

DATE: January 30, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-01181

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Robert M. Gregory, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR) dated January 24, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based on Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision dated August 5, 2003.

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's overall security clearance determination was arbitrary, capricious and contrary to law because it did not consider the Guidelines that Applicant "complied" with; (2) whether the Administrative Judge gave sufficient weight to the evidence of extenuation and mitigation; and (3) and whether there is an adequate basis on the record for the Administrative Judge to find that Applicant deliberately omitted information on his security clearance application. 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) Whether the Administrative Judge's overall security clearance determination was arbitrary, capricious and contrary to law because it did not consider the Guidelines that Applicant "complied" with. Applicant argues that the Administrative Judge failed to consider Applicant's suitability for a clearance despite the fact that Applicant "complied" with eight of the 13 Guidelines in the Directive.<sup>(1)</sup> Assuming for the purposes of this appeal that Applicant "complied" with the eight Guidelines not alleged in the SOR, it is legally irrelevant. Nothing in the Executive Order or Directive indicates that an applicant must be granted a security clearance unless the applicant's conduct and circumstances fall under or implicates all or most of the 13 Guidelines listed in the Directive. The Judge must evaluate the security significance of the conduct applicant did engage in. *See* ISCR Case No. 01-12922 (April 18, 2003) at pp. 2-3 (only two of the Guidelines were involved).

(2) Whether the Administrative Judge gave sufficient weight to the evidence of extenuation and mitigation. Applicant raises a number of issues in extenuation and mitigation, and he also argues that, under the "whole person" concept, he is suitable for a security clearance. The nine factors of the "whole person" concept mentioned by Applicant are outlined in Directive, Enclosure 2, Item E2.2.1. We will discuss the "whole person" in relation to extenuation and mitigation as Applicant has done. Apart from extenuation and mitigation, Applicant does not specify how the Judge erred with respect to the application of E2.2.1 factors, which Applicant must do to meet his burden of proof. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 9.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. The Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the

unfavorable evidence or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 01-03767 (December 5, 2003) at p. 3.

The disqualifying conditions noted under Guideline J (Criminal Conduct) were four arrests: 1989, 1992, 1995, and 2000, and the Judge found against Applicant on each of the four. The three alcohol-related arrests (1989, 1992 and 2000) also were the bases for the Guideline G (Excessive Alcohol Consumption) disqualifying conduct. Applicant admitted that his problem with alcohol was "evident" in his 1989 and 1992 arrests for driving under the influence, but they should have been mitigated due to the passage of time and Applicant's age at the time (he states he was 32 and 35 years old respectively). Applicant contends that the 2000 driving under the influence arrest, which was dismissed but reinstated on appeal, should not have been weighted against Applicant because his innocence must be presumed while this matter is pending in the Arizona Court of Appeals. The appeal does not address the 1995 arrest for domestic violence, disorderly conduct and riot.

The Judge specifically considered several mitigating conditions under Guidelines J and G, and overall found against Applicant. In finding against Applicant under Guideline J, the Judge included the 2000 arrest and concluded that the problem is still recent and not isolated based on the number and time sequence of the arrests. In finding against Applicant under Guideline G, the Judge concluded that Applicant has a recent problem involving a pattern of alcohol-related incidents based on Applicant's May 30, 2001, Statement that he drinks approximately 24 twelve-ounce beers a week. The Judge found that Applicant admitted the SOR allegations in his February 18, 2003, response and did not claim that he stopped or reduced his drinking. Applicant's response to the File of Relevant material did not refer to the drinking.

The Judge's consideration of the 2000 arrest was appropriate. Alcohol-related arrests that do not result in conviction may disqualify an applicant from obtaining a security clearance under Guideline G when there is sufficient record evidence showing that alcohol consumption played a significant part in the conduct that led to the arrests. *See, e.g.*, DISCR Case No. 92-1134 (November 23, 1993) at p. 3. As the Judge noted, alcohol played a significant part in the 2000 arrest. Applicant offers no counter authority. Also, under Guideline J, disqualifying conditions include allegations or admissions of criminal conduct, regardless of whether there is a formal charge. *See* Directive, Enclosure 2, Item E2.A10.1.2.

Applicant appears to believe that the Judge was required to find for him on rehabilitation and behavioral changes because there is an un rebutted statement that Applicant has received substance counseling from a certified counselor since December 16, 2002. The counselor observed that Applicant "has taken personal responsibility for his choices, and made positive changes in his behaviors." The counselor also stated: "[h]is goal has been to achieve self-control and return to a normal social drinking pattern (versus abusive or compulsive patterns) . . . [and Applicant] is also addressing the triggers and stressors which might negatively impact this goal." However, an Administrative Judge is not required to accept testimony merely because it is un rebutted. It would be arbitrary and capricious to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other evidence. *See, e.g.*, ISCR Case No. 00-0620 (October 19, 2001) at p. 3. Here, even considered in its best light, the counselor's statement does not demonstrate that Applicant has achieved self-control or is successfully rehabilitated.

There is a refutable presumption that a Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 02-01093 (December 11, 2003) at p. 3. Our review of the decision indicates that the Judge appropriately considered the E2.2.1 factors. The Board will not disturb an Administrative Judge's weighing of the evidence unless there is a showing that the Judge did so in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-01494 (May 28, 2003) at p. 3. Considering the record as a whole, Applicant failed to make such a demonstration.

Applicant's reliance on the U.S. District Court's decision in *Nickelson v. United States*, 284 F. Supp. 2d 387 (E.D. Va. 2003) is misplaced. First, that case is distinguishable because it involved a security clearance case in which a Hearing Office Administrative Judge recommended consideration of a waiver under 10 U.S.C. § 986 where the applicant had a 19-year-old conviction. In this case, Applicant's conduct is much more recent in time and falls under multiple Guidelines in the Directive. Second, the absence of any criminal conviction following an arrest does not have the

significance Applicant places on it. (2) Even in the absence of a criminal conviction, the federal government can allege and prove in these proceedings that an applicant has engaged in criminal conduct. *See, e.g.*, ISCR Case No. 00-0713 (February 15, 2002) at p. 5. Furthermore, although a criminal conviction may be a sufficient basis for an adverse security clearance decision, it is not a necessary requirement for one. Third, the decision of the Administrative Judge in the underlying case is not binding on this Board and generally should not be cited as precedent unless a party can show it meets the conditions specified by this Board. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5. Applicant did not show those conditions here.

On Guideline H (Drug Involvement), Applicant argues that he has not used drugs since 1998, and that the only corroboration of his use of drugs was his own honesty in answering Question 24 of the security clearance application ("Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"). The Judge agreed that Applicant had not used drugs since 1998. The Judge concluded that drug use is not recent. However, the Judge also concluded that Applicant has not demonstrated an intent not to abuse drugs in the future as contemplated by Drug Involvement Mitigating Condition 3. *See* Directive, Enclosure 2, Item E2.A8.1.3.3. The Judge was also concerned about drug use in terms of the overall misconduct and concluded that the risk of drug use continues to exist. The record contains sufficient record evidence to support the Judge's conclusion that the security concerns raised by Applicant's drug use had not been mitigated. Moreover, the Applicant does not dispute in this appeal that his response to Question 24 was false because it only addresses his 1992 DUI conviction.

On Guideline F (Financial Considerations) the Judge did not mitigate the \$36,758 child support arrearage that was several years old. The Judge found no corroboration for Applicant's assertion that he has made support payments since April 2000. The appeal does not rebut the Judge's concern nor otherwise refer to corroborating record evidence - it merely repeats the assertion that Applicant has made weekly payroll deductions since that date.

(3) Whether there is an adequate basis on the record for the Administrative Judge to find that Applicant deliberately omitted information on his security clearance application. The Judge found against Applicant on all four allegations of falsification in the SOR. Applicant disputes only one of the four on appeal. He contends on appeal that his "NO" response to Question 29 of the security clearance application was not falsification. He admitted that his purchases (ten times from unknown street vendors) were for personal use. Question 29 asks: "In the last seven years, have you been involved in the illegal purchase, manufacture, transfer, shipping, receiving, or sale of any narcotic...for your own intended profit or that of another?" Given the particular wording of Question 29, the Judge could not find Applicant's "NO" answer was a falsification unless there was record evidence that Applicant had been involved in a drug transaction for his profit or for the profit of another person or entity. *See* ISCR Case No. 97-0595 (February 19, 1999) at pp. 2-3. Given the record evidence in this case, the Judge's finding of falsification as alleged in SOR paragraph 5.d is not sustainable. However, that error is harmless under the particular facts and circumstances of this case. The Judge's other findings of falsification have not been challenged on appeal and are sufficient to support the Judge's adverse conclusions under Guideline E (Personal Conduct).

### **Conclusion**

With one exception that constitutes harmless error under the particular facts of this case, Applicant has not demonstrated error below. Accordingly, the Board affirms the Administrative Judge's security clearance decision.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

**Separate Opinion of Chairman Emilio Jaksetic, concurring:**

I agree with my colleagues that Applicant's argument concerning his "compliance" with eight out of the thirteen Guidelines fails to demonstrate error below. The Administrative Judge's decision is not arbitrary, capricious, or contrary to law merely because Applicant did not engage in other misconduct under Guidelines not alleged in the SOR. The Judge's findings and conclusions under Guidelines J (Criminal Conduct), G (Alcohol Consumption), H (Drug Involvement), F (Financial Considerations), and E (Personal Conduct) are more than sufficient to support his adverse security clearance decision. The Judge was not required to render a favorable security clearance decision merely because Applicant did not engage in various other kinds of conduct that have negative security implications.

Applicant also argues that the Administrative Judge should have concluded his conduct (under Guidelines J, G, H, F, and E) was extenuated or mitigated for various reasons. The mere presence of some favorable record evidence does not compel a Judge from reaching adverse conclusions about an applicant. The Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 02-14950 (May 15, 2003) at p. 6. Applicant's ability to argue for an alternate interpretation of the record evidence does not demonstrate the Judge weighed the evidence in this case improperly or reached arbitrary or capricious conclusions under each of the Guidelines alleged in the SOR. Applicant has not shown that the Judge's adverse conclusions about Applicant's conduct under Guidelines J, G, H, F, and E are arbitrary, capricious, or contrary to law.

I fully concur with my colleagues' discussion concerning the *Nickelson* case.

I fully concur with my colleagues' conclusion that the Administrative Judge erred by finding that Applicant falsified a security clearance application by answering "NO" to question 29, but that the error is harmless under the particular facts and circumstances of this case.

Finally, I concur with my colleagues' conclusion that the Administrative Judge's decision below should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Applicant refers to DoD Directive 5200.2-R. Because the issues here involve the adjudication of a security clearance to a contractor's employee, our discussion will refer to DoD Directive 5220.6, as indicated above.
2. We are not sure what Applicant means when he states in his brief that he "has never been convicted of any criminal act." Record evidence indicates that misdemeanor convictions resulted from the 1989, 1992 and 1995 arrests.