

DATE: December 7, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-21070

## 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 the Applicant a Statement of Reasons (SOR), dated October 16, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated July 30, 2004.

Applicant appealed the Administrative Judge's unfavorable 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 issue: whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. 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 Issue**

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. On appeal, Applicant argues that the Judge's decision should be reversed for the following reasons: (1) because Applicant was preoccupied with his job at a remote location, he mistakenly neglected to request a hearing and arrange for legal representation, (2) Applicant is of good character, and could not be subject to blackmail or coercion, (3) Applicant has held a security clearance for approximately 30 years without compromise of classified information, and (4) Applicant will lose his job if he doesn't have a clearance. In support of his contentions, Applicant offers additional explanations concerning his circumstances and written statements from three other individuals. The Board interprets Applicant's appeal brief as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Therefore, we may not consider Applicant's new explanations and the three written statements. The submission of such new evidence does not demonstrate error on the part of the Judge, or render his decision arbitrary, capricious or contrary to law.

A review of the record shows that Applicant was placed on reasonable notice of: (1) his right to respond to the SOR allegations against him, (2) his right to ask for a hearing or to ask for a decision based of the administrative record without a hearing, (3) his right to respond to the evidence presented against him and to present evidence on his own behalf for consideration by the Judge, and (4) the right to arrange for legal representation. The record also shows Applicant responded to the SOR, elected to have a decision made in his case without a hearing, received a copy of the Government's File of Relevant Material (FORM), submitted a response to the FORM for consideration by the Judge, and was given reasonable additional time to arrange for appropriate legal representation. Because Applicant did not obtain legal representation and instead continued to represent himself during the proceedings below, he cannot fairly complain about the quality of his self-representation or seek to be relieved of the consequences of his decision to represent himself. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3. Applicant's *pro se* status did not

relieve him of the obligation to take timely, reasonable steps to protect his rights under Executive Order 10865 and the Directive. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at p. 3. Applicant's failure to take better advantage of his rights under the Directive does not constitute a denial of those rights. *See, e.g.*, ISCR Case No.01-20579 (April 14, 2004) at p. 4.

Applicant's argument that he is of good character and has held a security clearance for many years without any problems does not demonstrate the Judge erred. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The Administrative Judge's unchallenged findings of fact concerning Applicant's history of sexual behavior, criminal conduct, and personal conduct provide a sufficient rational basis for the Judge's unfavorable security clearance decision.

Finally, an applicant's need for a security clearance to keep his job is not material to the evaluation of his security suitability. The possibility that an unfavorable security clearance decision could have adverse consequences for an applicant's job situation is not relevant or material to an evaluation of the security significance of that applicant's conduct. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8. The security significance of Applicant's history of misconduct is not diminished or reduced by the fact that an unfavorable security clearance decision could result in loss of his job.

### **Conclusion**

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board