

DATE: December 2, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-15537

## 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 September 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 Roger E. Willmeth issued an unfavorable security clearance decision, dated September 24, 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 the Administrative Judge erred by finding Applicant falsified a security clearance application; and (2) whether the Administrative Judge erred by concluding Applicant's conduct was not mitigated sufficiently 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**

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of episodic drug abuse. As noted earlier in this decision, there is no presumption of error below. Accordingly, the Judge's unchallenged findings of fact about Applicant's history of drug abuse need not be reviewed by the Board.

1. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in October 2000 by denying that: (a) he had ever used illegal drugs; and (b) his security clearance had ever been denied, suspended or revoked. On appeal, Applicant states that he did not know the form that he submitted through his company would be submitted to the Defense Security Service, and that if he had known the form was part of his security clearance processing, he would have answered the questions "appropriately." The Board construes Applicant's appeal statements as challenging the Judge's findings of falsification.

The Administrative Judge had to make a finding of fact about Applicant's intent or state of mind when he completed the security clearance application, which failed to disclose his past involvement with marijuana and cocaine, and the fact that he had a security clearance suspended in 1993. Considering the record evidence as a whole, and giving deference to the Judge's assessment of the credibility of Applicant's hearing testimony, the Board concludes that the Judge had sufficient record evidence to find that Applicant's omissions were deliberate and intentional. Accordingly, the Judge's finding that Applicant falsified the security clearance application is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge erred by concluding Applicant's conduct was not mitigated sufficiently to warrant a favorable security clearance decision. Applicant asserts: (a) his job performance is good; (b) he has had good attendance on the job; (c) he realizes he has made mistakes in the past, but has worked hard to overcome them; and (d)

he would like the opportunity to continue working for his company. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge erred by concluding Applicant's conduct was not mitigated sufficiently to warrant a favorable security clearance decision.

There is record evidence concerning Applicant's job performance. To the extent that Applicant's appeal statements go beyond the record evidence, they constitute a proffer of new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. During the proceedings below, Applicant had the opportunity to present evidence for the Administrative Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence.

The security concerns raised by an applicant's history of episodic drug use and falsifications are not necessarily mitigated by an applicant's favorable professional and work record. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6 (security clearance decisions not limited to consideration of an applicant's conduct during duty hours; off-duty conduct that raises security concerns can be considered in assessing an applicant's security eligibility). Moreover, an applicant has the burden of presenting evidence sufficient to overcome the security concerns raised by his or her conduct. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had not presented evidence sufficient to warrant a favorable security clearance decision. Applicant's appeal arguments to the contrary do not demonstrate the Judge erred.

### **Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board