

DATE: March 30, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23073

**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 April 18, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated December 29, 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 issue: Whether the Administrative Judge erred in concluding that the security concerns raised by the Applicant's multiple falsifications had not been mitigated. 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**

Whether the Administrative Judge erred in concluding that the security concerns raised by the Applicant's multiple falsifications had not been mitigated. On appeal, the Applicant does not dispute the fact that he falsified his security clearance application, as well as two employment-type applications, by stating on them that he possessed a Bachelor of Science degree--when in fact he had never received such a degree. Rather, he argues that the Judge erred in concluding that the security concerns raised by the falsifications had not been mitigated by (1) the Applicant's subsequent disclosure of the falsifications to the government and to his employers, [\(1\)](#)

and (2) the Applicant's 30 years of outstanding work performance and dedicated service to the defense industry. Applicant also takes issue with the Judge's finding that his testimony as to mitigation lacked credibility. For the reasons set forth below, we conclude the Applicant has not demonstrated that the Judge erred.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960)(security requirements include consideration of a person's honesty, judgment, sobriety, and sense of obligations), *aff'd*, 367 U.S. 886 (1961). Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964)(lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965).

The security concerns raised by an applicant's falsifications are not necessarily mitigated just because they have subsequently been disclosed. The facts and circumstances under which the disclosures occurred can undercut or negate their mitigating effect. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (Administrative Judge had rational basis to conclude applicant's disclosures to an investigator were not a prompt good-faith effort to correct the falsification);

ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (Administrative Judge had rational basis for concluding government's security concerns not mitigated by the fact Applicant had "come clean" and "had nothing left to hide"). Likewise, such concerns 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). Finally, an applicant's ability to contribute to the defense effort is not a measure of whether that applicant demonstrates the high degree of judgment, reliability, or trustworthiness that must be reposed in persons granted access to classified information. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at pp. 7-8.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7 (discussing various considerations that must be taken into account by an adjudicator when applying Adjudicative Guidelines disqualifying or mitigating conditions). Accordingly, the Judge could reasonably consider whether the evidence Applicant offered in mitigation was sufficient to overcome the security concerns raised by the seriousness of the Applicant's disqualifying conduct and the manner in which he chose to deal with it. In the decision, the Judge indicated that because the Applicant offered different, contradictory explanations as to why he had provided the false information, the Judge could not conclude that the Applicant's problems were behind him and that he currently possessed the reliability, trustworthiness, and good judgment required for access to classified information. Given the record evidence in this case, the Judge's adverse conclusions about the Applicant's security suitability were not unreasonable. Therefore, his decision was not arbitrary, capricious or contrary to law.

The Board is not persuaded by Applicant's challenge to the Administrative Judge's conclusion that Applicant's testimony lacked credibility. An applicant's statements are relevant evidence, but they are not binding on the Judge. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts applicant's denial. *See* ISCR Case No. 01-19278 (April 22, 2003) at p.6; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Moreover, as discussed earlier in this decision, a judge's credibility determinations are entitled to deference on appeal and the party challenging those determinations has a heavy burden of persuasion. Here, the Applicant has not met that burden. Applicant's disagreement with the Judge's credibility determination is not sufficient to show it was arbitrary, capricious, or contrary to law.

### **Conclusion**

Applicant has failed to demonstrate error below. Therefore, 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. *See* Personal Conduct Mitigating Condition 3 ("The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts"), Directive, Enclosure 2, Item E2.A5.1.3.3; and Personal Conduct Mitigating Condition 5 ("The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress"), Directive, Enclosure 2, Item E2.A5.1.3.5.