

DATE: July 8, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-13397

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Darlene Lokey Anderson issued a decision dated February 24, 2003, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 issue of: Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated July 30, 2002. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Applicant requested a hearing which was held on January 29, 2003. Subsequently, the Judge issued an adverse decision. Applicant appealed.

### **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 also* 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 the same record. 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 Issue**

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant offers several arguments on appeal. Taken together these arguments raise the issue of whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Applicant argues on appeal that his electronic security application was unsigned, that he had never seen it until the hearing, and that he and his colleagues had difficulties with the electronic format. Applicant's argument on appeal implies a denial that the security form in evidence is his. However, at the hearing Applicant did not deny that he prepared the form. Indeed, at the hearing Applicant said of the form "which I filled out wrong." Applicant cannot now assert that the form is not his. Applicant has not demonstrated error.

Applicant cites various passages from the transcript to support his interpretation of the record evidence. A party's alternative reading of the evidence is insufficient to demonstrate error so long as the Judge's findings of fact are supported by substantial record evidence. Here the Judge's findings of falsification in July 2000 and March 2001 are sustainable given the record evidence. Accordingly, Applicant has failed to demonstrate error.

Applicant contends the Administrative Judge should have applied the following Adjudicative Guidelines provisions: Personal Conduct Mitigating Condition 2 (E2.A5.1.3.2); Personal Conduct Mitigating Condition 3 (E2.A5.1.3.3); Personal Conduct Mitigating Condition 4 (E2.A5.1.3.4); Criminal Conduct Mitigating Condition 1 (E2.A10.1.3.1); Criminal Conduct Mitigating Condition 2 (E2.A10.1.3.2), and Criminal Conduct Mitigating Condition 6 (E2.A10.1.3.6). For the reasons that follow, Applicant's contention fails to demonstrate the Judge erred.

Given the Administrative Judge's sustainable findings about the facts and circumstances of Applicant's falsifications in July 2000 and March 2001, Personal Conduct Mitigating Conditions 2<sup>(1)</sup> and 3<sup>(2)</sup> are not applicable. Applicant's argument concerning Personal Conduct Mitigating Condition 4<sup>(3)</sup> lacks merit because it relies solely on the second half of that mitigating condition without regard to its first half (which is not applicable to the facts of this case).

Applicant's argues the Administrative Judge should have applied Criminal Conduct Mitigating Condition 1<sup>(4)</sup> in connection with his criminal conduct in 1995 and 1997. This argument is not well-founded because Applicant's criminal conduct in 1995 and 1997 was not alleged in the SOR under Guideline J and the Judge did not make formal findings against Applicant under Guideline J based on that conduct.

Because the Administrative Judge found Applicant engaged in falsification in July 2000 and March 2001, Criminal Conduct Mitigating Condition 2<sup>(5)</sup> is not applicable. Two acts of falsification occurring several months apart do not constitute "an isolated incident."

As the trier of fact, the Administrative Judge had the primary responsibility of weighing the record evidence, both favorable and unfavorable. Given the record evidence in this case, the Judge was not compelled to conclude Applicant had presented clear evidence of rehabilitation with respect to his acts of falsification. Accordingly, the Judge was not required to apply and Criminal Conduct Mitigating Condition 6<sup>(6)</sup>.

Applicant cites his defense-related work history and his role in his family. Applicant's arguments do not demonstrate that the Administrative Judge erred in her findings or conclusions.

In view of the foregoing, Applicant has failed to demonstrate that the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

### **Conclusion**

Applicant has failed to meet his burden of demonstrating error in the Administrative Judge's February 24, 2003 decision. The 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."
2. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."
3. "Omission of material facts was caused or significantly contributed to or caused by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided."
4. "The criminal conduct was not recent."
5. "The crime was an isolated incident."
6. "There is clear evidence of successful rehabilitation."