

DATE: May 1, 2006

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In Re:

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SSN:-----

Applicant for Security Clearance

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ISCR Case No. 04-10671

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Stephanie Hess, Esq., Chief Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 11, 2005, 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 October 12, 2005, after considering the record, Administrative Judge LeRoy F. Forman 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 issues on appeal: whether the Administrative Judge erred in making a factual finding and whether the Administrative Judge's conclusion that the security concerns raised by Applicant's history of indebtedness had been mitigated is arbitrary and capricious.<sup>(1)</sup>

At the hearing, Applicant testified that (a) he had refinanced his house for the purpose of obtaining the money necessary to pay off the debts listed in the SOR, (b) his settlement on the loan had occurred the day before the hearing, and (c) that checks would be issued directly from the lender to his creditors within approximately two weeks.<sup>(2)</sup> In corroboration of this testimony, Applicant offered into evidence his refinancing document which included escrow instructions for the payment of most of the debts.<sup>(3)</sup> At the close of the hearing, the Judge left the record open for 21 days to give Applicant the opportunity to provide additional documentation showing whether certain errors had been corrected and checks paying the debts had issued. Applicant reports on appeal that he made a timely submission after the hearing, which is not reflected in the record evidence. Because of the Board's disposition in the case, there is no need to resolve this issue.

In her brief, Department Counsel argues that it was error for the Administrative Judge to find that Applicant had "paid off [his] delinquent debts,"<sup>(4)</sup> absent evidence that checks from Applicant's lender had actually been issued by the escrow company to the creditors. Given the record in this case, it was not unreasonable for the Judge to conclude that an escrow company would issue checks in accordance with the lender's instructions and its legal and professional obligations. The Judge's remaining sustainable findings are sufficient to support his ultimate favorable clearance decision in this case.

Department Counsel also contends that it was arbitrary and capricious for the Administrative Judge to conclude that the

security concerns raised by Applicant's history of indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 3, <sup>(5)</sup> 4, <sup>(6)</sup> and 6 <sup>(7)</sup> and a "whole person" analysis. In support of that contention, Department Counsel argues that: (a) the debts had not actually been paid off before the close of the record, (b) Applicant actions to resolve his debts occurred shortly before the hearing, well after invocation of the security clearance process, and only after those debts had been delinquent for many years or placed for collection, (c) it was Applicant's wife, rather than the Applicant himself, who sought credit counseling and arranged the repayment plan, and (d) none of the debts were for treatment of Applicant's wife's medical problems.

The findings that Applicant had successfully mitigated the security concerns under Guideline F reflect permissible interpretations of the record evidence by the Administrative Judge. The fact that Department Counsel can articulate a reasonable alternative interpretation is of no moment. Department Counsel has not met her burden of demonstrating that the Judge's findings do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's findings about Applicant's history of indebtedness are sustainable.

Department Counsel's argument concerning Guideline F Mitigating Condition 3 is premised on the notion that an Administrative Judge cannot apply that mitigating condition unless the applicant demonstrates that the debts at issue became delinquent as a direct result of the circumstances beyond applicant's control. The Board has previously noted that a Judge is not required to interpret Mitigating Condition 3 so narrowly. Given the wording of that mitigating condition, it is not unreasonable for a Judge to construe it as covering a situation where the record evidence shows that events beyond an applicant's control resulted in, or significantly contributed to: (a) the applicant's debts becoming delinquent, (b) the applicant becoming unable to deal with or otherwise address debts that had become delinquent previously, and (c) the applicant incurring new, unforeseen debts that aggravate or exacerbate the applicant's financial situation. The Board has also previously noted that while it is reasonable to expect applicants to have documentation about the satisfaction of specific debts, it is not so obvious to expect that applicants will necessarily have documentation about how they got into financial difficulties. In such cases, it is not unusual for the applicant's financial difficulties to have begun years earlier, while claims of satisfaction of debts alleged in the SOR involve more recent events. *See* ISCR Case No. 03-17479 at 4 (App. Bd. Nov. 3, 2005). Given the record in this case, Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Judge to give Applicant some credit for the mitigating evidence he produced under Mitigating Condition 3.

Similarly, given the record in this case, Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Administrative Judge to give Applicant some credit under Guideline F Mitigating Condition 4 with respect to the mitigating evidence he produced. The record indicated that for many years Applicant's wife had acted as his agent insofar as the families finances were concerned. To the extent that unfavorable actions by Applicant's wife were being imputed to Applicant, it was not unreasonable for the Judge to evaluate the evidence as a whole and give some consideration to favorable actions by Applicant's wife that were undertaken to resolve what was in part a family problem.

As to Guideline F Mitigating Condition 6, the Administrative Judge made sustainable findings that Applicant established a plan to resolve his financial problems and had taken significant actions to implement that plan. Applicant was not required, as a matter of law, to establish that he had paid-off every debt in its original full amount. Again, given the record in this case, Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Judge to give Applicant some credit for the mitigating evidence he produced under Guideline F Mitigating Condition 6.

Department Counsel is essentially arguing that the record evidence shows that Applicant was not as diligent about dealing with his financial problems as he could have been. However, the unfavorable record evidence cited by Department Counsel is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Department Counsel's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. In this case, Applicant had: (a) arranged for a comprehensive approach for paying-off, settling or otherwise resolving his indebtedness, (b) reasonably documented actions he had taken in furtherance of that approach, and (c) demonstrated a not insubstantial improvement to his financial situation. He is now alert to the security concerns presented by his circumstances and the responsibilities incumbent on him as a result. The

Board need not agree with the Judge's decision to conclude that it is sustainable.

### **Order**

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable findings under Guideline E are not at issue on appeal.
2. Transcript at 31-32.
3. Applicant's Exhibit A.
4. Decision at 5.
5. Directive ¶ E2.A6.1.3.3. "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)."
6. 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."
7. Directive ¶ E2.A6.1.3.6. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."