

DATE: June 16, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17007

**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 the Applicant a Statement of Reasons (SOR), dated February 4, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Administrative Judge Wilford H. Ross issued an unfavorable security clearance decision, dated March 8, 2004.

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 issue: whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. 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>**

Whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors.<sup>(2)</sup>

In his decision, the Judge concluded that the Applicant's seventeen proven or admitted violations of law between 1997 and 2001 reflected immaturity and poor judgment of security concern under Guideline E, and that the Applicant had not presented sufficient mitigating evidence to overcome that concern. On appeal, the Applicant contends that the Judge's decision is arbitrary, capricious, or contrary to law because the Judge erred in the application of the "whole person" concept. In support of that contention, Applicant argues: (1) the violations in question are, individually, not serious, (2) the diminished frequency and recency of the conduct within the last two years mandates the conclusion that the Applicant has reformed and rehabilitated himself from the mistakes of his youth, (3) the violations were not the result of bad motivation and there is little likelihood of their continuation or recurrence, and (4) the Applicant has a good record of complying with rules at school and work.<sup>(3)</sup>

The Applicant was responsible for presenting evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proved or that Applicant admitted, and the Applicant also had the ultimate burden of persuasion as to obtaining a favorable security clearance decision.<sup>(4)</sup>

*See* Directive, Additional Procedural Guidance, Item E3.1.15. The Judge had to consider the record evidence as a whole, both favorable and unfavorable, evaluate the facts and circumstances of Applicant's past conduct and current circumstances in light of pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. In deciding whether Applicant met this burden of persuasion, the Judge considered evidence that was indicative of extenuation, mitigation, changed circumstances, or reform and rehabilitation. The Judge found sufficient mitigation in Applicant's favor on other matters

covered in the SOR. The fact that the evidence relating to the seventeen violations of law did not lead the Judge to the decision desired by Applicant does not establish error.

In this case, the Judge considered the "whole person" factors, such as the Applicant's age, the circumstances surrounding the conduct, his motivation, and the likelihood of continuance or recurrence, and nevertheless concluded that the evidence presented in the case was insufficient to overcome the security concerns raised by Applicant's overall history of misconduct. Considering the record as a whole, Applicant has failed to demonstrate that the Judge's application of the relevant Section 6.3 factors and his weighing of the record evidence was arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). The federal government need not wait until an applicant actually mishandles or fails to safeguard properly classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *See Gayer v. Schlesinger*, 490 F. 2d 740, 750 (D.C. Cir. 1973). All that is required is proof of facts or circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 5. Moreover, an applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. The favorable evidence cited by Applicant did not compel the Administrative Judge to make a favorable security decision. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6. Applicant has failed to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

### **Conclusion**

Applicant failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

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. The Administrative Judge made favorable findings with respect to SOR paragraphs 1.a, 1.b, 1.c, 1.d, 1.e, and 2.r. Those favorable findings are not at issue in this appeal.
2. Directive, Section 6.3 and Enclosure 2, Items E2.2.1.1 through E2.2.1.9.
3. As part of his appeal, the Applicant offered new explanations as to his past conduct and motivations, and submitted two character reference letters for the Board's consideration. The Board may not consider such new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
4. The Applicant did not respond to the government's File of Relevant Material.