

DATE: February 28, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-05829

## 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) declined to grant Applicant a security clearance. On October 29, 2004, 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), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On July 14, 2005, after the hearing, Administrative Judge James A. Young 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 issue on appeal: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of indebtedness had not been mitigated.<sup>(1)</sup> In support of that contention, Applicant essentially reargues his case with respect to the mitigating evidence he presented below, noting that he has paid off several of the debts and is either contesting or attempting to settle the remaining ones.<sup>(2)</sup>

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the Guideline F allegations had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case, the Applicant had a history of not meeting financial obligations which ran over many years. At the time the case was submitted for decision, Applicant still had significant outstanding debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and still ongoing. Likewise, the Judge could also reasonably conclude that Applicant's promises to resolve his indebtedness and his recent efforts to resolve that indebtedness were not a substitute for a consistent record of timely remedial action. Although the Judge found in favor of Applicant with respect to several of the factual allegations, the Judge was not required, as a matter of law, to conclude that the security concerns raised by Applicant's history of financial difficulties had been fully mitigated. The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings and conclusions about Applicant's history of indebtedness are sustainable. Thus, the Administrative Judge did not err in denying Applicant a clearance.

#### Order

The decision of the Administrative Judge granting 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

### **Concurring Opinion of Chairman Emilio Jaksetic:**

For the reasons that follow, I concur with my colleagues' conclusion to affirm the Administrative Judge's decision.

My colleagues correctly note that Applicant's appeal brief contains factual assertions that seek to supplement the record evidence, and that such assertions constitute new evidence that the Board cannot consider on appeal. Apart from the prohibition set forth in Directive, Additional Procedural Guidance, Item E3.1.29, Applicant's effort to supplement the record evidence on appeal runs afoul of the general legal principle that a party does not have a right to have the record reopened on appeal so that the party can continually offer further evidence for consideration in the case. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)(discussing the need for finality in administrative proceedings, and explaining why a party cannot expect it has a right to reopen the record on appeal).

I do not find persuasive Applicant's claim that the Administrative Judge ignored the record evidence that he presented during the proceedings below. There is a rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1285 (9th Cir. 1984). That presumption is not rebutted or overcome merely because Applicant disagrees with the weight that the Judge gave to the record evidence, or because Applicant disagrees with the conclusions that the Judge drew from the record evidence. Apart from the rebuttable presumption, a reading of the decision below persuades me that the Judge considered the record evidence presented by Applicant.

Applicant also challenges the Administrative Judge's findings of fact based largely on his disagreement with the Administrative Judge's weighing of the record evidence. Applicant's disagreement with the Judge is not sufficient to demonstrate the Judge erred. There is no simple formula or rule of law on how a Judge must weigh record evidence. Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge has discretion to weigh the record evidence. A Judge is not always faced with a case where the record evidence points all in one direction. To the contrary, it is not unusual for a Judge to be faced with conflicting record evidence, or with a record that contains some evidence that favors one side and different evidence that favors the other side. In such situations, the Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a conclusion as to whether the applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. [\(3\)](#)

In this case, the Administrative Judge considered the record evidence presented by Applicant concerning the debts covered by the SOR paragraphs and concluded Applicant's evidence (both written and testimonial) was not convincing enough to counter the evidence presented against him. Applicant disagrees with the Judge's findings about his debts, but Applicant has not shown that the Judge's findings reflect a failure to weigh the evidence in a reasonable or common sense manner. Accordingly, I concur with my colleagues' conclusion that the Judge's findings of fact about Applicant's history of indebtedness are sustainable.

Applicant's argument concerning the applicability of Financial Considerations Mitigating Condition 6 [\(4\)](#) is not persuasive. The record evidence shows that Applicant believes that he is acting properly and in good faith with respect to the various debts covered by the SOR. However, Applicant's beliefs are not dispositive or binding on the Administrative Judge. In addition to the record evidence about Applicant's beliefs about the debts covered by the SOR, the Judge also had to take into account the record evidence concerning those debts and Applicant's actions with respect to them. Considering the record evidence as a whole, it was not arbitrary or capricious for the Judge to conclude that Applicant had not presented evidence sufficient to warrant application of Financial Considerations Mitigating Condition 6.

Applicant also relies on his contention that he disputes various debts covered by the SOR, and that he is entitled to

contest those debts through the legal process. Applicant is free to seek legal redress -- in other jurisdictions and before other legal entities -- concerning his claims about the status of various debts. However, the problem with Applicant's position is that it assumes that he is entitled to hold a security clearance until he is able to challenge the legal status of various debts before other legal entities and receives a resolution of those challenges from other legal entities. There is no right to a security clearance. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Furthermore, there is no presumption in favor of granting or continuing a security clearance. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). As noted earlier, I concur with my colleagues' conclusion that the Judge's findings of fact about Applicant's history of indebtedness are sustainable. The Judge's findings of fact in this security clearance adjudication do not preclude the Applicant from seeking legal redress before other legal entities concerning his claims about the various debts. However, Applicant is not entitled to have a security clearance while he seeks such legal redress elsewhere.

Finally, Applicant contends none of the debts covered by the SOR warrants an unfavorable decision under Guideline F (Financial Considerations). This contention is not persuasive. The Administrative Judge was not required to consider each of the debts covered by the SOR separately and decide whether each debt, standing alone, raised security concerns under Guideline F. Rather, the Judge had to consider the totality of the facts and circumstances<sup>(5)</sup> of Applicant's history of financial difficulties and decide whether the totality of those facts and circumstances raised security concerns under Guideline F that shifted the burden of persuasion to Applicant under Directive, Additional Procedural Guidance, Item E3.1.15. The Judge's findings and conclusions about Applicant's overall history of financial difficulties provide a rational and legally sufficient basis for his adverse formal findings under Guideline F, and his unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.a, 1.g, and 2.a. Those favorable findings are not at issue on appeal. Applicant's appeal brief contains additional assertions and explanations that seek to supplement the record evidence that was before the Administrative Judge. The Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29.
2. As part of his argument with respect to SOR paragraph 1.e, Applicant references ISCR Case No. 99-0201 at 4 (App. Bd. Oct. 12, 1999). That case interpreted "good-faith" in the context of Guideline E (Personal Conduct), not Guideline F (Financial Considerations). In this case, the Judge found in Applicant's favor under Guideline E.
3. "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."
4. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."
5. *See* Directive, Section 6.3 ("Each clearance decision must be a fair and impartial common sense determination based upon consideration of *all the relevant and material information . . .*")(italics added), and Directive, Adjudicative Guidelines, Item E2.2.1 (whole person concept).