

DATE: November 18, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-02983

## **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 the Applicant a Statement of Reasons (SOR), dated November 4, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated May 20, 2005.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issue: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of indebtedness had not been mitigated. 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 the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of indebtedness had not been mitigated. Applicant contends the Administrative Judge should have concluded that the security concerns raised by her history of indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 3 <sup>(2)</sup> and 6 <sup>(3)</sup>

In support of that contention Applicant argues that: (a) the Judge erred in making certain findings of fact, <sup>(4)</sup> (b) the indebtedness resulted from conditions beyond her control--her husband's loss of employment and serious medical problems, and (c) she has paid off many of the debts. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

The factual findings which Applicant challenges are either permissible characterizations on the part of the Administrative Judge or immaterial, in that they would not be reasonably likely to change the outcome of the case. Applicant has not met her burden of demonstrating that the Administrative Judge's material findings with respect Applicant's history of financial difficulties do not reflect a reasonable or plausible interpretation of the record evidence. As noted above, the Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings about Applicant's history of indebtedness are sustainable.

The application of Adjudicative Guidelines 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, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Even if a Judge concludes that a particular Adjudicative Guideline disqualifying or mitigating condition is applicable, the Judge must still consider what weight it is reasonably entitled to be given in light of the other applicable provisions of the Adjudicative Guidelines and the record evidence as a whole. *See, e.g.*, ISCR

Case No. 02-05110 (March 22, 2004) at pp. 4-6. Accordingly, the Administrative Judge's finding that many of the Applicant's original financial problems could be traced to conditions that were largely beyond her control did not compel the Judge to make a favorable security clearance decision. Even if Applicant's financial difficulties initially arose due to circumstances outside her control, the Judge could consider whether Applicant acted in a reasonable manner when dealing with her financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 99-0012 (December 1, 1999) at p. 4. In this case, it was not arbitrary or capricious for the Judge to consider such factors as: (a) the length of Applicant's history of financial difficulties, (b) the extent and nature of her indebtedness, (c) the extent and effectiveness of her efforts to deal with that indebtedness, (d) the fact that some of the debts were still unpaid, and (e) the presence of a prior discharge in bankruptcy, in reaching his adverse security clearance decision. The Judge found in Applicant's favor with respect to many of the factual allegations alleged in the SOR. However, given the record evidence, the Judge was not required to conclude, as a matter of law, that Applicant's history of financial difficulties was fully mitigated under Financial Considerations Mitigating Conditions 3.

Given the overall history of Applicant's financial problems, her involvement with the bankruptcy process, the sizable nature of the indebtedness, and the fact that some of the debts at issue had been incurred years earlier, but had still not been resolved at the time of the hearing, it was not arbitrary or capricious for the Judge to decide that the evidence was insufficient for him to conclude that Applicant's efforts to resolve her debts warranted full mitigation of her financial history through application of Financial Considerations Mitigating Condition 6. Although the Judge gave the Applicant some credit under Mitigating Condition 6, the Judge was not required, as a matter of law, to conclude Applicant's history of financial difficulties was fully mitigated under that mitigating condition.

### **Conclusion**

Applicant has failed to demonstrate harmful error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.b, 1.c, 1.f, 1.g - 1.v, 1.x, 1.y, 1.aa - 1. ff, 2.a, 2.b, and 2.c. Those favorable formal findings are not issue on appeal. Additionally, the Judge found against Applicant with respect to Guideline E (SOR paragraph 2.d) and that unfavorable finding was not appealed by Applicant.

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).

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

4. Applicant's contention in this regard is predicated in part on the offer of new evidence that was not before the Judge. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.