

DATE: January 12, 2007

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In re:

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SSN:-----

Applicant for Security Clearance

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ISCR Case No. 05-11366

## **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 December 12, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 23, 2006, after the hearing, Administrative Judge Martin H. Mogul denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

In his appeal, Applicant asserts that the Administrative Judge erred by failing to consider mitigating evidence offered by Applicant, including any collateral estoppel or mitigating effect from his receipt of a final clearance shortly before submitting the current application for a higher clearance.

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

Applicant does not dispute the accuracy or evidentiary sufficiency of the Judge's findings of fact. In summary, the Judge found the following facts. Applicant obtained a Chapter 7 Bankruptcy discharging his debts on November 12, 1997. Applicant currently owes approximately \$77,000 in debts to the Internal Revenue Service and about \$26,800 in debts to six other unsecured creditors, all of which are listed in the SOR and are currently delinquent. Applicant provided proof that one SOR-listed debt (in the amount of \$10,882) had been satisfied. Applicant also had earlier debts, including very large medical bills, discharged in bankruptcy sometime in 1988 or 1989. He owes his step-mother \$82,000 for a personal loan outstanding since 2001. His wages are being garnished \$1,040 per month for child support (an amount including \$200 per month toward a \$10,000 arrearage). Applicant plans to file an additional bankruptcy to discharge his debts but had not done so at the time of the hearing. Applicant testified that he thought some of his IRS debt would be discharged by the new bankruptcy, but provided no evidence supporting that assertion and continues to owe the entire amount. Applicant cited several mitigating reasons for his history of bankruptcy and failure to resolve his debts, including a dissolution of his first marriage, unsuccessful business ventures and his son's illness.

#### **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 or remand 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, E3.1.33. 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*.

In deciding whether the Administrative Judge's rulings or conclusions are arbitrary or capricious, the Board reviews the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998) (citing Supreme Court decision). The Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 at 3 (App. Bd. Mar. 18, 1996). It reviews a decision as a whole, rather than focusing on isolated sentences or passages in it, to discern what the Judge meant. *See, e.g.*, ISCR Case No. 90-1874 at 4 (App. Bd. July 30, 1993). There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 96-0228 at 3 (App. Bd. Apr. 3, 1997). Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 90-1596 at 5 (App. Bd. Sep. 18, 1992); ISCR Case No. 02-29608 at 3 (App. Bd. Dec. 17, 2003).

Because Applicant asserts that the Judge failed to consider substantial portions of the mitigating circumstances offered at the hearing, the Judge's conclusions are pertinent and are quoted in their entirety:

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guideline[s] F:

With respect to Guideline F, the Government has established that Applicant has had a long history of financial difficulties including filing two previous bankruptcies. The evidence has shown that Applicant has taken far too little action to pay off these debts. Based on his extremely large debt to the IRS, and his substantial additional debts, he has a long way to go before his debts are resolved. Based on his tenuous financial situation and his history of financial irresponsibility, Applicant has failed to demonstrate a stable and mature outlook about his finances. I therefore resolve Guideline F against Applicant.

Regarding the Disqualifying Conditions (DC) under Guideline F, I conclude both DC E2.A6.1.2.1, and DC E2.A6.1.2.3 apply, because of Applicant's history of not meeting financial obligations and his inability to satisfy his debts. I find that none of the Mitigating Conditions (MC) apply.

Decision, at 5.

Applicant asserts in his appeal that the Judge's decision fails to address why Applicant's demonstrated efforts to resolve delinquent tax debts, recent full payment of taxes, and previous and pending bankruptcies do not require application of Guideline F (Financial Considerations) Mitigating Conditions (FCMC) 1 or 6; <sup>(1)</sup> why his marriage dissolution, business failures and family medical bills do not require application of FCMC 3; <sup>(2)</sup> and why his consultations with legal and financial counseling professionals do not require application of FCMC 4. <sup>(3)</sup> While the Judge noted Applicant's substantial additional indebtedness to his step-mother in assessing his current financial state, he did not address her hearing testimony that she did not want to be repaid that money until he was in a position to comfortably do so. Finally, Applicant asserts that the decision does not address the significance of the evidence that Applicant was twice <sup>(4)</sup> granted a final Secret clearance when his financial situation was, if anything, worse than at present, and that this adverse clearance action only resulted when his employer sought to have that Secret clearance upgraded to Top Secret.

Directive ¶ 3.2 makes no distinction concerning basic clearance levels in its procedures for deciding whether access to

classified information is clearly in the national interest, so there is potentially some logical relevance to these earlier decisions. However, possession of a previously granted clearance does not give rise to any right or vested interest, nor does any favorable clearance decision preclude the Government from reassessing a person's security eligibility in light of current circumstances. ISCR Case No. 03-24144 at 6 (App. Bd. Dec. 6, 2005). Moreover, neither estoppel nor reciprocity precludes revocation or denial of a clearance,<sup>(5)</sup> particularly when, as here, the earlier decisions were based on different information and involved a different level of background investigation.

A Judge's failure to articulate an explanation for his conclusion that none of the potentially mitigating conditions apply, including a rational connection between the facts found and the choice made, may render his decision arbitrary and capricious but this would not end the analysis on appeal. When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is 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.<sup>(6)</sup>

An error is harmless when a clearance denial is based on multiple security concerns, some of which are sustainable and not affected by the error.<sup>(7)</sup> This is not such a case. An error is also harmless if it did not affect the result.<sup>(8)</sup> It is on this basis that, considered individually and taken together, the errors asserted by Applicant are harmless. Concerning FCMC 1, recency is not determined by when a debt was incurred, but whether it is still owed or only recently resolved. The findings of fact establish that all but one of the original SOR debts are still owed and delinquent. Concerning FCMC 3, Applicant's marriage dissolution, business failures and family medical bills were considered by the Judge.<sup>(9)</sup> Concerning FCMC 4, consultation or counseling are necessary but not sufficient conditions because "clear indications that the problem is resolved or is under control" are also required and the record does not support such a finding. Concerning FCMC 6, other than the one debt Applicant paid off and his plan to file for another bankruptcy (once the implications of the new bankruptcy laws aimed at limiting or preventing abusive multiple discharges can be determined), there was nothing in the record to suggest Applicant has initiated any good faith effort to repay or resolve the listed debts. Concerning the non-SOR debt to Applicant's step-mother, the Judge merely noted it as part of his current debt load and made no finding that it was delinquent. Whether she was demanding immediate repayment was thus irrelevant. Concerning his prior clearance, that decision was based on incomplete information and thus would not affect the "whole person" analysis to his benefit. As Applicant explained in his sworn affidavit on 13 May 2005:

The reason my finances were not listed on my Security Clearance Application is that I initially applied for a Secret Clearance and was told by my Security Office that I did not have to list my delinquent accounts. When I applied for a Top Secret Clearance I was then told to list my delinquent credit accounts.

Government Exhibit 2 at 1. Thus the Board concludes that remanding this case for a new decision by the Judge is not warranted. Any error in the decision below was harmless.

Moreover, Applicant's appeal does not specifically seek either reversal or remand of the Judge's decision based on identified errors. Instead, he:

asks that his secret clearance be reinstated and that, if the Appeals Board has concerns, his case be reexamined in one years time to determine if he has made further strides toward resolving the financial issues noted by the Administrative Judge. If at that point [Applicant] has demonstrated sufficient financial maturity, he asks that he be allowed to reapply for a Top Secret Clearance.<sup>(10)</sup>

Concerning this requested remedy, the Board has no authority to deny applicant a higher level clearance while permitting retention of a lower level clearance.<sup>(11)</sup> Although different levels of background investigation may be involved for different clearance levels, the decisional standards for determining whether clearance at either level is in the best interests of national security are identical. Finally, the Board has no authority to grant a clearance on a conditional or probationary basis.<sup>(12)</sup> Accordingly, Applicant's requested remedy is denied.

## Order

The judgment 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. Directive ¶ E2A6.1.3.1, "The behavior was not recent;" Directive ¶ E2A6.1.3.6, "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."
2. Directive ¶ E2A6.1.3.3, " 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)."
3. Directive ¶ E2A6.1.3.4, "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."
4. First in April 2000, then again in March 2004, only 5 months before he submitted the current application.
5. ISCR Case No. 03-04927 at 5 (App. Bd. Mar. 4, 2005); *Cf.*, ISCR Case No. 03-08073 at 3 (App. Bd. Oct. 24, 2005); ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003).
6. *Id.*, at 2; ISCR Case No. 04-07714 at 7 (App. Bd. Oct 19, 2006).
7. *See*, ISCR Case No. 03-12361 (App. Bd. Oct 31, 2005).
8. ISCR Case No. 03-20638 at 3 (App. Bd. Apr. 22, 2005) (citing ISCR Case No. 00-0250 at 6 (App. Bd. Jul. 11, 2001)).
9. Decision at 4. Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties. ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005).
10. Appeal brief at 4.
11. ISCR Case No. 03-11627 at 4 (App. Bd. Mar. 18, 2005); ISCR Case No. 03-18181 at 5 (App. Bd. Feb. 9, 2005); *see* Directive ¶3.2.

12. ISCR Case No. 02-03797 at 4 (App. Bd. Mar. 4, 2005); ISCR Case No. 02-03832 at 4 (App. Bd. Jan. 25, 2005).