

DATE: January 31, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-24062

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Leodis C. Matthews, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 20, 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), Guideline G (Alcohol Consumption), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated September 13, 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's conclusion that Applicant's alcohol abuse was not mitigated is arbitrary, capricious, or contrary to law; (2) whether the Administrative Judge's finding that Applicant engaged in falsification of a material fact in her answer to a question on a 2001 security clearance application relating to alcohol or drug related arrests was erroneous; (3) whether the Administrative Judge's conclusion that Applicant's falsifications on her security clearance application were not mitigated is arbitrary, capricious, or contrary to law; and (4) whether the Administrative Judge's conclusion that Applicant's falsifications constitute unmitigated criminal conduct is arbitrary, capricious, or contrary to law. 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 [\(1\)](#)

1. Whether the Administrative Judge's conclusion that Applicant's alcohol abuse was not mitigated is arbitrary, capricious, or contrary to law. The Administrative Judge made the following findings concerning Applicant's alcohol consumption: (a) Applicant began consuming alcohol as a teenager in 1991; (b) in August 1994 Applicant was arrested and charged with Minor Consumption of Alcohol; (c) by October 1999, Applicant's consumption of alcohol had increased to the point where she was drinking four times a week and was experiencing blackouts; (d) from November 1999 to April 2000, Applicant received treatment for her condition and was diagnosed with "alcohol abuse"; (e) since her treatment, Applicant has used alcohol to the point of intoxication on one occasion and has consumed alcohol a total of about a dozen times; and (f) Applicant feels comfortable that she can continue to consume alcohol on an extremely limited basis. The Administrative Judge concluded that Applicant's history of alcohol abuse continues to be a problem and that sufficient rehabilitation and mitigation have not been shown. On appeal, Applicant asserts that her earlier alcohol abuse has been mitigated because she successfully completed an alcohol treatment program, has had no incidents of alcohol abuse afterwards, has consumed alcohol minimally since then, recognizes the seriousness of her past drinking habit and has established her maturity.

Applicant does not specifically challenge the Administrative Judge's finding below that Applicant used alcohol to the point of intoxication on one occasion after completing her treatment program. However, the assertion on appeal that she has "had no incidents of alcohol abuse afterwards" (after rehabilitation treatment) could be construed as a challenge to

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the Judge's finding. To the extent Applicant challenges the Judge's finding, that challenge is without merit. A review of the record indicates that there is sufficient record evidence to support the Judge's finding that Applicant abused alcohol on one occasion after completion of her treatment program.

Applicant's argument concerning mitigation of her alcohol abuse makes repeated reference to an earlier decision decided by a DOHA Hearing Office Administrative Judge.<sup>(3)</sup> Applicant relies on this decision to assert that the Administrative Judge should have found mitigation of her alcohol abuse in this case. Applicant's argument fails to demonstrate the Judge erred. A decision by a Hearing Office Administrative Judge may be cited as persuasive authority. Nevertheless, it is not legally binding precedent on other Hearing Office Judges or the Board. *See* ISCR Case No. 02-15358 (July 22, 2003) at p. 3. Applicant's ability to cite Hearing Office decisions in other cases that appear to support her position does not demonstrate the Judge's decision in this case is arbitrary, capricious, or contrary to law. The fact that the case cited by Applicant was the subject of a remand decision by the Board, and the fact that a favorable decision was ultimately affirmed by the Board, are of no consequence. Moreover, the case cited by Applicant is factually distinct from the case at bar on the important issue of whether the Applicant abused alcohol subsequent to completing a rehabilitation program. Applicant has failed to establish error.

Concentrating on her reduced consumption of alcohol since her completion of rehabilitation, Applicant asserts that evidence of mere consumption of alcohol is not *per se* alcohol abuse and it does not follow that any time a person drinks alcohol, regardless of the quantity, he or she is drinking to excess within the meaning of the Alcohol Consumption Guideline. Applicant's argument fails to establish error on the part of the Administrative Judge. The Judge concluded that Applicant's history of alcohol abuse was not mitigated by her completion of rehabilitation treatment and her subsequent drinking habits because Applicant consumed alcohol to the point of intoxication on one of those subsequent occasions and this constituted abuse in the context of Applicant's overall history with alcohol. The Judge also concluded that Applicant's failure to abstain from the use of alcohol for a period of at least 12 months after a diagnosis of alcohol abuse prevented her from concluding that Applicant's problems with alcohol had been mitigated.<sup>(4)</sup> Based on the record evidence, the Judge's findings and conclusions regarding Applicant's alcohol consumption are sustainable.

2. Whether the Administrative Judge's finding that Applicant engaged in falsification of a material fact in her answer to a question on a 2001 security clearance application relating to alcohol or drug related arrests was erroneous. The Administrative Judge made the following findings regarding Applicant's alleged falsifications of a security clearance application: (a) Applicant completed a security clearance application in March 2001 during which she was asked if she had ever been charged with or convicted of any offenses related to alcohol or drugs (Question 24); (b) Applicant answered "NO"; (c) this was a false answer inasmuch as Applicant failed to list the fact that she was arrested for Minor Consumption of Alcohol in 1994; (d) Applicant later appeared in court, was found guilty and paid a \$40.00 fine; (e) Applicant testified at the hearing that she did not really believe the incident in 1994 was an arrest nor did she think about the incident when she answered the question; and (f) Applicant also falsified her answer to Question 27 of the security clearance application when she failed to reveal her past drug use.<sup>(5)</sup> The Administrative Judge concluded that Applicant deliberately failed to reveal information about her 1994 arrest and her past drug use to the Government. On appeal, Applicant argues that her falsification of her answer to Question 24 was not willful because, given the circumstances under which the authorities charged her with the offense (charged along with other students at a college party wherein she was handcuffed briefly but not read her rights nor taken to the police station), she reasonably assumed she had not been formally charged with a crime. Applicant also argues that Applicant's arrest in 1994 was not a material fact.

Applicant's statements about her state of mind and intent when she answered Question 24 on the security clearance application are relevant and material evidence that the Administrative Judge had to consider. However, those statements were not binding on the Judge; rather, the Judge had to consider Applicant's statements in light of her assessment of Applicant's credibility and the record evidence as a whole. Considering the record as a whole, and giving due deference to the Administrative judge's assessment of Applicant's credibility (Directive, Additional Procedural Guidance, Item E3.1.32.1), the Board concludes the Judge's finding of willful falsification reflects a reasonable interpretation of the record evidence that is sustainable. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Administrative Judge's finding of falsification is erroneous. *See, e.g.*, ISCR case No. 99-0435 (September 22, 2000) at p. 4.

Applicant's argument that the fact of her 1994 arrest was not material for purposes of establishing a security clearance disqualifying falsification under the Personal Conduct Guideline (Guideline E) is without merit. Clearly, information is material if it would result in an adverse security clearance decision. However, for purposes of establishing a falsification under Guideline E, materiality is not limited to falsifications about matters that would support an adverse security clearance decision. Falsifications can be material even if the conduct an applicant sought to conceal is determined to be extenuated or mitigated for purposes of Guidelines other than Guideline E. For purposes of falsification, materiality also covers information that is relevant to a security clearance investigation. *See*, ISCR Case No. 95-0818 (January 31, 1997) at pp. 3-4. Here, the 1994 arrest Applicant sought to conceal was clearly relevant and material to the background investigation concerning her security eligibility. As such, it was material for purposes of Guideline E.

3. Whether the Administrative Judge's conclusion that Applicant's falsifications on her security clearance application were not mitigated is arbitrary, capricious or contrary to law.<sup>(6)</sup> The Administrative Judge made the following findings of fact regarding the circumstances of Applicant providing information regarding her background to Government investigators: (a) in March 2001, Applicant falsified her answers to questions about alcohol related arrests and past drug use on her security clearance application; (b) in June 2002, Applicant was interviewed by the Defense Security Service (DSS); (c) during the interview, Applicant was not truthful with the special agent regarding her drug use; (d) about a half hour after the interview was completed, Applicant tried to contact the special agent to disclose the full truth concerning her illegal drug involvement; and (e) Applicant was eventually able to contact the agent, and within a day or two of the first interview she met with the agent again and disclosed the full truth concerning her drug involvement. The Administrative Judge concluded that none of the mitigating factors set forth in the Directive concerning falsification applied in Applicant's case. On appeal, Applicant asserts that she successfully mitigated the government's case when she made a prompt, good faith effort to correct the falsifications in Questions 24 and 27 of her security clearance application.<sup>(7)</sup> Central to her argument is the idea that, notwithstanding her falsifications, she redeemed herself in the hour after her June 2002 interview with the DSS special agent when she attempted to contact him to correct untruths that she had communicated during the interview. The Board does not find Applicant's contentions persuasive.

In support of her argument, Applicant again places substantial reliance on an earlier DOHA Hearing Office decision.<sup>(8)</sup> As stated earlier in this decision, DOHA Hearing Office decisions may be cited as persuasive authority, but they are not binding on the Board. The Board finds nothing in the cited decision that affects its analysis in this case or mandates a particular result.

The words "prompt, good-faith" are not defined in the Directive. Undefined words in the Directive must be applied in a reasonable, common sense way. *See, e.g.*, ISCR Case No. 98-0803 (August 17, 1999) at p. 3. The Board has specifically declined to set forth a "bright-line" definition of "prompt" and of "good-faith." What constitutes acting in a reasonable time and acting in good-faith will depend on the particular facts and circumstances of each case.<sup>(9)</sup>

Resolution of this appeal does not require the Board to provide a "bright-line" definition of the concept "prompt-good faith." Applicant concedes that at least one of her answers on the March 2001 security clearance questionnaire (Question 27) was the product of a willful falsification and the Administrative Judge's finding that Applicant also willfully falsified her answer to Question 24 is sustainable. Applicant was under a legal obligation to provide complete and accurate answers to the security questionnaire. Applicant took no active steps to correct her falsifications for over a year, but instead passively waited until a DSS special agent arranged for an interview. Even at that point Applicant perpetuated, in part, her earlier falsification by not revealing the full extent of her drug use. Applicant is essentially arguing that her efforts to contact the DSS investigator after the initial interview were prompt in relation to the falsification that took place during that interview. This argument ignores the fact that Applicant's initial falsifications on her security clearance application were well over one year old. The record evidence also establishes that Applicant revealed her drug abuse to the government in a piecemeal manner over the course of her security clearance investigation. Under these circumstances, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant's falsifications were not mitigated.

4. Whether the Administrative Judge's conclusion that Applicant's falsifications constitute unmitigated criminal conduct is arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant's deliberate falsifications were a violation of Title 18 of the United States Code, Section 1001, a felony. She concluded that this dictated an

ultimate finding against Applicant under the Criminal Conduct Guideline (Guideline J). On appeal, Applicant incorporates arguments made in other portions of her brief and asserts; (a) in terms of criminal conduct, her falsification of Question 24 of her security clearance application is mitigated under Guideline J because she did not voluntarily commit the crime;<sup>(10)</sup> and (b) her falsification of Question 27 on the application was isolated and was followed by clear evidence of successful rehabilitation (as demonstrated by her correction of the falsifications on her own accord.<sup>(11)</sup>

Applicant's argument regarding Question 24 is untenable given the fact that the Administrative Judge's finding that Applicant engaged in willful falsification is sustainable. Applicant's argument concerning Question 27 is merely a recapitulation of her interpretation of the record evidence. That interpretation is not supported by the record evidence. Applicant has not satisfied her burden of demonstrating that the Judge erred by concluding that Applicant's criminal conduct was unmitigated.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The first section of Applicant's appeal brief contains a discussion as to why Applicant's past drug use does not make her ineligible for a security clearance. The Administrative Judge found in favor of Applicant on all of the SOR allegations under Guideline H (Drug Involvement). Therefore, Applicant's arguments on this subject are moot and need not be discussed here.

2. It is not clear whether Applicant's assertion refers to mere use of alcohol to excess, or to a drinking incident involving law enforcement authorities similar to the incident for which she was arrested in 1994.

3. DISCR Case No. 93-1050 (July 19, 1994).

4. The Judge's language makes indirect reference to Alcohol Consumption Mitigating Condition 4 which provides, "Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a

recognized alcohol treatment program."

5. On appeal, Applicant does not challenge the Administrative Judge's conclusion that her answer to Question 27 was the product of a willful falsification, nor does she assert that the matters willfully concealed were not material.

6. Notwithstanding her argument in another section of her appeal brief that her answer to Question 24 of the 2001 security clearance application was not the result of willful falsification, Applicant has chosen to include her answer to Question 24 in her discussion and argument on the subject of mitigation of falsification.

7. In this portion of her appeal, Applicant is, in essence, invoking the language of Guideline E Mitigating Condition 3 which states, "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

8. In this instance, DISCR Case No. 94-0907 (January 26, 1995). The case is erroneously cited as Case No. 94-0902 in Applicant's brief.

9. As measured by an objective, "reasonable person" standard and not the personal beliefs of an applicant. *See, e.g.*, ISCR Case No. 98-0470 (April 19, 1999) at p. 3.

10. Applicant herein invokes the language of Guideline J Mitigating Condition 4 which states, "The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur."

11. Here, Applicant invokes the language of Guideline J Mitigating Condition 2 ("The crime was an isolated incident") and Guideline J Mitigating Condition 6 ("There is clear evidence of successful rehabilitation").