

DATE: August 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-25725

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

#### **FOR APPLICANT**

Claude E. Ducloux, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated December 9, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Claude R. Heiny issued a favorable security clearance decision, dated February 16, 2005.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred in his finding as to Applicant's current alcohol consumption; (2) whether the Administrative Judge erred in his finding as to whether Applicant's omissions from his security clearance application constituted a deliberate falsification; and (3) whether the Administrative Judge's decision relied on piecemeal analysis of Applicant's conduct and circumstances. For the reasons set forth below the Board affirms the Judge's February 16, 2005 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) Whether the Administrative Judge erred in his finding and conclusions as to Applicant's current alcohol consumption. Department Counsel argues that the Administrative Judge erred in his finding that Applicant currently limits his alcohol consumption to a glass of wine with dinner once every three to six weeks. Department Counsel also argues that the Administrative Judge's application of Guideline G (Alcohol Consumption) Mitigating Conditions 2<sup>(1)</sup> and 3<sup>(2)</sup>

are not supported by the record evidence.

Department Counsel is correct that the Judge's finding of fact is erroneous. There is no record evidence to support a finding that Applicant limits his consumption to a single glass of wine every three to six weeks. Applicant himself testified that he drinks one to three glasses of wine in that time frame and his wife testified that Applicant drinks wine or beer with her whenever she presents it at dinner, perhaps as often as three times a week. However, the Judge's error is harmless given the totality of facts and circumstances in this case.

The Administrative Judge's application of the challenged two mitigating conditions is supported by the Judge's sustainable findings and the record evidence. Applicant's last alcohol related incident was in 1998, almost seven years prior to the close of the record in this case. The Judge found that Applicant recognized in 1999 that he had a problem with alcohol and significantly reduced his consumption at that time. Department Counsel relies on Applicant's conduct in the 1980s and 1990s to undermine Applicant's testimony at the November 2004 hearing. Given the facts and circumstances of this case, the Board is not persuaded that Applicant's conduct in the 1980s and 1990s undermined the

credibility of his testimony in 2004. Department Counsel also cites Applicant's omissions from his security clearance application as grounds to challenge Applicant's testimony. The Judge found the omissions were errors and not deliberate falsifications and was not bound to conclude that those errors necessarily undermined Applicant's testimony. Department Counsel argues Applicant had motive to fabricate testimony in order to receive a security clearance. The same could be argued about any applicant in DOHA proceedings, but the mere presence of such potential motive by itself is not grounds for ignoring testimony. The Judge's application of the mitigating conditions is sustainable given the facts and circumstances of this case.

(2) Whether the Administrative Judge erred in his finding as to whether Applicant's omissions from his security clearance application constituted a deliberate falsification. Department Counsel argues that the Administrative Judge erred by finding that Applicant's incorrect answers to two questions were not deliberate falsifications. Department Counsel's argument amounts to a disagreement with Judge's interpretation of the record evidence which is insufficient to demonstrate error. We need not agree with each and every one of the Judge's findings and conclusions to conclude that they are supported by adequate record evidence to sustain them in light of the contrary record evidence. Absent a showing that the Judge weighed the record in a manner that is arbitrary, capricious or contrary to law the Board will not disturb the Judge's findings of fact. *See, e.g.*, ISCR 03-19011 (July 27, 2005), at p. 4.

(3) Whether the Administrative Judge's decision relied on piecemeal analysis of Applicant's conduct and circumstances. Department Counsel argues that the Administrative Judge favorable decision relies on piecemeal analysis of Applicant's conduct and circumstances. The Board concludes that this argument is unpersuasive.

The Board need not agree with all the Judge's findings and conclusions in order to conclude that the record evidence permitted the Judge to find that the bulk of Applicant's security significant conduct had stopped by early 1999 and that Applicant's 2002 omissions were not deliberate falsifications. Under those conditions the Judge had room to reach the favorable conclusions he did regarding Applicant's security eligibility.

### **Conclusion**

Department Counsel has failed to meet its burden of demonstrating harmful error on appeal. The Administrative Judge's February 16, 2005 decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The problem occurred a number of years ago and there is no indication of a recent problem" (Directive, Adjudicative

Guidelines, Item E2.A7.1.3.2).

2. "Positive changes in behavior supportive of sobriety" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.3).