

DATE: March 29, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-07757

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated June 25, 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) and Guideline E (Personal Conduct). Administrative Judge Richard A. Cefola issued an unfavorable security clearance decision dated December 29, 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 erred by finding Applicant falsified a security clearance application; and (2) whether the Administrative Judge should have concluded Applicant presented sufficient favorable evidence 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 falsified a security clearance application. When Applicant completed a security clearance application in August 2000 he did not list a July 1995 arrest for driving while intoxicated and violating probation.<sup>(2)</sup> The issue for the Administrative Judge to decide was whether or not Applicant's omission of the July 1995 arrest from the security clearance application was deliberate and knowing.

The record evidence before the Administrative Judge contained Applicant's explanation for the omission and his denial of any intent to mislead or deceive the federal government. Applicant's statements about his state of mind and intent when he completed the security clearance application were relevant and material evidence that the Judge had to consider. However, Applicant's statements were not binding or conclusive on the Judge. The Judge had to consider Applicant's statements in light of the record evidence as a whole and decide whether to accept Applicant's explanation for the omission, or reject it as not credible. *See, e.g.*, ISCR Case No.99-0194 (February 29, 2000) at p. 3.

Given the record evidence in this case, the Administrative Judge had a rational basis for his conclusion that Applicant's explanation for the omission was not credible. Applicant's strong disagreement with the Judge's conclusion is not sufficient to demonstrate the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law, or that the Judge reached a conclusion that is unreasonable in light of the record evidence before him. *See, e.g.*, ISCR Case No. 02-29608 (December 17, 2003) at p. 4; ISCR Case No. 02-03414 (November 20, 2003) at p. 4.

2. Whether the Administrative Judge should have concluded Applicant presented sufficient favorable evidence to warrant a favorable security clearance decision. The Administrative Judge entered a formal finding against Applicant with respect to SOR paragraph 2.a (which pertained to the July 1995 arrest)(Decision at p. 5). However, reading the Judge's decision in its entirety, the only reasons the Judge gave in support of his unfavorable security clearance decision

relate to Applicant's falsification of the security clearance application (SOR paragraph 2.b). The Board is unable to discern whether (a) the Judge's unfavorable formal finding with respect to SOR paragraph 2.a is a typographical error, or (b) the Judge failed to make findings and reach conclusions with respect to SOR paragraph 2.a as required by Directive, Additional Procedural Guidance, Item E3.1.25. In either event, the error is harmless under the particular facts and circumstances of this case.

The Administrative Judge concluded that Applicant had not demonstrated his falsification of the security clearance application was mitigated, and entered a formal finding against Applicant with respect to SOR paragraph 2.b. On appeal, Applicant makes some arguments that the Board construes as raising the issue whether the Judge should have concluded Applicant presented sufficient favorable evidence to warrant a favorable security clearance decision.<sup>(3)</sup> Applicant's appeal arguments can be construed as raising two separate questions: (a) whether the Administrative Judge failed to consider the evidence presented by Applicant; and (b) whether the Judge failed to weigh the record evidence properly.<sup>(4)</sup> For the reasons that follow, the Board concludes Applicant has not shown the Judge erred.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. An appealing party's disagreement with the Judge's findings and conclusions is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence. Merely because the Judge did not give as much weight to the evidence presented by Applicant as he would have liked, it does not follow that the Judge simply ignored that evidence. *See, e.g.*, ISCR Case No. 02-15935 (October 15, 2003) at p. 6. In this case, the Judge concluded that Applicant had presented sufficient evidence to mitigate his past drug use, but not sufficient evidence to mitigate his falsification of the security clearance application. Such an analysis indicates the Judge did not just ignore the evidence presented by Applicant, but rather considered and weighed that evidence in making his findings and reaching his conclusions.

In this case, Applicant disagrees with the Administrative Judge's weighing of the record evidence. However, mere disagreement with a Judge's weighing of the record evidence is not sufficient to demonstrate error. The Board will not disturb a Judge's weighing of the record evidence unless the appealing party demonstrates the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-06928 (September 17, 2003) at p. 4. Nothing in Applicant's appeal brief persuades the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge concluded that Applicant's past history of drug abuse was mitigated sufficiently to warrant favorable formal findings under Guideline H (Drug Involvement). The Judge's favorable formal findings under Guideline H are not at issue on appeal.
2. At the time of the July 1995 arrest, Applicant was on probation for a 1992 drug conviction.
3. Applicant's appeal brief contains some factual assertions that go beyond the record evidence below and seek to supplement it on appeal. The Board cannot consider new evidence on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29.* Accordingly, the Board will only consider Applicant's appeal arguments to the extent they do not rely on new evidence.
4. Applicant's argument about the absence of any current alcohol or drug problem fails to demonstrate the Administrative Judge erred. The Judge's unfavorable security clearance decision is based on his findings and conclusions about Applicant's falsification of a security clearance application. The absence of any evidence that Applicant has a current alcohol or drug problem is irrelevant to the falsification issue in this case.