of his SCA. Finally, Department Counsel challenges the Administrative Judge's interpretation of question 38 contending that the Judge limited its application to debts that were currently over 180 days old at the time Applicant signed the SCA, rather than apply it to the seven years prior to the application.

For the reasons that follow, the Board finds that the Administrative Judge erred in concluding that Applicant did not intend to falsify his December 2000 SCA. The record indicates that Applicant was well aware of his history of indebtedness, and also aware of the fact that it was material to a determination of his security clearance eligibility. Question 38, particularly when read in conjunction with questions 33 through 37 and 39, clearly apprised Applicant that his financial circumstances were a matter of current interest and concern to the government. Applicant's explanations for his "No" response to question 38 are conflicting, and at times confusing.<sup>(3)</sup> The Board is not persuaded that there is substantial evidence that Applicant knew that Credit Card B was past due by 180 days at the time he completed his SCA in December 2000; however, there is substantial evidence, by Applicant's own admission that he paid no more bills to Credit Card A after April 2000, that he had to know in December 2000 that Credit Card A had been past due by at least 180 days when he completed the December 2000 SCA. There is also substantial evidence that Applicant had to know that there were bills incurred with his late spouse that had become past due by 180 days, and the Administrative Judge simply dismissed them because Applicant obtained financing for his house in 1997. Additionally, the details Applicant provided concerning his knowledge of additional financial problems after 2000, while not directly relevant to what Applicant knew in December 2000, were relevant to Applicant's general credibility. For example, Applicant testified that he was not aware of any problem with his household financial situation from September 2000 to August 2002,<sup>(4)</sup>

even though he previously testified that in January 2002 he became aware that he had financial problems because he was served with notice that his house was about to be foreclosed.<sup>(5)</sup> Whether Applicant was confused, or contradicted himself for other reasons, such inconsistent testimony of matters that have current security significance are not trivial and must be addressed by the Judge. *See, e.g.*, ISCR Case No. 01-06870 at 3 (App. Bd. Sept. 13, 2002).

In deciding whether the Administrative 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. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The Judge explains Applicant's admission regarding the due credit card account, as well as the outstanding debts he had accumulated with his late spouse, with findings that Applicant did not review his credit report prior to completing his SCA and that Applicant believed he had addressed those debts when he financed his house in 1997. Otherwise, she merely states that she finds Applicant's testimony credible. The fact that Applicant did not consult a credit report prior to completing his SCA is not reasonably dispositive of whether he knew that he had past due debt at the point in time when he completed the SCA. Nor does a finding that Applicant obtained financing in 1997 overcome the requirement to look at the scope and content of question 38. The Judge must articulate a satisfactory explanation for her conclusions in light of the record evidence. Furthermore, as explained in the previous paragraph, the Judge's determination that she found Applicant credible runs contrary to record evidence showing serious inconsistencies in his testimony generally.

Although the Board must give deference to the credibility determinations made by an Administrative Judge (Directive ¶ E3.1.32.1), that deference does not immunize credibility determinations from review. *See, e.g.*, ISCR Case No. 99-0710 at 4 (App. Bd. Mar. 19, 2001). As the Supreme Court noted in *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985): "[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the courts of appeals may well find clear error on a finding purportedly based on a credibility determination." The Board must decide whether a Judge's acceptance of an applicant's explanation for his or her conduct is consistent with a reasonable interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0620 at 3 (App. Bd. Oct. 19, 2001).

The Judge failed to reasonably consider the significance of Applicant's admission on cross-examination with regard to Credit Card A, reasonably weigh Applicant's explanations considering the broad scope and content of question 38, and reasonably consider Applicant's contradictory, and at times confusing, testimony about aspects of his financial situation that have security significance. In effect, the Judge's credibility determination is based on a subjective evaluation. Accordingly, the

Board concludes that, in totality, the Judge did not have a sustainable basis for concluding that Applicant did not intend to falsify his December 2000 SCA.

In her decision, the Administrative Judge concluded in the alternative that even if Applicant's falsification of his SCA had been intentional, his conduct was still mitigated under the "whole person" concept. However, the Judge offered no analysis or rationale to support that conclusion, and made no findings of fact indicative of positive behavioral changes, rehabilitation, or that the conduct would be unlikely to recur in the future. Therefore, that conclusion is likewise not sustainable.

The error identified by Department Counsel is harmful and unlikely to be remedied by remand. Therefore, the Administrative Judge's favorable decision under Guideline E must be reversed.

Department Counsel also contends the Administrative Judge erred in concluding the security concerns raised under Guideline F had been mitigated. In support of that contention, Department Counsel notes that most of Applicant's approximately \$129,000 in outstanding indebtedness remains unpaid, and the few payments Applicant has made were made well after invocation of the security clearance process, were sporadic and inconsistent, and were not clearly

documented by independent evidence. Department Counsel also argues that the Judge erred in relying on Applicant's uncorroborated assertions that he would pay off or settle the remainder of his unpaid debts in the future, given Applicant's long history of financial problems and the fact that Applicant had previously had a Chapter 13 bankruptcy petition dismissed because of his failure to make timely payments.

Because the Administrative Judge's favorable clearance decision must be reversed on other grounds, the Board need not reach the issue of whether the Judge erred in concluding that the security concerns on Guideline F had been mitigated.

### **Order**

The decision of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. On Credit Card A, Applicant made his last payment in April 2000 and acknowledged that he knew that he made no further monthly payments on the account up until he turned over control of paying the bills to his wife in September 2000 (HT at 75-76). On Credit Card B, Department Counsel demonstrated that it was past due by at least 120 days by February 2001 and that Applicant made a last payment in July 2000 (Government Exhibit 9); however Government Exhibit 5 suggests that the July 2000 payment was a payment in full.

2. HT at 75-77.

3. *E.g.*, HT at 37-39.

4. HT at 77-78.

5. HT at 45-47.