

DATE: August 9, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-03683

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

Jonathan A. Beyer, Department Counsel

#### **FOR APPLICANT**

Tobe Lev, Esq.

Administrative Judge Paul J. Mason issued a decision dated February 22, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: 1) Were the Administrative Judge's findings that Applicant falsified his drug use a reasonable interpretation of the record evidence? and 2) Was the Administrative Judge's decision not to grant Applicant a continuance erroneous?

### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated July 5, 2001. The SOR was based on Guidelines E (Personal Conduct), H (Drug Involvement), and J (Criminal Conduct). Applicant requested a hearing which was held on November 27, 2001.

The Administrative Judge issued a written decision dated February 22, 2002 in which he found for Applicant with regard to the allegations under Guideline H and one allegation each under Guidelines E and J. The remainder of the Administrative Formal Findings were against Applicant. The case is before Board on Applicant's appeal from that unfavorable decision. [\(1\)](#)

### **Scope of Review**

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal

error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative 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 making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

### **Appeal Issues**

1) Were the Administrative Judge's findings that Applicant falsified his drug use a reasonable interpretation of the record evidence? There is no dispute that at various times Applicant gave differing accounts of his drug history in statements to investigators and on security forms. Applicant contends that these differing statements were erroneously viewed as falsifications by the Administrative Judge. He asserts that 1) the Administrative Judge's decision to accept Applicant's most self-incriminating statement as the most accurate was an arbitrary indulgence; 2) new evidence suggests that Applicant's girl friend was in jail during a period when the Judge found Applicant had used cocaine and that Applicant was unlikely to have used drugs during her incarceration or after he had recently passed a drug test; 3) new evidence casts doubt on an investigator's testimony as to why Applicant was polygraphed; 4) the conduct of the investigators was designed to elicit contradictory statements by Applicant; 5) Applicant was in the Air Force from 1980-1989, testified that he was tested for drugs during that time and was honorably discharged, so the Administrative Judge should have concluded that Applicant did not use drugs in that time frame; and 6) the government should have investigated Applicant's military service to determine whether or not he used drugs at that time.

As to Applicant's first argument, it is not arbitrary for an Administrative Judge to give weight to admissions or statements against interest made by an applicant. Indeed, such statements are recognized as admissible by the Federal Rules of Evidence, which are more restrictive than the rules of evidence applicable in these proceedings. It was well within the Administrative Judge's discretion to give more weight to Applicant's damaging statements than to statements by Applicant which tended to minimize his drug use.

Applicant's second argument fails for two reasons: 1) the Board is prohibited from receiving or considering new evidence on appeal (Directive, Additional Procedural Guidance, Item E3.1.29); and 2) given Applicant's history of drug use it does not "strain credulity" to believe either that Applicant used drugs while his girlfriend was in jail or after passing a drug test.

Applicant's third argument fails for three reasons: 1) as noted above, the Board is prohibited from receiving or considering new evidence on appeal; 2) the investigator stated clearly at the hearing that he had no first-hand knowledge of the alleged interview with Applicant's girlfriend which he believed to be the reason for the polygraph, so evidence regarding the alleged interview casts little doubt on the rest of the investigator's testimony; and 3) for whatever reasons, valid or not, the polygraph session was held and Applicant submitted to the polygraph and the attendant interviews. The government's reasons for requesting the polygraph session are irrelevant to an evaluation of Applicant's numerous contradictory statements.

Applicant's fourth argument fails to demonstrate the Administrative Judge erred. The Board has no authority over the Defense Security Service (DSS) and how it conducts investigations. Furthermore, there is no evidence to suggest that any of Applicant's written statements were anything other than voluntary.

Applicant's fifth argument is unpersuasive. Applicant made a statement acknowledging "I smoked marijuana on a sometimes daily basis to a quarterly basis from 1979-1990", a period that encompasses the dates of his military service. It was not unreasonable for the Administrative Judge to find contrary statements by Applicant to be false.

Applicant's sixth argument does not demonstrate the Administrative Judge erred. As noted earlier, the Board has no authority over how DSS conducts investigations. And, Applicant fails to articulate a reason how any investigation of Applicant's military service would affect the Judge's findings about Applicant's falsifications.

Considering the record as a whole the Board concludes that the Administrative Judge's finding that Applicant deliberately falsified statements regarding his drug use was a plausible interpretation of the record evidence. Applicant's arguments to the contrary fail to demonstrate the Judge's finding is not sustainable given the record evidence in this case. *See* Directive, Additional Procedural Guidance, Additional Procedural Guidance, Item E3.1.32.1 (standard of review for findings of fact).

2) Was the Administrative Judge's decision not to grant Applicant a continuance erroneous? During cross-examination of the first witness at the hearing on November 27, 2001, Applicant's counsel requested a continuance because he had only become aware of the hearing date on the previous Friday and only received the file on the previous day. The Judge noted that the SOR had been issued to Applicant in July 2001. The Judge denied the request for a continuance. The Board finds the Judge's denial was well within his discretion. The Judge was entitled to consider such questions as how long Applicant had notice of the case (4 months) and did Applicant have the opportunity to obtain counsel and documentation. Considering the record as a whole, it was not arbitrary or capricious for the Judge to conclude Applicant had sufficient time to prepare for the hearing. Applicant has not demonstrated the Judge's decision to deny continuance was erroneous or an abuse of discretion.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error below. The Administrative Judge's decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The findings in Applicant's favor with respect to SOR paragraphs 1.f, 2 and 3.b are not at issue in the case before the Board.