

DATE: December 21, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10381

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 July 12, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns under Guideline F (Financial Considerations), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On May 31, 2006, 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 one issue on appeal, asserting that the Judge erred in his finding of fact that she had not enrolled in credit counseling when she, apparently after the hearing, did complete additional steps to join a debt management plan with whom she had begun preliminary consultations before the hearing.

Applicant attended her April 25, 2006 hearing with some original documents pertaining to her financial history, of which she had not made any copies. The Judge examined the proffered original documents during the hearing, but neither marked nor orally identified them for the record.⁽¹⁾ Rather than address the documents during the hearing, the Judge left the record open for ten days with instructions to Applicant to make copies of anything she wanted considered in evidence and forward the copies to him via Department Counsel.⁽²⁾ Applicant did send nine documents by facsimile to Department Counsel, who forwarded them to the Judge without objection but with the note that one document contained copies of two Travelers Express Money Grams indicating payments made after the hearing. In his written decision, the Judge admitted those documents into evidence as Exhibit A, but did not further address their contents. A review of Exhibit A shows that Department Counsel forwarded pages that the facsimile machine numbered "02" through "10" but did not forward any page numbered "01." Thus, Applicant's first page and any explanation of the relevance of the submitted documents that may have been on that page were not made a matter of record. The Judge's decision does not note the absent page. The failure to preserve a complete record is error, and can impair the Board's ability to perform its review function. *Cf.* Directive ¶¶ E3.1.19 and E3.1.29; ISCR Case No. 02-24875 at 2, fn 1 (App. Bd. Oct. 12, 2006). In this case, however, this error is harmless as further discussed below.

Applicant testified extensively during the hearing concerning her initial consultations with a credit counseling organization about entering a debt management plan. At the time of the hearing, she had not yet paid the fee or joined the plan. The Judge noted that in 2004 she had consulted with them about the program and decided she did not have

sufficient financial resources to join. (3)

The Board's standard of review for allegations of factual error requires that we determine whether the 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, giving deference to the Judge's credibility determinations. (Directive ¶ E3.1.32.1.) Based on the written evidence (Exh. A) that Applicant submitted in response to the Judge's invitation, (4) evaluated in light of all the hearing testimony on this issue, it would appear that the finding "she is not enrolled in any credit counseling service," was correct on the day of the hearing, but appears to have been incorrect as of the date the record closed. The Board cannot consider new evidence on appeal, (5) so Applicant's assertion in the appeal brief that she is, in fact, enrolled in credit counseling comes too late. The issue is whether the documents which she submitted compelled the Judge to at least address whether the evidence showed she had completed all steps necessary to enroll in that counseling program before concluding that she had not. The record was sufficient for the Judge to have found that she was in a credit counseling service. The Judge's conclusion otherwise, without any reference to Exhibit A and her hearing testimony that, once enrolled, she would submit just such documentation, is not sustainable.

Once Applicant demonstrates error, the Board must consider whether: (a) the error was harmful or harmless; (b) the non-appealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. (6)

Applicant's belated participation in financial counseling and a debt management plan is material to the issue of whether Financial Consideration Mitigating Condition 4 (7) applies in her case. Because this Mitigating Condition requires both counseling and "clear indications that the problem is being resolved or is under control," the factual error concerning Applicant's actual enrollment in counseling is harmless. Making one \$120 payment toward an admitted indebtedness approximating \$25,000 would not have required favorable application of this Mitigating Condition, as a matter of law, nor would it materially affect the Judge's "whole person" analysis concerning the security concerns raised by Applicant's financial history. Since correcting the factual error would not cause the pertinent Mitigating Condition to apply, or otherwise produce a materially different result, the error was harmless. Similarly, the Judge's failure to preserve a complete record is harmless in this case, given the totality of Applicant's circumstances.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. Tr. at 15-16.

2. Although the initial reason cited for keeping the record open was to give Applicant time to make copies of the documents from the hearing, the Judge did not specifically limit Applicant's submission to only those documents. He later said, "any documents you want me to consider in writing my opinion are due by 5 May, . . . and I will consider any of those documents that you present me within those ten days." Tr. at 59.

3. At the hearing, Applicant said, "I have sought a counselor. I have not actively engaged in the [counseling program] yet, but that is my intent after I take care of all the legwork for my counselor. Once I do that, you will be getting information and paperwork forwarded to you from my [program] counselor and myself, a cancelled check, a money order, whatever it may be, to show the steps that I -g, to show that I am moving forward and actively trying to take care of my obligations." Tr. at 56-57.

4. The first document Applicant submitted was a pre-hearing letter dated February 17, 2006 from the credit counseling organization describing the proposed debt management plan. This required her to, among other things, contact her various creditors and then send in her first payment of \$120 to the counseling organization by March 6, 2006. The second document contained a photocopy of the two post-hearing Money Grams, both dated May 5, 2006. The first Money Gram was made out to the counseling organization in the amount of \$120 and the other was to a collection agency for \$70 in settlement of a debt that does not appear to have been one of those listed on the SOR or previously considered by the Judge. It is on this basis that Applicant asserts the Judge erred when he found, "she is not enrolled in any credit counseling service."

5. Directive ¶ E3.1.29.

6. ISCR Case No. 03-04927 at 2 (App. Bd. Mar. 4, 2005); ISCR Case No. 04-07714 at 7 (App. Bd. Oct 19, 2006).

7. Directive ¶ E2.A6.1.3.4: "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control."