

DATE: July 16, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-14772

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated July 2, 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). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated March 22, 2004.

Applicant appeals 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge made harmful errors in his findings of fact; (2) whether the Administrative Judge erred by not applying mitigating conditions from Guideline H (Drug Involvement) to Applicant's case; and (3) whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. For the reasons set forth below, the Administrative Judge's decision is affirmed.

**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 made harmful errors in his findings of fact. Applicant cites two sentences from the Administrative Judge's decision which he argues contain factual error. In one case Applicant's point has merit. The Judge made errors as to Applicant's age and profession. However, given the totality of the Judge's decision, these errors are not harmful. The second case raised by Applicant is problematic: it is a sentence from the synopsis which conflicts with the body of the Judge's decision. The Board has previously held that it "is not inclined to view the synopsis of an Administrative Judge's decision as critical, or more important than the body of the Judge's decision itself. Absent unusual circumstances, any flaw or failing with a synopsis is not likely to demonstrate harmful error." ISCR Case No. 01-20314 (September 29, 2003) at p. 3. Therefore, the Board concludes that the error in the synopsis is not harmful. Applicant has shown the presence of errors in the Judge's decision, but those errors are harmless.

2. Whether the Administrative Judge erred by not applying mitigating conditions from Guideline H (Drug Involvement) to Applicant's case. Applicant argues that mitigating conditions from Guideline H (Drug Involvement) are applicable to his case. Since the SOR was based on Guideline J (Criminal Conduct), the Judge was not obliged to apply mitigating conditions from Guideline H to Applicant's case. Applicant has failed to demonstrate error on this point.

3. Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law.

Applicant requests a reversal of the Administrative Judge's decision. Applicant points to his recent employment record and a Presidential Statement about rehabilitation. The Board construes Applicant's argument as raising the issue of whether the Judge decision was arbitrary, capricious, or contrary to law. The Board concludes the decision is sustainable.

The Judge made unchallenged findings that Applicant was arrested eight times between 1979 and 1995. He further

found that Applicant was convicted of multiple charges in 1988 and received sentences of 60 days confinement, three to six years confinement, one to three years confinement and 18 months confinement to be followed by 46 months probation. The Judge's unchallenged findings were adequate to support his conclusions that Applicant has not demonstrated that it is clearly consistent with national security to grant Applicant a security clearance.

Applicant requests that he be given an opportunity for a face to face meeting because he believes he erred by declining a hearing. The Board has no authority to grant the remedy sought by Applicant.

Applicant cites the fact that he was permitted to keep an interim clearance while his case was investigated as evidence that he should be granted a clearance. Applicant's argument is unpersuasive. The methods and scope of DSS investigations are outside the scope of review of the Appeal Board. *See*, ISCR case No. 02-20947 (June 18, 2004), at p. 4.

The Administrative Judge found that 10 U.S.C. §986 applies to Applicant but was not the sole basis for denial of a clearance to Applicant. The Board affirms the other bases of the Judge's decision. Applicant does not raise the issue of waiver under 10 U.S.C. §986 (which in any case would be unavailable because of the application of other disqualifying conditions). Therefore, the Board need not address the issue of waiver under 10 U.S.C. §986.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating harmful error which would justify remand or reversal. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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