

DATE: May 2, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-17539

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

George H. Edwards, Esq.

Applicant has appealed the December 17, 2002 decision of Administrative Judge Claude R. Heiny, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

This 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) whether the Administrative Judge ignored evidence favorable to Applicant; (2) whether the Administrative Judge made erroneous findings of fact; and (3) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. 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 April 1, 2002. The SOR was based on Guideline E (Personal Conduct). A hearing was held on September 11, 2002. The Administrative Judge issued a written decision, dated December 17, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse 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<sup>(1)</sup>

1. Whether the Administrative Judge ignored record evidence favorable to Applicant. Applicant argues the Administrative Judge: (a) ignored mitigating evidence; and (b) failed to take into account the evidence that Applicant consistently admitted that an incident occurred on October 28, 1994, and only denied that he assaulted a female soldier. These arguments raise the issue of whether the Judge ignored evidence favorable to Applicant.

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. As the trier of fact, the Judge must weigh the record evidence, both favorable and unfavorable. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence, both favorable and unfavorable. Furthermore, merely because the Judge made findings of fact and reached conclusions unfavorable to Applicant, it does not follow that the Judge simply ignored the record evidence.

2. Whether the Administrative Judge made erroneous findings of fact. Applicant argues: (a) the Administrative Judge erred by finding: (a) an Army CID investigation determined Applicant had indecently assaulted a female soldier in October 1994; (b) Applicant was not truthful about the October 1994 incident; and (c) the Letter of Reprimand issued to Applicant in connection with the October 1994 incident was based on conduct unbecoming an officer and indecent assault.

(a) On appeal, there is no dispute that: (i) the Army CID conducted an investigation of an incident in October 1994 that involved Applicant (then a Lieutenant Colonel in the U.S. Army) and a female Specialist; and (ii) the Army CID prepared a written report of its investigation.<sup>(2)</sup> However, Applicant challenges the following sentence from the Judge's findings of fact: "The CID investigation determined the Applicant had indecently assaulted the woman."

The facts and circumstances surrounding the October 1994 incident are relevant to this case. Whether the Army CID reached a conclusion about the October 1994 incident (as found by the Administrative Judge) or whether the Army CID report merely contains a "statement in the investigator's summary" (as argued by Applicant on appeal) is not essential to the Judge's findings of fact about the October 1994 incident. Considering the record as a whole, the Board concludes the Judge made findings concerning the facts and circumstances surrounding the October 1994 incident that reflect a legally permissible interpretation of the record evidence in this case.<sup>(3)</sup> Applicant's argument on this point fails to demonstrate the Judge's findings of fact are erroneous.

(b) The Administrative Judge found that: (i) Applicant was not truthful about the October 1994 incident when he was initially interviewed by the Army CID about it; (ii) Applicant later admitted to the CID investigator that he had lied about the October 1994 incident during the investigation; and (iii) Applicant was not truthful about the October 1994 incident when he gave a written statement to a Defense Security Service (DSS) investigator in January 2001.

On appeal, Applicant does not challenge the Administrative Judge's first and second findings, but does challenge the Judge's finding that Applicant was not truthful about the October 1994 incident in his January 2001 written statement. In support of this claim of error, Applicant relies heavily on making distinctions about the terms "sexual harassment," "indecent assault," and "fraternization" and contends that Applicant and other persons (including Army personnel and the DSS investigator) used those terms interchangeably and inaccurately. Applicant's argument fails to demonstrate the Judge erred.

SOR subparagraph 2.c alleged that Applicant falsified material facts in his January 2001 written statement by claiming

he had been falsely accused of sexual harassment. Applicant denied that allegation. Applicant's explanation of his January 2001 written statement is relevant and material evidence that the Administrative Judge had to consider. However, Applicant's explanation was not conclusive or binding on the Judge. Rather, the Judge had to consider Applicant's explanation in light of the record evidence as a whole and the Judge's assessment of the credibility of Applicant's hearing testimony, and make a finding as to Applicant's intent or state of mind when he gave the January 2001 written statement. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. The Judge found that Applicant falsified material facts in his January 2001 written statement by claiming that he had been falsely accused of sexual harassment. By making that finding, the Judge rejected Applicant's explanation. Considering the record evidence as a whole, the Judge's finding is sustainable.

(c) The Administrative Judge found that as a result of the October 1994 incident Applicant received a Letter of Reprimand for conduct unbecoming an officer and indecent assault. On appeal, Applicant argues the Judge's finding is erroneous because the Letter of Reprimand "was in relations to the allegation of the offense of conduct unbecoming an officer and indecent assault" (emphasis in Applicant's brief), and the Letter of Reprimand did not include a finding that the allegation had been substantiated.

Applicant correctly notes that a copy of the Letter of Reprimand is not contained in any of the exhibits submitted by Department Counsel.<sup>(4)</sup> But, Government Exhibit 2 contains a DA Form 4833 that indicates Applicant received a reprimand as the result of the CID investigation concerning allegations of conduct unbecoming an officer and indecent assault. However, Applicant fails to articulate any reason why the Judge's finding on this point was harmful or prejudicial in any meaningful way. What is pertinent to this case are the facts and circumstances surrounding the October 1994 incident, not the particular wording used in the Letter of Reprimand issued to Applicant as a result of that incident.<sup>(5)</sup>

3. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) the Judge never addressed the absence or presence of rehabilitation or the likelihood of recurrence as required by Sections 6.3.5 and 6.3.6 of the Directive; (b) he satisfies Personal Conduct Mitigating Conditions 2,<sup>(6)</sup> 3,<sup>(7)</sup> and 5;<sup>(8)</sup> and (c) his misconduct only involved "a single incident of poor judgment." The Board construes these arguments as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law for failing to apply pertinent provisions of the Directive.

(a) In making a decision, an Administrative Judge must apply pertinent provisions of the Directive. *See* Directive, Additional Procedural Guidance, Item E3.1.25. Accordingly, a Judge must take into consideration whether there is evidence of rehabilitation and whether an applicant is likely to repeat past misconduct. *See* Directive, Sections 6.3.5 and 6.3.6; and Additional Procedural Guidance, Items E2.2.1.6 and E2.2.1.9. Apart from making a general reference to the factors that appear in Item E2.2.1 (Decision at p. 4), the Judge also noted that he considered, *inter alia*, "presence or absence of rehabilitation" and "the probability that the circumstances or conduct will continue or recur in the future" (Decision at pp. 6-7). Although the Judge could have written more in his decision about these matters, the Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 4. Furthermore, the Board will not assume the Judge's references to the pertinent factors were merely a subterfuge or an empty gesture. *See, e.g.*, ISCR Case No. 99-0019 (November 22, 1999) at p. 5 (there is a rebuttable presumption that an Administrative Judge acts in good faith). *Cf. Lenn v. Portland School Committee*, 998 F.2d 1083, 1087-88 (1st Cir. 1993) (party has heavy burden of persuasion on appeal if it asserts the judge below "indulg[ed] in the adjudicatory equivalent of a shell game"). Considering the Judge's decision in its entirety, the Board concludes Applicant has failed to demonstrate the Judge erred with respect to this aspect of the case.

(b) The Administrative Judge specifically explained why he did not apply Personal Conduct Mitigating Conditions 2, 3, and 5 (Decision at p. 6). Considering the record as a whole, the Judge's conclusions concerning those three mitigating conditions are not arbitrary, capricious, or contrary to law. Applicant's appeal arguments to the contrary are not persuasive.

(c) Applicant also argues: (i) his misconduct involved only a single incident of poor judgment; (ii) "there is no other adverse event in the life of the applicant, either prior to or subsequent to the incident of October 28, 1994"; and (iii) his false statement to the CID investigator in 1994 "was an isolated incident which was not recent." These arguments are

not persuasive. Apart from the October 1994 incident with the female soldier, Applicant lied to the CID investigator in 1994. Furthermore, the Judge found that Applicant falsified material facts in his January 2001 written statement. Given the Judge's findings that Applicant engaged in three separate acts of misconduct, it is not tenable for Applicant to claim the Judge should have concluded Applicant was involved in only a single incident of poor judgment.

### **Conclusion**

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's adverse 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. The Administrative Judge entered a formal finding in favor of Applicant with respect to SOR subparagraph 2.b. The Judge's findings and conclusions about that aspect of the case is not at issue on appeal.
2. Applicant refers to the fact that the Army CID report (part of Government Exhibit 2) contains references to attachments, but that none of those attachments is included with the Army CID report admitted into evidence at the hearing. However, Applicant's appeal brief fails to make any identifiable appeal argument or claim of error concerning the absence of those attachments. And, in any event, a review of the hearing transcript shows that Applicant raised no objection to the admission of Government Exhibit 2 (without the attachments) when he had the opportunity to do so before the Administrative Judge.
3. Applicant asserts that the Administrative Judge "failed to take into consideration whether or not the alleged victim made a true statement." A reading of the decision below persuades the Board that the Judge had to take that matter into consideration when making his findings of fact about the October 1994 incident. By finding that Applicant engaged in misconduct in connection with the October 1994 incident, the Judge implicitly found the victim's statements about Applicant's conduct were truthful.
4. Applicant asserts the Letter of Reprimand contained certain language that he purports to quote in his appeal brief. Applicant's proffer of such language on appeal goes beyond the record evidence before the Administrative Judge and constitutes new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
5. An SOR is an administrative pleading that is not held to the stringent standards of a criminal indictment, and as long

as there is fair notice to the applicant and the applicant has a reasonable opportunity to respond, a security clearance case should be adjudicated on the merits of relevant issues and not concerned with pleading niceties. *See, e.g.*, ISCR Case No. 99-0554 (July 24, 2000) at pp. 4-5.

6. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."
7. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."
8. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."