

DATE: March 9, 2006

In Re:

-----

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-07749

**APPEAL BOARD SUMMARY DISPOSITION**

**APPEARANCES**

**FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance due to 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 December 31, 2005, after a 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's appeal brief contains no assertion of error on the part of the Administrative Judge. It consists largely of a restatement of Applicant's view of the case already proffered below. It also contains statements that constitute new evidence, which the Board cannot consider. See Directive, ¶ E3.1.29. Applicant does not request any specific type of relief from the Board in her appeal brief.

The Appeal Board's authority to review a case is limited to cases in which the appealing party has alleged the administrative judge committed harmful error. Applicant has not made an allegation of harmful error. Therefore, the decision of the Administrative Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

### Concurring Opinion of Chairman Emilio Jaksetic:

My colleagues correctly note that Applicant's appeal brief contains factual assertions that seek to supplement the record evidence. Such assertions constitute a proffer of new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. At the hearing, Applicant had a reasonable opportunity to present evidence for the Judge to consider in her case. Apart from the bar to new evidence set by Item E3.1.29, there is no general right to have the record kept open on appeal so that party can offer new evidence. *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).

Apart from Applicant's proffer of new evidence, Applicant does not make any identifiable claim of error concerning the Administrative Judge's findings of fact about her history of financial difficulties. Absent such an identifiable claim of error, there is no need for the Board to review the Judge's factual findings about Applicant's history of financial difficulties because there is no presumption of error below. Applicant's brief essentially asks the Board to review the record evidence for itself, make its own findings of fact and reach its own conclusions about her financial situation, and enter formal findings in her favor under Guideline F (Financial Considerations). The Board's appellate authority under the Directive does not authorize the Board to simply ignore a Judge's decision and make its own decision on appeal as if the Judge's decision did not exist.

Applicant's appeal statements concerning the falsification issues in the case (SOR paragraphs 2.a and 2.b) could be construed and interpreted as my colleagues have done in their decision. However, even if I were to construe and interpret Applicant's arguments concerning SOR paragraphs 2.a and 2.b as raising a challenge to the Judge's findings of falsification, I would still conclude that the Judge's decision is sustainable.

Reading Applicant's brief broadly, Applicant seems to be asserting that she did not falsify the security clearance application because she was unaware of the delinquent debts she did not list. Department Counsel argues in its reply brief<sup>(1)</sup> that the Administrative Judge could find Applicant engaged in falsification if he found her explanation for the omissions to be not credible. Although Department Counsel's argument is superficially appealing, it overlooks some problematic aspects of the falsification issues in this case. A Judge has broad discretion to reach a credibility determination, and such a credibility determination is entitled to deference on appeal.<sup>(2)</sup> However, a negative credibility determination -- standing alone -- is not a substitute for some record evidence in support of a controverted SOR allegation.<sup>(3)</sup> Under the Directive, Department Counsel has the burden of presenting evidence to prove a controverted SOR allegation.<sup>(4)</sup> An applicant does not have the burden of disproving a controverted SOR allegation. Indeed, an applicant's burden of presenting evidence is predicated on a threshold showing that either: (a) the applicant made admissions to SOR allegations, or (b) Department Counsel presented evidence to prove controverted SOR allegations.<sup>(5)</sup> If an applicant has not admitted an SOR allegation, and no evidence has been presented by Department Counsel in support of a controverted SOR allegation, then an applicant has no burden of presenting evidence to refute or rebut the controverted allegation. A credibility determination -- whether favorable or unfavorable -- does not supersede or vitiate the burdens of proof set forth in the Directive. Rather, the effect of a credibility determination must be considered and evaluated within the context of who has the burden of proof under the terms of the Directive.

To resolve this appeal, I need not decide whether the Administrative Judge's findings of falsification are supported by more than just his negative credibility determination. Even if I were to conclude -- solely for the sake of argument -- that the Judge's findings of falsification were based solely on his negative credibility assessment, such a conclusion would not warrant remand or reversal. The Judge's findings and conclusions about Applicant's history of financial difficulties provide a legally permissible basis for the Judge's unfavorable conclusions about Applicant's security eligibility and his adverse security clearance decision.

In view of the foregoing, I agree that the Administrative Judge's unfavorable security clearance decision should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Board can address the issues raised on appeal by the nonappealing party, not just the issues raised by the appealing party. *See* Directive, Additional Procedural Guidance, Item E3.1.32 ("The Appeal Board shall address the material issues raised *by the parties* to determine whether harmful error occurred.")(italics added). Considered together, Applicant's appeal brief and Department Counsel's reply brief can be viewed as asking the Board to rule on the Judge's findings of falsification.
2. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1 (" . . . the Appeal Board shall give deference to the credibility determinations of the Administrative Judge").
3. *See, e.g.*, ISCR Case No. 97-0356 at 3 (App. Bd. Apr. 21, 1998); ISCR Case No. 96-0461 at 3-4 (App. Bd. Dec. 31, 1997).
4. *See* Directive, Additional Procedural Guidance, Item E3.1.14.
5. *See* Directive, Additional Procedural Guidance, Item E3.1.15.