

DATE: February 5, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-16939

## **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) issued to Applicant a Statement of Reasons (SOR) dated June 3, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Martin H. Mogul issued an unfavorable security clearance decision dated November 13, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised by Applicant's appeal brief: (1) whether the Appeal Board can consider new evidence on appeal; and (2) whether Applicant can be given an opportunity to prove that he can be trusted with a security clearance. For the reasons that follow, the Board affirms the Administrative Judge's 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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review 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 the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are

contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

### **Appeal Issues**

1. Whether the Appeal Board can consider new evidence on appeal. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about Applicant's 1981 reprimand under Article 15 of the Uniform Code of Military Justice, Applicant's 1985 court-martial for various offenses, or Applicant's falsification of a security clearance application in August 1999. [\(1\)](#)

However, Applicant asks the Board to consider that he has earned the trust of the former president of a named company, who is willing to state that Applicant's past conduct does not reflect of Applicant's work.

A review of the case file shows that Applicant had an opportunity to respond to the File of Relevant Material (FORM) and submit additional information for the Administrative Judge to consider in his case. The Judge indicated in his decision that no response to the FORM was received from Applicant. If Applicant had wanted the Judge to consider the former president's opinion about Applicant's character, judgment and reliability, then Applicant had to get the former president to state his opinion in writing so that Applicant could submit it in response to the FORM. By failing to submit anything in response to the FORM, Applicant waived his right to have additional information considered by the Judge in his case.

Applicant's proffer concerning the views of a former president of a named company constitutes new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

2. Whether Applicant can be given an opportunity to prove that he can be trusted with a security clearance. Applicant states he is "a changed man" and asks that he be given "the opportunity to prove that point and that I deserve the trust bestowed upon me." The Board construes Applicant's statements as raising the issue of whether he can be given an opportunity to prove that he can be trusted with a security clearance.

Under the Directive, there is no authority for a Hearing Office Administrative Judge or the Board to grant a conditional or probationary security clearance. *See, e.g.*, ISCR Case No. 99-0109 (March 1, 2000) at p. 3. Furthermore, absent any showing of factual or legal error by the Judge, there is no legitimate basis for the Board to overturn the Judge's unfavorable security clearance decision. In this case, the Judge's unchallenged findings of fact provide a rational basis for the Judge's adverse conclusions under Guideline J and Guideline E. Applicant's desire to be given a chance to prove he can be trusted with a security clearance does not demonstrate any factual or legal error by the Judge.

### **Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Applicant has not shown error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. As noted earlier in this decision, there is no presumption of error below and the appealing party has the burden of demonstrating that the Administrative Judge erred. Since Applicant does not challenge the Administrative Judge's findings of fact, those findings of fact stand on appeal. Accordingly, the Board need not review the Judge's findings of fact.