

DATE: January 15, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-14740

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

William S. Fields, Esq., Department Counsel

#### **FOR APPLICANT**

Arnold S. Schickler, Esq.

Administrative Judge Roger C. Wesley issued a decision, dated May 31, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed.

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

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 1; (2) whether the Administrative Judge failed to weigh the seriousness of Applicant's conduct against applicable mitigating evidence or factors; and (3) whether the Administrative Judge's decision is arbitrary and capricious. For the reasons that follow, the Board affirms the Administrative Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 3, 2001. The SOR was based on Guideline E (Personal Conduct). A hearing was held on February 7, 2002. The Administrative Judge issued a written decision, dated May 31, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from the Judge's favorable security clearance decision.

### **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 Issues**

A brief summary of the factual background of this case will be useful to provide a context for the discussion of issues raised by the parties on appeal.

Applicant was president and chief operating officer of a publicly-traded company ("Company A") that performed work on classified defense contracts. In November 1993, a grand jury indicted Company A, Applicant, and other named individuals on various counts of conspiracy to defraud the federal government, fraud against the federal government, and making false statements to the federal government. A superseding indictment was issued in April 1994 to add an additional count. <sup>(1)</sup>

In December 1993, Company A was suspended from doing business on government contracts. Applicant's security clearance was suspended in March 1994. The suspension of Company A was upheld by a federal district court and a federal court of appeals.

Following issuance of the indictment, a civil suit was filed by the federal government, seeking recovery from Company A, Applicant, and other named defendants for alleged submission of false claims on government contracts concerning a classified program. Two other civil actions were submitted against Company A, Applicant, and other named defendants for claims relating to the criminal indictments.

In June 1998, a plea agreement was entered into. Under the plea agreement, Company A pleaded guilty to one felony count of violating 18 U.S.C. 1001. Applicant did not enter a guilty plea to the indictment and the criminal charges against him were dropped as part of the plea agreement. As part of the plea agreement, Company A was fined \$400,000, assessed a statutory penalty of \$200, required to reimburse the federal government \$1.1 million for its investigation costs, and pay \$6,500,000 to settle the civil actions that had been brought against Company A.

1. Whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 1. Department Counsel contends the Administrative Judge erred by applying Personal Conduct Mitigating Condition 1 <sup>(2)</sup>

because the adverse information presented by Department Counsel during the proceedings below was substantiated, and the adverse information was clearly pertinent to a determination of judgment, trustworthiness, or reliability. In support of this contention, Department Counsel makes several, interrelated arguments:

- (a) the Judge improperly applied the preponderance of the evidence standard;
- (b) the criminal indictment was admissible as an exception to the hearsay rule;
- (c) Applicant admitted to the conduct referenced in the indictment, except to the extent of denying that the conduct was improper, criminal, or of security significance;
- (d) the criminal indictment proves there was probable cause that Applicant engaged in the acts alleged in the indictment;
- (e) the criminal indictment contains evidentiary findings with respect to acts by Applicant that demonstrate poor judgment, lack of candor, or unreliability;
- (f) Applicant made general denials and, except for conduct referenced in Count 10 of the superseding indictment, failed

to specifically or coherently deny or explain the occurrence of acts on his part that were found in the indictment;

(g) Company A, which was named as a defendant in the indictment, agreed to plead guilty and pay approximately \$8 million in fines, civil settlements, and costs; and "Corporations do not pay out that kind of money to settle 'unsubstantiated' allegations";

(h) the guilty plea by Company A is evidence of Applicant's culpability because the guilty plea of a co-conspirator has some probative value;

(i) the Air Force specifically found the alleged misconduct of the company was imputed to Applicant and other officers of the company;

(j) Personal Conduct Mitigating Condition 1 is the only mitigating condition which could overcome the Government's case under Personal Conduct Disqualifying Condition 1 ; and

(k) the Judge's application of Personal Conduct Mitigating Condition 7 would be insufficient because its plain language is worded to overcome Personal Conduct Mitigating Condition 6, not Personal Conduct Disqualifying Condition 1.

For the reasons that follow, the Board concludes Department Counsel's arguments fail to demonstrate the Administrative Judge erred.

Department Counsel correctly notes that the preponderance of the evidence standard does not apply in DOHA proceedings. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 2. However, our review of the Administrative Judge's decision in its entirety persuades us that the Judge did not apply the preponderance of the evidence standard in making his findings of fact. Department Counsel's contention to the contrary lacks merit.

In DOHA proceedings, strict rules of evidence do not apply, and technical rules of evidence may be relaxed to permit the development of a full and complete record. *See* Directive, Additional Procedural Guidance, Item E3.1.19. Furthermore, hearsay evidence is admissible in these proceedings and can be relied on by an Administrative Judge in making findings of fact. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 7. The Appeal Board decision relied on by Department Counsel to support its contention that the criminal indictment is admissible is factually distinguishable. In any event, Department Counsel's admissibility argument is misplaced because the Judge admitted the criminal indictment into the record evidence. The admission of the criminal indictment into the record evidence did not require the Judge to give any particular weight to it.

Department Counsel's argument concerning Applicant's admissions in the answer to the SOR is not well taken. Applicant correctly notes that the admissions in the answer to the SOR are very limited and narrow in their nature and scope. It is untenable for Department Counsel to assert that Applicant's answer to the SOR contains admissions that he engaged in the conduct referenced in the criminal indictment.

Applicant correctly notes that the Board has held that an indictment is not proof of the criminal conduct alleged therein. Consideration of this case leads the Board to qualify that prior holding for two reasons. First, Department Counsel correctly notes that an indictment is evidence that the grand jury made a finding that there is probable cause that the named defendant(s) engaged in the conduct alleged in the indictment. As such, a grand jury indictment is distinguishable from the allegations in a complaint made by a party to a lawsuit. Second, there is an important distinction between evidence that has probative value and evidence that constitutes proof of a controverted fact. Individual pieces of evidence may have probative value even if the individual pieces, standing alone, are not sufficient to prove a controverted fact. [\(3\)](#)

Accordingly, although a criminal indictment, standing alone, may not be sufficient to constitute proof of the conduct alleged therein, it does not follow that a criminal indictment has no probative value in these proceedings. However, as the trier of fact, an Administrative Judge is not bound by the probable cause finding made by a grand jury. Such a probable cause finding is evidence that a Judge must consider in light of the record as a whole in making findings of fact and drawing reasonable inferences from the record evidence. In this case, the Judge did not ignore the indictment. Rather, the Judge considered the indictment in his evaluation of the record evidence as a whole, including the evidence

that the indictment had been dismissed. (4)

Department Counsel's disagreement with the weight that the Judge gave to the dismissed indictment is not sufficient to demonstrate the Judge committed error.

The general nature of Applicant's denials does not have the significance Department Counsel seeks to attribute to them. Department Counsel is required to present evidence to prove controverted facts. Directive, Additional Procedural Guidance, Item E3.1.14. Department Counsel's burden of proving controverted facts does not turn on whether an applicant's denials are general or specific. An Administrative Judge has the discretion to draw reasonable inferences and conclusions about the applicant's credibility based on the Judge's consideration of the applicant's denials (whether they are general or specific in nature) in light of the record evidence as a whole. (5)

For all these reasons, the Board declines to rule that the general nature of an applicant's denials, standing alone, requires a Judge to reach any particular conclusion about the applicant's credibility or make any particular finding of fact in a case.

Under the relaxed rules of evidence that apply to DOHA proceedings and the substantial evidence standard, the record evidence of the facts and circumstances surrounding Company A's guilty plea and settlement of the civil claims could be considered by the Administrative Judge when he weighed the record evidence in this case. However, Department Counsel's argument about the significance of Company A's guilty plea and settlement of the civil claims does not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law. A reading of the decision shows the Judge considered the evidence concerning Company A's guilty plea and its settlement of the civil claims. Department Counsel's disagreement with the weight that the Judge placed on that evidence is not sufficient to demonstrate the Judge weighed it in an arbitrary or capricious manner.

Department Counsel also contends that the Air Force specifically found the alleged misconduct of Company A was imputed to Applicant and other officers of the company. Department Counsel appears to be referring to an Air Force memorandum concerning the suspension of the Company A. It is not clear whether the author of that memorandum made a specific finding of fact about Applicant and other officers of the company, or was relying on a presumption that the conduct of Company A should be imputed to them. (6)

As the trier of fact, the Administrative Judge had to decide how much weight to give to the Air Force memorandum. Considering the record evidence as a whole, the Board is not persuaded that Department Counsel's argument on this point demonstrates the Judge acted in an arbitrary or capricious manner with respect to weighing the Air Force memorandum.

Department Counsel's various arguments, viewed in their entirety, can be construed as raising the issue of whether it was arbitrary or capricious for the Administrative Judge to find Applicant had rebutted or refuted the allegations of misconduct made against him. The Board does not have to agree with the Judge's findings of fact to conclude Department Counsel has failed to demonstrate they are arbitrary, capricious, or contrary to law.

Department Counsel persuasively argues that the kind of conduct covered by the indictment is relevant and material to evaluating an applicant's security eligibility. If the Administrative Judge had found that Applicant had engaged in the conduct alleged in the criminal indictment, then such conduct clearly would be pertinent to a determination about Applicant's judgment, trustworthiness, and reliability. However, the Judge did not make such a finding. Given the Judge's particular findings in this case, it was not arbitrary or capricious for the Judge to conclude the allegations against Applicant were unsubstantiated for purposes of applying Personal Conduct Mitigating Condition 1.

The Board is not persuaded by Department Counsel's argument that Personal Conduct Mitigating Condition 1 is the only mitigating condition which could overcome the Government's case under Personal Conduct Disqualifying Condition 1. The Board recently addressed a similar argument in another case. In that case the Board stated the following:

"[N]othing in the Adjudicative Guidelines specifies how an adjudicator is to decide what mitigating conditions may be applied in a given case to mitigate the negative security implications of disqualifying conditions applicable to the facts

and circumstances of an applicant's case. However, the absence of such a specific rule does not leave an adjudicator unfettered discretion in applying the Adjudicative Guidelines for or against clearance. Rather, an adjudicator must:

- (a) evaluate the possible applicability of disqualifying and mitigating conditions under the pertinent Adjudicative Guidelines according to their plain meaning;
- (b) assess the applicability of particular disqualifying and mitigating conditions under the pertinent Adjudicative Guidelines in terms of other relevant provisions of the Directive;
- (c) apply provisions of the Adjudicative Guidelines in a manner that is consistent with the adjudicator's obligation to render an overall commonsense decision based on consideration of an applicant's security eligibility under the whole person concept; and
- (d) construe and apply provisions of the Adjudicative Guidelines in a manner consonant with the "clearly consistent with the national interest" standard.

Accordingly, the application of Adjudicative Guidelines for or against clearance is not reducible to a simple formula, but rather requires an adjudicator to exercise sound judgment within the parameters set by the Directive when deciding which Adjudicative Guidelines for or against clearance are applicable to a given case." ISCR Case No. 01-20906 (January 10, 2003) at pp. 6-7 (footnotes omitted)

The same reasoning is applicable to Department Counsel's argument in this case. Furthermore, Department Counsel's argument runs afoul of prior Board decisions which make it clear that the application *vel non* of Adjudicative Guidelines disqualifying or mitigating conditions is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 6.

Department Counsel also argues the Administrative Judge's application of Personal Conduct Mitigating Condition 7<sup>(7)</sup>

would be insufficient because its plain language is worded to overcome Personal Conduct Mitigating Condition 6, not Personal Conduct Disqualifying Condition 1. As discussed in the preceding paragraph, application of Adjudicative Guidelines for or against clearance is not reducible to a simple formula. Given the record evidence in this case, the Judge's application of Personal Conduct Mitigating Condition 7 was not arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge failed to weigh the seriousness of Applicant's conduct against applicable mitigating evidence or factors. Department Counsel contends the Administrative Judge failed to weigh the seriousness of Applicant's conduct against applicable mitigating evidence or factors. In support of this contention, Department Counsel argues:

- (a) the Judge ignored the significance of the conduct that led to the settlement of the criminal and civil cases;
- (b) as a matter of common sense, companies do not plead guilty to felonies and pay millions of dollars in exchange for dismissal of "unsubstantiated" charges, and prosecutors do not require companies to plead guilty to felonies and pay millions of dollars to obtain dismissal of "unsubstantiated" charges;
- (c) the Judge should have evaluated the entirety of Applicant's conduct which led to the settlement to evaluate how it reflected on Applicant's judgment, reliability, and candor rather than focusing on whether Applicant committed a specific criminal act;
- (d) the record evidence does not support the Judge's conclusion that Applicant had rebutted, refuted, or mitigated the Government's case;
- (e) the conviction of Company A impeaches Applicant because he was named co-defendant in the count of the indictment to which the company pleaded guilty;
- (f) the record evidence does not support the Judge's favorable credibility determination as to Applicant;

- (g) the Judge erred by concluding Applicant demonstrated mitigation when Applicant does not acknowledge any wrongdoing;
- (h) the Judge erred by giving Applicant the benefit of any favorable conclusions based on fact that an insurance company reimbursed the settlement sums paid by Company A;
- (i) the Judge erred by relying on results of an internal investigation of Company A because it was not based on access of all relevant information, and because there was no formal report made about the investigation;
- (j) the Judge "completely ignored" the significance of testimony of the current CEO of Company A, which showed that Applicant failed to take various steps that could have avoided the problems that led to the criminal indictment;
- (k) the fact that the federal government resumed contracting with Company A "did not in any way rebut, refute or mitigated (sic) the Government's case against Applicant"; rehabilitation of company does not prove Applicant has been rehabilitated;
- (l) because Applicant ran a company that engaged in criminal conduct involving a serious breach of fiduciary duties to the federal government, affirming the Administrative Judge's decision would tend to undermine public confidence in the industrial security program; and
- (m) given the extremely serious nature of the allegations in this case, the favorable evidence of Applicant's good conduct since 1993 is insufficient to support the Judge's decision under Section 6.3 of the Directive.

For the reasons that follow, the Board concludes most of these arguments lack merit, and that the arguments that have merit fail to demonstrate harmful error by the Judge.

Contrary to Department Counsel's contention, the motives or reasons why companies and prosecutors make decisions about handling or resolving criminal charges are not a matter of common sense, but rather one that turns on the particular facts and circumstances of each case. Accordingly, Department Counsel's argument fails to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

An Administrative Judge's credibility determinations are entitled to receive deference on appeal. Directive, Additional Procedural Guidance, Item E3.1.32.1. Although a Judge's credibility determinations are not immune from review, the party challenging such credibility determinations has a heavy burden of persuasion on appeal. Department Counsel has failed to meet that heavy burden of persuasion in this case.

Department Counsel persuasively argues that the Administrative Judge erred by drawing a favorable inference from the fact that an insurance company reimbursed the settlement sums paid by Company A. Given the record evidence in this case, there is insufficient evidence to justify the favorable inference the Judge drew from that fact. <sup>(8)</sup>

However, the Judge's error on this point is harmless. Reading the Judge's decision in its entirety, the Board concludes it is not likely that the Judge's favorable inference concerning the insurance company's action was pivotal or decisive to his favorable security clearance decision. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error standard).

It is not unreasonable for Department Counsel to argue that the conviction of Company A has some probative value as to Applicant's culpability because he was named as co-defendant in the indictment. However, as discussed earlier in this decision, evidence that has probative value is not necessarily sufficient to constitute proof of a controverted fact. Furthermore, a reading of the decision shows the Administrative Judge considered the evidence concerning Company A's guilty plea. Department Counsel's disagreement with the weight that the Judge placed on that evidence is not sufficient to demonstrate the Judge weighed it in an arbitrary or capricious manner.

The Board is not persuaded by Department Counsel's argument that the Administrative Judge "completely ignored" the significance of the testimony of the current CEO of Company A. There is a rebuttable presumption that an



Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. An appealing party's strong disagreement with the weight a Judge places on certain evidence is not sufficient to overcome the presumption that the Judge considered all the record evidence. Furthermore, as long as a Judge draws reasonable inferences and reaches plausible conclusions, the appealing party's ability to argue for an alternate interpretation of the evidence is not enough to demonstrate the Judge's findings and conclusions are arbitrary or capricious.

Department Counsel persuasively argues that evidence of rehabilitation of Company A does not constitute evidence of rehabilitation of Applicant. However, our reading of the decision below persuades us that the Administrative Judge relied on the rehabilitation of Company A for the limited purpose of concluding that Personal Conduct Mitigating Condition 7<sup>(9)</sup>

could be applied in favor of Applicant. Accordingly, Department Counsel has not shown the Judge erred.

Department Counsel correctly argues that maintaining public confidence in the industrial security program can be a factor in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 6. If the Administrative Judge had made findings of fact about Applicant along the lines asserted by Department Counsel, then a favorable security clearance decision could undermine public confidence in the industrial security program. However, the Judge did not make such findings of fact. The Board does not have to agree with the Judge's findings and conclusions to decide that this appeal argument fails to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

Department Counsel's remaining arguments are based on its strong disagreement with the Judge's weighing of the record evidence, the inferences he drew, and the conclusions he reached. The Board does not have to agree with the Judge's findings and conclusions to decide that Department Counsel's remaining arguments, viewed individually or collectively, fail to demonstrate the Judge ignored the record evidence, weighed the record evidence in an arbitrary or capricious manner, or that the Judge's findings and conclusions are arbitrary or capricious.

3. Whether the Administrative Judge's decision is arbitrary and capricious. Department Counsel makes six assertions of arbitrary and capricious action by the Administrative Judge without any elaboration or argument. Those conclusory assertions lack sufficient specificity to warrant discussion by the Board. *See* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity). To the extent the assertions summarize arguments made earlier in the appeal brief, the Board need not discuss those arguments again.

### **Conclusion**

Department Counsel has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's favorable security clearance decision.

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. Unless specifically stated otherwise in this decision, any reference to "criminal indictment" or "indictment" should be understood as referring to both the original indictment and the superseding indictment, collectively.
2. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."
3. For example, a defendant's fingerprint at the scene of a crime may have probative value by proving that the defendant had been at the scene of the crime, even though mere presence at the scene of the crime may not be sufficient, by itself, to prove the defendant committed a crime.
4. Dismissal of the criminal indictment did not preclude the Administrative Judge from considering it as part of the record evidence in this case. *Cf.* ISCR Case No. 99-0119 (September 13, 1999) at p. 2 (Department Counsel can present evidence to prove that an applicant engaged in criminal conduct even if the criminal charges against the applicant were dismissed or the applicant was acquitted of criminal charges). What significance an Administrative Judge reasonably can place on the fact that an indictment was dismissed will depend on whether the record evidence shows the reasons for the dismissal and, if so, what inferences reasonably can be drawn from the reasons for the dismissal. *Cf.* ISCR Case No. 96-0360 (September 25, 1997) at p. 4 ("Absent record evidence of the specific reasons why the criminal charges were not pursued, a Judge cannot legitimately make assumptions or draw inferences about the reasoning state authorities used to drop the criminal charges.").
5. For example, an Administrative Judge may consider whether, in light of the record evidence as a whole, an applicant's denials are made in good faith or not.
6. The Board has held the concept of imputed knowledge can be applied in DOHA proceedings. Whether that concept can be appropriately applied in any given case will depend on the particular facts of the case. In this case, the Administrative Judge specifically considered the question of what knowledge could be imputed to Applicant. The Board need not agree with the Judge's finding on this point to conclude Department Counsel has failed to demonstrate the Judge's finding is arbitrary, capricious, or contrary to law.
7. "Association with persons involved in criminal activities has ceased."
8. Given the record evidence in this case, Applicant's argument about the significance of the insurance settlement is unpersuasive.
9. "Association with persons involved in criminal activities has ceased."