

DATE: November 30, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-26723

## **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 October 20, 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), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Claude R. Heiny issued an unfavorable security clearance decision, dated September 10, 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 failed to consider record evidence favorable to Applicant; (2) whether the Administrative Judge erred by finding that Applicant falsified a security clearance application; and (3) whether there is a rational basis for the Administrative Judge's unfavorable 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 failed to consider record evidence favorable to Applicant. Applicant contends the Administrative Judge failed to take into account the record evidence of his job performance, and the absence of record evidence that he has had an alcohol-related incident while on the job. <sup>(2)</sup> This claim of error does not demonstrate the Judge erred.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically stated otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Furthermore, there is no requirement that a Judge cite and discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 99-0288 (September 18, 2000) at p. 5. 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.

The absence of record evidence that Applicant abused alcohol on the job or during duty hours does not have the significance that Applicant attributes to it. Security clearance adjudications are not limited to consideration of an applicant's conduct on the job or during duty hours. Security clearance adjudications can be based on an applicant's conduct away from the job and during non-duty hours. *See, e.g.*, ISCR Case No. 02-22240 (July 16, 2004) at p. 5. Accordingly, even though there is no evidence that Applicant abused alcohol on the job or during duty hours, the Administrative Judge properly considered the record evidence of Applicant's alcohol abuse away from the job. Moreover, the absence of any evidence that Applicant abused alcohol on the job or during duty hours is irrelevant to Applicant's falsification of a security clearance application or his criminal conduct.

2. Whether the Administrative Judge erred by finding that Applicant falsified a security clearance application. The

Administrative Judge found that Applicant falsified a security clearance application by failing to disclose significant portions of his criminal record and the fact that he had a security clearance revoked in 1991. Applicant challenges the Judge's finding that he falsified the security clearance application by not disclosing that information.

The Administrative Judge had the opportunity to consider Applicant's explanation for why he failed to disclose significant portions of his criminal record and the fact that he had a security clearance revoked in 1991. The Judge was not bound--as a matter of law--to accept or reject Applicant's explanation. Rather, the Judge had to consider Applicant's explanation in light of the record evidence as a whole. Considering the record as a whole, the Judge had a sufficient basis to find that Applicant's omissions were deliberate and intentional. Accordingly, the Judge's finding of falsification is sustainable. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.*

3. Whether there is a rational basis for the Administrative Judge's unfavorable security clearance decision. Applicant also argues: (a) the Administrative Judge unfairly judged him on the basis of "mistakes that were made years ago that I've overcome"; (b) he needs a security clearance to keep his job; and (c) he deserves a chance to receive a security clearance. The Board construes these arguments as raising the issue of whether the Judge had a rational basis for his unfavorable security clearance decision.

A security clearance decision is based on consideration of an applicant's past conduct and present circumstances. *See Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Under the whole person concept, <sup>(3)</sup> Applicant's past conduct forms a reasonable basis for the Judge to assess Applicant's current security eligibility. It was not arbitrary, capricious, or contrary to law for the Judge to consider Applicant's overall history of conduct in assessing Applicant's current security clearance eligibility.

Whether or not Applicant needs a security clearance to keep his job is not material to the Administrative Judge's evaluation of the security significance of Applicant's conduct in this case. The possibility that an unfavorable security clearance decision could have adverse consequences for Applicant's job situation is not relevant or material to the Judge's evaluation of the security significance of Applicant's conduct. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8.

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 is not required to wait until a person fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Given the Administrative Judge's findings of fact about Applicant's history of alcohol abuse, criminal record, and falsification of a security clearance application, the Judge had a rational basis for his adverse conclusions about Applicant's security eligibility and his unfavorable security clearance decision.

### **Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate error below.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's formal finding in favor of Applicant with respect to SOR paragraph 2.c is not at issue on appeal.
2. Applicant does not challenge the Administrative Judge's findings of fact about his history of alcohol abuse. Because there is no presumption of error below, the Judge's unchallenged findings of fact about Applicant's history of alcohol abuse stand and will not be reviewed by the Board.
3. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.