

DATE: December 22, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26685

**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) 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), Guideline J (Criminal Conduct), and Guideline D (Sexual Behavior). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated August 31, 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 issues: (1) whether the Administrative Judge erred in his application of the "whole person" concept as set forth in the Directive, (2) whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's deliberate falsifications had not been mitigated, (3) whether the Administrative Judge erred by concluding the security concerns raised by Applicant's sexual behavior had not been mitigated, and (4) whether the Administrative Judge erred by concluding the security concerns raised by Applicant's criminal conduct 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<sup>(1)</sup>**

1. Whether the Administrative Judge erred in his application of the "whole person" concept as set forth in the Directive.

(2) Applicant contends that the Judge's decision is arbitrary, capricious, or contrary to law because the Judge erred by not applying the "whole person" concept. In support of that contention, Applicant argues: (1) the Judge's decision focused on the worst moments of his life, and (2) to judge Applicant as a whole person would require more than one hearing. For the reasons that follow, we find no error.

After reviewing the Judge's decision in this case, it is our view that the Judge reasonably considered "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 conduct. Considering the record as a whole, the Judge's application of the relevant Section 6.3 factors, and his weighing of the record evidence, was not arbitrary, capricious, or contrary to law.

Applicant was only entitled to one hearing. *See* Directive, Additional Procedural Guidance, Item E3.1.3. At that hearing, 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. 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 reasonably could consider whether Applicant presented evidence that was indicative of extenuation, mitigation, changed circumstances, or reform and rehabilitation. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 6; and Directive Section 6.3.5 and Enclosure 2, Item E2.2.1.6. There is a rebuttable presumption that the Administrative Judge considered all of the evidence presented. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. The Judge found sufficient mitigation in Applicant's favor on other SOR conduct. The fact that the evidence relating to the conduct at issue did not lead the Judge to the decision desired by Applicant does not establish error.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snapp 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 properly handle or safeguard 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. Considering Applicant's burden of persuasion and the record as a whole, the Board finds that the Judge's adverse security clearance decision is sustainable.

2. Whether the Administrative Judge erred in concluding that the security concerns raised by Applicant's deliberate falsifications had not been mitigated. Applicant argues that the Judge erred in concluding that the security concerns raised by his falsification of a security clearance application and a signed, sworn statement to a government investigator had not been mitigated because: (1) the falsifications were a regrettable error for which he apologizes, (2) the information has now been disclosed, and (3) Applicant cannot be subject to blackmail or coercion. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

As noted above, the federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snapp 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 security clearance documentation 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).

Based upon the record before him, the Judge's findings and conclusions with respect to the Guideline E allegations are sustainable. This case involved the omission of information which was of obvious security significance in response to two different question on the Applicant's security clearance application and in a signed, sworn statement to a government investigator. The Judge was not required, as a matter of law, to conclude that the security concerns raised by Applicant's disqualifying conduct were mitigated by Applicant's subsequent disclosures to the government. *See ISCR Case No. 01-19513* (January 22, 2004) at p. 5 (government's security concerns not mitigated by the fact that Applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); *ISCR Case No. 01-03767* (December 5, 2003) at p. 4 (government's security concerns not mitigated by the fact Applicant had "come clean" and "has nothing left to hide"). After reviewing the Judge's decision in light of the record as a whole, the Board concludes the Judge's weighing of the record evidence was not arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's sexual

behavior had not been mitigated. Applicant contends that the Administrative Judge should have concluded his disqualifying conduct under Guideline D (Sexual Behavior) was extenuated or mitigated because, having occurred over three years prior to the hearing, it was not recent.

The passage of time since an applicant last engaged in conduct is a relevant factor that a Judge should take into account when evaluating the record evidence. However, Applicant overstates the significance of the passage of time since his last incident of sexual misconduct. Given the seriousness of the conduct, the Judge could reasonably have concluded that the time that had elapsed was not significant. Moreover, the Board need not decide whether that passage of time would be significant or decisive in this case because the Judge's decision is not based solely on Applicant's sexual misconduct. Rather, the Judge's decision is also predicated on his findings that Applicant is vulnerable to influence or coercion because of that past conduct, and that Applicant engaged in acts of falsification in October 2001 and April 2002. The Judge's findings on this aspect of the case are unaffected by the passage of time since Applicant engaged in the sexual misconduct in question. Even dated conduct can be the source of an applicant's current vulnerability to coercion or influence. *See* ISCR Case No. 02-32254 (May 26, 2004) at pp. 4-5. And the passage of time since Applicant's acts of sexual misconduct do not extenuate or mitigate his later acts of falsification. *See* ISCR Case No. 02-33091 (July 6, 2004) at p. 3.

4. Whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's criminal conduct had not been mitigated. Applicant contends that the Administrative Judge should have concluded that his disqualifying conduct under Guideline J (Criminal Conduct) was extenuated or mitigated because his multiple falsifications were really extensions of a single criminal sex act. In support of his contention, he notes that his background investigation did not reveal any additional criminal incidents. Therefore, those falsifications constituted an isolated incident rather than an identifiable history or pattern. <sup>(3)</sup> For the reasons set forth below, we conclude the Applicant has not demonstrated that the Judge erred.

Applicant's argument that his multiple instances of criminal activity constitute an isolated incident, rather than a history or pattern, because Applicant has never committed any other criminal acts besides those alleged in the SOR, is without merit. *See* ISCR Case No. 02-22240 (July 16, 2004) at p. 5. In his decision, the Judge found that Applicant had committed three criminal falsifications--two in October 2001 and one in April 2002. That finding was not challenged on appeal. Given the Judge's finding that Applicant committed multiple, serious criminal acts, over a significant period of time, the Judge's conclusion that those acts were not an isolated incident is sustainable.

### **Conclusion**

Applicant has failed to demonstrate outcome determinative error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made favorable findings with respect to SOR allegations 1.c, 1.e, 1.f, and 1.g. 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. *See* Criminal Conduct Mitigating Condition 2, "The crime was an isolated incident" (Directive, Enclosure 2, E2.A10.1.3.2).