

DATE: September 25, 2006

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In Re:

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SSN:-----

Applicant for Security Clearance

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ISCR Case No. 03-21329

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

#### FOR APPLICANT

#### *Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 23, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 29, 2006, after the hearing, Administrative Judge Wilford H. Ross denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied due process of law; whether the Administrative Judge's adverse security clearance decision is arbitrary capricious, or contrary to law.

Applicant argues he was denied due process of law because he was told by Department Counsel prior to the hearing that it was not necessary for him to bring certain items of documentary evidence, such as the full debtor's schedule from his bankruptcy filing or documentation relating to his dealings with a county child support agency for submission as evidence at the hearing. The Board does not find this argument persuasive.

There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sept. 20, 2001). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant has not met that heavy burden, in that he fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to conclude that Department Counsel had acted improperly. At his hearing, the Administrative Judge asked Applicant whether he had the bankruptcy schedules, and Applicant responded, "I asked for that, and the only thing they sent me was a list of creditors." Applicant's appeal did not include the bankruptcy schedules, nor did Applicant explain how he was prejudiced by their absence from the record. Applicant also testified at his hearing that he did not have any additional information regarding his child support obligation. <sup>(1)</sup> A review of the record suggests that Applicant did not bring the documents at issue to the hearing because they were otherwise unavailable. As noted, Applicant's appeal does not explain how any bankruptcy documentation would support a favorable clearance determination.

In this case, Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to

protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). Because Applicant did not raise his concerns with the Administrative Judge during the hearing, or otherwise make a request for additional time to collect the evidence at issue, he was not denied due process under the Directive or Executive Order.

Applicant also argues that the Administrative Judge's adverse decision should be reversed because it is contrary to other DOHA Hearing Office decisions in which applicants in ostensibly similar circumstances were granted clearances. The Board does not find this argument persuasive.

The decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues and or the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Administrative Judge found that Applicant had a lengthy history of not meeting financial obligations and had only recently filed for bankruptcy--after receipt of the SOR. The Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge articulated a rational basis for not favorably applying any mitigating conditions and reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before him, the Judge's unfavorable clearance decision under Guideline F is not arbitrary, capricious, or contrary to law.

### **Order**

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Mark W. Harvey

Mark W. Harvey

Administrative Judge

## Member, Appeal Board

1. Applicant's appeal contends that he overpaid his child support, which was being garnished from his wages. Applicant's appeal does not describe the amount of the overpayment, nor does he provide supporting documentation. Applicant fails to show how he was prejudiced by the absence of information about the overpayment. The Administrative Judge concluded that Applicant is current on his child support requirements. In any event, the Board cannot consider new evidence on appeal. *See* Directive ¶ 3.1.29.