

DATE: May 7, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-25941

## **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 August 11, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision dated February 9, 2004.

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 on appeal: whether the Administrative Judge's finding that Applicant was cited twice for traffic violations in 2003 was erroneous; whether the Administrative Judge's conclusion that Applicant failed to mitigate his conduct with respect to a pattern of traffic violations was arbitrary or capricious; whether the Administrative Judge's adverse security clearance 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 Issues [\(1\)](#)

1. Whether the Administrative Judge's finding that Applicant was cited twice for traffic violations in 2003 was erroneous. The Administrative Judge found that Applicant was cited for 13 traffic violations between 1992 and 2003, and was cited twice for speeding in 2003 (Decision at pp.1 and 3). Applicant contends that he was not cited in 2003, and that he was last cited on August 8, 2002. Applicant also admits that he was cited for speeding in June 2002, but suggests that this citation should not have been considered because the charge was dropped after he attended an eight-hour defensive driving course.

In his hearing testimony, Applicant did not provide the dates of these two citations, and the Judge reasonably could have understood Applicant's testimony to be that the violations occurred in 2003. *See* Hearing Transcript at pp. 41-42. Applicant did not provide the specific dates of the violations until this appeal, and the Board may not consider additional evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Additionally, the Judge's consideration of the earlier speeding citation (the one that Applicant says occurred in June 2002), whether or not mitigated for state purposes by Applicant's defensive driving course attendance, is sustainable. In the context of this case, additional traffic violations are disqualifying conduct. While Applicant was free to explain, extenuate or mitigate that conduct, as explained below, an Administrative Judge can find that an applicant engaged in the proscribed driving activity whether or not the citation results in points or a conviction. *Cf., e.g.*, ISCR Case No. 99-0119 (September 13, 1999) at p. 2 ("[T]he fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude an Administrative Judge from finding an applicant engaged in the conduct underlying those criminal charges.").

2. Whether the Administrative Judge's conclusion that Applicant failed to mitigate his conduct with respect to a pattern of traffic violations was arbitrary or capricious. The Judge concluded that the government established its *prima facie* case regarding Guideline E because Applicant's multiple proven or admitted traffic violations between 1992 and 2003

reflected disdain for basic societal requirements and therefore had security significance.<sup>(2)</sup>

The Judge concluded that Applicant's judgment, as he approaches his mid-30s, is unlikely to change in light of his receipt of the two recent speeding tickets.<sup>(3)</sup>

Applicant argues that most of his tickets were in a period of 7 years between 1992 and 1999, and that except for the one recent speeding ticket, the one Applicant says occurred in August 2002, he has had no violations since 1999. Applicant argues that this is evidence that he does follow the rules and regulations. He argues that his most recent ticket was in an unfamiliar area in which he was lost and unaware of the speed limit. He argues on appeal that various traffic violations (e.g., the fictitious license plate) were amended charges in which prosecutors revised the charges to help him avoid driving points. The Board construes Applicant's argument as raising the issue of whether the Judge acted arbitrarily or capriciously in concluding that Applicant failed to mitigate his conduct with respect to a pattern of traffic violations.

Applicant is responsible for presenting witnesses or other evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proves or that Applicant admits, and Applicant also has the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. Applicant suggests that the Judge erred because the frequency and recency of his conduct within the past five years requires the conclusion that Applicant had reformed and rehabilitated himself from the mistakes of his youth.

The Judge had to consider the record evidence as a whole, both favorable and unfavorable, evaluate the facts and circumstances of Applicant's past conduct and current circumstances in light of pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. In deciding whether Applicant met this burden of persuasion, the Judge reasonably could consider whether Applicant presented evidence that was indicative of extenuation, mitigation, changed circumstances, or reform and rehabilitation. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 6; and Directive Section 6.3.5 and Enclosure 2, Item E2.2.1.6. There is a rebuttable presumption that the Administrative Judge considered all of the evidence presented. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. The Judge found sufficient mitigation in Applicant's favor on other SOR conduct. The fact that the mitigating evidence presented by Applicant with respect to the traffic violations did not lead the Judge to the decision desired by Applicant does not establish error. Here, the Judge drew negative inferences from the occurrence of not just one, but two, recent, admitted incidents of disqualifying conduct in addition to other record evidence. Considering the record as a whole, the Board concludes that the Judge's weighing of the record evidence against a finding of rehabilitation or changed circumstances was not arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 01-12949 (April 1, 2003) at p. 3.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law. Applicant argues that he has had a steady job for almost four years with the contractor; he obeys all the rules at work, rarely uses sick leave and worked a lot of overtime to ensure project completion; and he returned to school and obtained a systems engineer certificate. He asks to be given an opportunity to show that he can hold a security clearance and states that he would lose his job without benefits if a security clearance is not granted. Applicant notes other work accomplishments.<sup>(4)</sup>

The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). 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). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *See Gayer v. Schlesinger*, 490 F. 2d 740, 750 (D.C. Cir. 1973). All that is required is proof of facts or circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or

trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 5. Moreover, an applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. The favorable evidence cited by Applicant did not compel the Administrative Judge to make a favorable security decision. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence or vice versa. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6. We do not have to agree with the Judge's security decision to sustain it. Considering Applicant's burden of persuasion and the record as a whole, the Board finds that the Judge's adverse security clearance decision is sustainable.

### **Conclusion**

Applicant failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's February 9, 2004 decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in Applicant's favor with respect to SOR paragraphs 1.b and 1.c under Guideline G (Alcohol Consumption); paragraph 1.a had been withdrawn and was not considered by the Judge. The Judge also entered formal findings in Applicant's favor with respect SOR paragraphs 2.a and 2.c under Guideline E (Personal Conduct); paragraph 2.b had been withdrawn and was not considered. The favorable formal findings and withdrawn paragraphs are not at issue on appeal.
2. Decision at p. 5. The Judge noted that Personal Conduct Disqualifying Condition 5 applies. Directive, Enclosure 2, Item E2.A5.1.2.5: "A pattern of dishonesty or rule violations. . ."
3. This is a relevant consideration in extenuation or mitigation. Directive Section 6.3.6 and Enclosure 2, Item E2.2.1.9 ("The likelihood of continuation or recurrence.").
4. Some of these factual assertions are not in the record, and to that extent, cannot be considered by the Board on appeal.