

DATE: June 23, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-26360

## **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 April 10, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision dated March 8, 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: (1) whether the Administrative Judge erred by finding Applicant had falsified a security clearance application he completed in April 2000; and (2) whether the Administrative Judge should have concluded Applicant had presented sufficient evidence of extenuation or mitigation to warrant a favorable security clearance decision. 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 <sup>(1)</sup>

1. Whether the Administrative Judge erred by finding Applicant had falsified a security clearance application he completed in April 2000. The Administrative Judge found that Applicant falsified a security clearance application he completed in April 2000 by failing to disclose that he had delinquent debts. On appeal, Applicant challenges the Judge's finding of falsification, arguing: (a) he is not a native speaker of English and misunderstood the meaning of questions 38 and 39 on the security clearance application; (b) he answered questions 38 and 39 on the security clearance application to the best of his knowledge, based on a mistaken belief about the status of his debts, not with any intention of being untruthful; and (c) "[s]ince my financial history was thoroughly reviewed under Guideline F it was not logical that I would deliberately withhold or omit information in an attempt to defraud the DOD."

In deciding whether Applicant falsified the security clearance application by failing to disclose he has delinquent debts, the Administrative Judge had to make a finding about Applicant's intent or state of mind when he completed the application. Applicant's statements about his intent or state of mind are relevant evidence that the Judge had to consider. But, the Judge was not limited to considering Applicant's statements about his intent or state of mind. Rather, the Judge could consider Applicant's statements in light of any record evidence that provides circumstantial evidence of Applicant's intent or state of mind. *See, e.g.*, ISCR Case No. 99-0164 (February 29, 2000) at p. 3.

In a written statement Applicant gave to an investigator in May 2001, he indicated "I cannot explain why I did not list the debts on the security questionnaire. I did not intend to hide anything." (File of Relevant Material, Item 5 at p. 2). In response to the two SOR paragraphs alleging falsification, Applicant responded "I deny" without explanation or elaboration. Because Applicant did not submit any response to the File of Relevant Material, his brief comments in the May 2001 written statement and his simple denials in his answer to the SOR are the only statements by him about the falsification issue that were available for the Judge to consider.

The Administrative Judge had to decide whether Applicant's failure to disclose his delinquent debts when he completed the security clearance application was deliberate or not. Given the record evidence concerning Applicant's history of financial difficulties, it was legally permissible for the Judge to find that Applicant's unexplained failure to disclose his delinquent debts when he completed the security clearance application was a deliberate falsification.

Applicant's appeal brief offers explanations about the security clearance application that go beyond the record evidence in this case. By offering those explanations, Applicant seeks to supplement the record with new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, Applicant cannot fairly challenge the Administrative Judge's finding of falsification based on a proffer of evidence that he did not submit for the Judge's consideration when he had the opportunity to do so.

2. Whether the Administrative Judge should have concluded Applicant had presented sufficient evidence of extenuation or mitigation to warrant a favorable security clearance decision. Applicant refers to the Administrative Judge's discussion of the general factors set forth under Directive, Adjudicative Guidelines, Item E2.2.1, and argues that the Judge should have concluded his conduct was extenuated or mitigated under several of those factors.

To the extent that Applicant argues the Administrative Judge should have concluded his history of financial difficulties was extenuated or mitigated, Applicant's argument is moot. The Judge entered formal findings in favor of Applicant with respect to Guideline F (Financial Considerations). Given those favorable formal findings, Applicant's arguments about his financial situation are irrelevant to this appeal.

To the extent that Applicant argues the Administrative Judge should have concluded his falsification was extenuated or mitigated based on factual assertions that go beyond the record evidence, Applicant's arguments rely on new evidence, which cannot be considered on appeal.

To the extent that Applicant argues his failure to fully disclose his financial situation to the federal government will not happen again, he fails to demonstrate the Administrative 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). Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness. The Judge's finding that Applicant falsified a security clearance application provides a rational basis for the Judge's adverse conclusions about Applicant's judgment, reliability, and trustworthiness. Given the sparse record evidence in this case, it was not arbitrary or capricious for the Judge to conclude that Applicant had failed to meet his burden of presenting credible evidence demonstrating extenuation or mitigation of his falsification of the security clearance application. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

### **Conclusion**

The Board affirms the Administrative Judge's unfavorable security clearance decision because Applicant has not demonstrated the Judge committed factual or legal error.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Attached to Applicant's appeal brief are eight letters and one e-mail message from various individuals writing on his behalf. The nine documents postdate the Administrative Judge's decision. As such, they constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board notes that Applicant had a reasonable opportunity to submit documentary evidence in response to the File of Relevant Material. Having failed to avail himself of that opportunity, Applicant cannot fairly challenge the Judge's decision based on evidence that he did not submit for the Judge's consideration.