

DATE: August 11, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-10454

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Peregrin D. Russell-Hunter, Esq., Chief Department Counsel

Edward G. Loughran, Esq., Department Counsel

#### FOR APPLICANT

#### *Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 13, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 19, 2005, after the hearing, Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge's security clearance decision is arbitrary, capricious, or contrary to the record evidence. [\(1\)](#) We reverse the Administrative Judge's decision.

### **Whether the Record Supports the Administrative Judge's Factual Findings**

#### A. Facts

The Administrative Judge made the following pertinent findings of fact:

In August 1996, Applicant received non-judicial punishment pursuant to Article 15 of the Uniform Code of Military Justice after he forged and signed a document to enable someone to fraudulently obtain civilian housing. In June 1997, Applicant received an Under Other Than Honorable Conditions discharge from the Navy in lieu of Court Martial after he falsified a marriage certificate for himself in order to obtain military allowances to which he was not entitled. Applicant also lied to Naval investigators when approached about the false license.

In August 2000, Applicant received a Letter of Caution from his employer regarding timeliness, idleness, and improper use of the internet. The Letter was extended in December 2000 as a result of additional workplace incidents.

Since 2000, however, Applicant's employer has been pleased with his performance. Applicant's references attest to his

honesty and integrity.

Applicant's credit reports indicate a number of unpaid debts. Applicant was the victim of identity theft, of which he was not aware when he completed his security clearance application. He has hired an attorney to help him contest those debts which he does not believe are his. Some of the contested debts do not appear on Applicant's most recent credit reports. Applicant has paid or brought up to date those debts which he believes were his.

## B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency' finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

On appeal, Department Counsel asserts that the Administrative Judge's acceptance of Applicant's testimony that he was a victim of identity theft, without corroborating evidence, was arbitrary, capricious, and contrary to the record evidence. This assertion has merit. Department Counsel points out that when Applicant was asked about his financial delinquencies in a DSS interview in June 2003, he stated that his difficulties resulted from two periods of unemployment--June 1997 to September 1997 and October 1999 to April 2000. During the hearing, Applicant attributed his financial situation to identity theft, but provided no documentation to support that assertion. In response to questions from Department Counsel and the Judge, Applicant stated that he had not reported the identity thefts to the police or asked the credit reporting agencies to freeze his accounts. Furthermore, in the DSS interview in June 2003, Applicant stated that he accepted responsibility for certain delinquent accounts. At the hearing, he disputed those debts on the grounds of identity theft. The Judge left the record open after the hearing for Applicant to provide supplemental documentation in support of his case, but Applicant's submissions did not support his testimony. Applicant's explanations were relevant and material evidence that the Judge had to consider. However, the Judge was not required to accept Applicant's explanations at face value. As the trier of fact, the Judge had to consider Applicant's statements in light of the record as a whole. *See, e.g.*, ISCR 01-20579 at 4-5 (App. Bd. April 14, 2004). Given the lack of documentation and the conflicting evidence in the record, the Judge's acceptance of Applicant's uncorroborated explanations of identity theft cannot be sustained. Given the record evidence, it was arbitrary and capricious for the Judge to accept Applicant's uncorroborated claims as to the source of his debts and the settlement of his debts.

Department Counsel also contends that the Judge's finding that Applicant did not falsify his security clearance application (SCA) of July 2000 was arbitrary, capricious, and contrary to the record evidence. Department Counsel's contention has merit. In answer to Question 39 on his SCA, Applicant indicated that he did not have any debts delinquent over ninety days. At the hearing, Applicant testified that he was unaware of his delinquencies at the time he completed his application, only becoming aware of them when he reviewed his credit reports as a result of his security clearance investigation and then realized he was a victim of identity theft. As to this issue, Applicant's denial of intent to falsify and his insistence that his financial difficulties were all the result of identity theft were relevant and material evidence which the Judge had to consider, but the Judge was not bound to accept it at face value, particularly in light of conflicting evidence in the record. As discussed earlier, Applicant indicated in a signed, sworn statement to a DSS agent in 2003 that his financial difficulties arose during two periods of unemployment in June 1997 to September 1997 and October 1999 to April 2000. Applicant stated that during those periods he made extensive use of credit cards and eventually could not afford to make the minimum payments required by his creditors, and accounts became delinquent and were charged off. Applicant also stated that when he became employed again he incurred more debts which he could not afford to pay. He indicated that as of the date of his statement to the agent, some of his debts were up to date, some were in collection, and some had been charged off. At the hearing Applicant stated that his financial difficulties were the result of identity theft, beginning with the loss of his wallet and the misappropriation of his Social Security number and other personal information sometime between 1996 and 1997, but that he was not aware of his financial delinquencies until after he completed his SCA in July 2000. The Judge found Applicant's testimony at the hearing to be credible. Although the Board must give deference to a Judge's credibility determinations, those determinations are not

immune from review. *See, e.g.*, ISCR Case No. 96-0316 at 3 (App.Bd. Feb 24, 1997); *see also, NLRB v. Cook Family Foods, Ltd.*, 47 F.3d 809, 816 (6<sup>th</sup> Cir. 1995). The Judge's finding that Applicant testified credibly when he indicated he did not intentionally falsify his answer to Question 39 of the July 2000 SCA is contrary to the record evidence as a whole. Given the lack of corroboration and the conflicting evidence discussed earlier in this decision, it was arbitrary and capricious for the Judge to accept Applicant's explanations at face value.

### **Whether the Record Supports the Administrative Judge's Ultimate Conclusions**

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel argues that the Administrative Judge's decision is arbitrary, capricious, and contrary to law because the Judge analyzed the record evidence in a piecemeal manner. Department Counsel's argument has merit. The record in this case includes a pattern of serious dishonesty on the part of Applicant (*e.g.*, forging documents while in the United States Navy, defrauding the U.S. government out of allowances to which he was not entitled, lying to investigators about this conduct--leading to an Under Other Than Honorable Conditions discharge from the Navy). The Judge noted that conduct in his findings of fact. The record also includes discrepancies between Applicant's statements at different times as to the origin of his financial difficulties and his efforts to resolve those difficulties. Therefore, the analysis failed to reflect a reasonable interpretation of the record evidence as a whole. By analyzing each incident separately, the Judge failed to consider the significance of a clear pattern of dishonest conduct on the part of Applicant. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan 11, 2000); *see also, Raffone v. Adams*, 468 F.2d 860, 866 (2d Cir. 1972).

Department Counsel has demonstrated errors which, taken cumulatively, warrant reversal.

### **Order**

The Administrative Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant responded to Department Counsel's appeal and submitted further evidence relating to his job performance and his efforts to settle his financial affairs. Much of that material constitutes new evidence, which cannot be considered on appeal. *See* Directive ¶ E3.1.29.