

DATE: March 14, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-09829

## 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 July 10, 2003, which stated the reasons DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision, dated November 23, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge's findings of fact were reasonable in light of all the contrary record evidence, and (2) whether the Administrative Judge's conclusions followed rationally from his findings of fact. For the reasons set forth below, 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's findings of fact were reasonable in light of all the contrary record evidence. Applicant challenges two of the Judge's findings of fact regarding statements Applicant made in a security clearance application, dated March 27, 2000. Both findings are sustainable given Applicant's statements in the application.

Applicant disputes the Administrative Judge's characterization of Applicant's response to the File of Relevant Material. Reading the document as a whole, the Board concludes that the Judge's characterization was not unreasonable.

Applicant argues that the Judge found that Applicant lied and then held that finding against Applicant even though falsification was not an issue in the SOR. Applicant's argument is not persuasive. Applicant is correct that a credibility determination is not a substitute for record evidence. However, his argument conflates: (1) a finding that he used marijuana after 1999, and (2) a conclusion that he has not persuasively shown that he has rejected the use of marijuana. The Administrative Judge did not make a finding that Applicant used marijuana after 1999. Accordingly, the Board does not read the Judge's decision as making a finding that Applicant lied about when he last used marijuana. Furthermore, Applicant is wrong to the extent that he assumes that the Administrative Judge cannot evaluate his credibility in the absence of an allegation of falsification. Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge can evaluate an applicant's credibility in order to weigh the applicant's statements before making findings of fact. *Cf.* ISCR Case No. 02-19479 (June 22, 2004) at p. 4 (in assessing the credibility of an applicant's hearing testimony, the Administrative Judge is not limited to considering only those matters specifically alleged in the SOR).

(2) Whether the Administrative Judge's conclusions followed rationally from his findings of fact. Applicant argues that the Judge should have applied Drug Involvement Mitigating Conditions 1<sup>(2)</sup>

and 3<sup>(3)</sup>

to his case.

Applicant's argument regarding Drug Involvement Mitigating Condition 1 has some merit. The Judge found Applicant's last use of marijuana was in 1999. On its face, marijuana use that is five years old is dated. Given the Administrative Judge's finding about the date of Applicant's last use, the Judge was obliged to discuss whether he was applying Drug Involvement Mitigating Condition 1 and articulate his reasons for applying or not applying that mitigating condition. *See, e.g.*, ISCR Case No. 02-24452 (August 4, 2004) at pp. 5-6 (passage of significant amount of time may require a Judge to explain why he or she is not applying Drug Involvement Mitigating Condition 1). Applicant has demonstrated error in the Administrative Judge's decision.

Applicant's arguments regarding Drug Involvement Mitigating Condition 3 are not persuasive. Given the Judge's findings regarding Applicant's history of extensive marijuana use and his reluctance to forswear marijuana use until 2003, it was reasonable for the Judge to conclude Mitigating Condition 3 did not apply to Applicant's conduct and circumstances.

The Board concludes that the Administrative Judge's error in failing to discuss the applicability of Drug Involvement Mitigating Condition 1 was harmless in this case. It is well settled that the application or non-application of a single disqualifying or mitigating condition is not necessarily dispositive. In this case, given the Judge's sustainable findings about Applicant's history of marijuana use and his reluctance to forswear its use until 2003, it is unlikely that the Judge would have come to a different resolution of Applicant's case even if he had applied Drug Involvement Mitigating Condition 1. Therefore his error was harmless.

Applicant argues that the Administrative Judge held Applicant to a standard different from that set forth in the Directive because the Judge was basing his decision on matters unrelated to Applicant's personal conduct. The Board does not agree with Applicant's reading of the Judge's decision.

### **Conclusion**

Applicant has failed to demonstrate harmful error on appeal. Therefore, the Judge's unfavorable security clearance decision is affirmed.

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. Applicant's appeal brief makes factual assertions that go beyond the record evidence that was before the

Administrative Judge in this case. Those factual assertions constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will consider only those appeal arguments that do not rely on a proffer of new evidence.

2. "The drug involvement was not recent" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.1).

3. "A demonstrated intent not to abuse any drugs in the future) (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).