

DATE: December 18, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-05009

## 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 March 28, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision dated October 31, 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 issue has been raised on appeal: whether the Administrative Judge's finding of falsification is erroneous. 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 <sup>(1)</sup>

Applicant does not challenge the Administrative Judge's findings and conclusions under Guideline H (Drug Involvement). Nor does Applicant challenge the Administrative Judge's findings and conclusions about Applicant use of marijuana in 1996 and 1997 while he held a security clearance, which was alleged under Guideline E (Personal Conduct). As noted earlier in this decision, there is no presumption of error below and the appealing party has the burden of raising claims of error. Accordingly, for purposes of deciding this appeal, the Board need not discuss or review the Judge's findings and conclusions under Guideline H, or the Judge's findings and conclusions under Guidelines E and H about Applicant's use of marijuana while he held a security clearance.

On appeal, Applicant takes strong exception with the following statement in the Administrative Judge's decision: "Applicant falsified his October 1991 SF-86 in several material respects: omitting his two alcohol-related arrests, his past use and purchases of cocaine and his history of in-patient counseling and treatment for illegal substance abuse" (Decision at p. 8). Applicant contends the Judge erred because there is no record evidence supporting that statement except for his admitted use of marijuana.

Applicant's concern is not a frivolous one. The SOR paragraph concerning falsification alleged that Applicant falsified a Defense Department form by failing to disclose his use of marijuana. The SOR paragraph did not allege that Applicant sought to conceal any other information. Although the SOR was amended at the hearing, there was no amendment of the SOR paragraph alleging falsification. Furthermore, there is no record evidence that Applicant purchased or used cocaine, and no record evidence that Applicant had any alcohol-related arrests that predated the time when he completed the Defense Department form. Moreover, the Administrative Judge made no factual findings that Applicant purchased or used cocaine or had alcohol-related arrests that predated the time when he completed the Defense Department form. Accordingly, the one sentence identified by Applicant is, for the most part, not supported by the record evidence and goes beyond the Judge's own specific findings of fact. Given the record evidence in this case, the Judge reasonably could find that Applicant falsified the Department of Defense form by failing to disclose his use of marijuana. However, there is *no* record evidence that would support a finding that Applicant falsified the Department of Defense form by

concealing other information.

Clearly, the one sentence identified by Applicant is factually and legally flawed. However, when reviewing an Administrative Judge's decision, the Board does not consider individual sentences in isolation from the rest of the decision; rather, the Board considers the decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 01-22311 (April 4, 2003) at p. 4. Viewed in the context of the Judge's decision as a whole, the one sentence identified by Applicant is a serious anomaly or aberration that is clearly inconsistent with the remainder of the Judge's decision.

Apart from the one seriously flawed sentence identified by Applicant, the Administrative Judge's decision contains findings of fact and conclusions that are not challenged by Applicant on appeal. The Judge's unchallenged findings of fact and unchallenged conclusions provide a sufficient rational basis for the Judge's adverse security clearance decision. There is not a significant chance that, but for the error, the Judge would have reached a different result. Accordingly, the error identified by Applicant does not warrant remand or reversal. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Applicant's appeal brief also contains the following paragraph: "If there is written proof of these issues I request that such information be made available to me through the Freedom of Information Act. If there is no supporting documentation for review, such information should immediately be expunged from the official record."

To the extent that Applicant seeks to have the Administrative Judge's erroneous statement corrected, the Board's decision in this case constitutes an official determination that the one sentence objected to by Applicant is factually and legally flawed and cannot be sustained.

To the extent that Applicant asks for relief under the Freedom of Information Act, the Board does not have authority to act on his request. The Board's authority is limited to reviewing Administrative Judge decisions under the Directive. That authority does not extend to handling claims for relief under the Freedom of Information Act. However, upon issuance of this decision, the Board will provide the Director, DOHA with a copy of the Board's decision so that the Director can be made aware of Applicant's request for relief. By doing so, the Board expresses no opinion as to what action, if any, the Director should take in connection with Applicant's request for relief.

### **Conclusion**

Applicant has demonstrated the Administrative Judge erred. However, the error identified by Applicant does not warrant remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 2.a, 2.b, and 3.c. Those favorable formal findings are not at issue on appeal.