

DATE: March 25, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10113

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Jr., Esq., Department Counsel

**FOR APPLICANT**

William L. Enyart, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 17, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated November 16, 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 certain findings of fact by the Administrative Judge are not supported by the record evidence; (2) whether the Administrative Judge failed to articulate a rational basis for concluding Personal Conduct Disqualifying Condition 4 applies; (3) whether the Administrative Judge should have applied Personal Conduct Mitigating Conditions 1 and 4; and (4) whether the Administrative Judge failed to consider evidence that Applicant is a good, reliable, and conscientious employee, and that Applicant has not committed a security violation. 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 certain findings of fact by the Administrative Judge are not supported by the record evidence. Applicant contends that some of the findings of fact by the Administrative Judge are speculative and not supported by the record evidence. Applicant also contends the Judge erred by finding that Applicant falsified a security clearance application he executed in January 2001. Applicant's claims of error have mixed merit.

Applicant persuasively argues that some of the Administrative Judge's findings of fact<sup>(1)</sup> are speculative in nature and are not adequately supported by the record evidence. However, the erroneous factual findings identified by Applicant on appeal do not warrant remand or reversal because they are not material to the outcome of this case.

Applicant's challenge to the Administrative Judge's findings of falsification is not persuasive. Given the record evidence in this case, the Judge had to decide whether to accept or reject Applicant's explanations for his answers to Questions 17 and 19 on the Security Clearance Application. Considering the record evidence as a whole, and giving deference to the Administrative Judge's assessment of the credibility of Applicant's hearing testimony, the Judge's findings of falsification are sustainable. The Board is not required to decide whether it agrees with the Judge's findings to conclude they are sustainable.

2. Whether the Administrative Judge failed to articulate a rational basis for concluding Personal Conduct Disqualifying Condition 4 applies. Applicant challenges the Administrative Judge's application of Personal Conduct Disqualifying Condition 4.<sup>(2)</sup> The Board need not decide whether this claim of error is persuasive. The Judge's decision sets forth reasons for his adverse conclusions about Applicant's security eligibility that are sufficient to support his unfavorable

decision independent of the Judge's application of Personal Conduct Disqualifying Conduct 4.

3. Whether the Administrative Judge should have applied Personal Conduct Mitigating Conditions 1 and 4. Applicant contends the Administrative Judge should have applied Personal Conduct Mitigating Condition 1<sup>(3)</sup> and Personal Conduct Mitigating Condition 4<sup>(4)</sup> in his favor. This contention is not persuasive.

With respect to Personal Conduct Mitigating Condition 1, Applicant's argument about his beliefs concerning his discharge from the Air Force is not persuasive. Federal officials, not individual applicants, are responsible for deciding what information is pertinent to a security clearance investigation and adjudication. Accordingly, Applicant's beliefs about his discharge from the Air Force are not determinative of whether information about his discharge is pertinent to the investigation and adjudication of his security eligibility. Given the record evidence in this case, it was not arbitrary or capricious for the Judge to conclude the information Applicant omitted was pertinent.

With respect to Personal Conduct Mitigating Condition 4, the record evidence in this case did not compel the Administrative Judge to conclude that Applicant's omissions were the result of improper or inadequate advice from authorized personnel.

4. Whether the Administrative Judge failed to consider evidence that Applicant is a good, reliable, and conscientious employee, and that Applicant has not committed a security violation. Applicant contends the Administrative Judge failed to consider the record evidence which shows Applicant is a good, reliable and conscientious employee, and that he has nor committed any security violation. This contention is not persuasive.

There is a rebuttable presumption that the 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. That presumption is not rebutted merely because Applicant can cite to favorable record evidence that he believes the Judge should have given greater weight to.

Security clearance decisions are not limited to consideration of an applicant's job performance and can be based on conduct and circumstances unrelated to an applicant's job performance. *See, e.g.*, ISCR Case No. 02-20947 (June 18, 2004) at pp. 4-5. Accordingly, the record evidence concerning Applicant's job performance did not preclude the Administrative Judge from evaluating Applicant's security eligibility under Guideline E for reasons unrelated to his job performance.

Moreover, the federal government is not required to wait until an applicant commits a security violation before it can make an unfavorable security clearance decision. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Accordingly, the absence of evidence that Applicant has committed a security violation did not preclude the Judge from making an unfavorable security clearance decision based on other grounds.

### **Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate error that warrants remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. For example, the Administrative Judge's finding that Applicant's family wanted to "bury" Applicant's discharge from the Air Force, and the Judge's finding that Applicant's father ought to have been able to answer any questions about the nature of Applicant's discharge.

2. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail" (Directive, Adjudicative Guidelines, Item E2.A5.1.2.4).

3. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.1).

4. "Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.4).