

DATE: July 8, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-28921

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Steven Granberg, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated February 14, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision dated March 18, 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 Directive violates Applicant's rights under the Equal Protection component of the Fifth Amendment to the United States Constitution; and (2) whether the Administrative Judge erred by concluding Applicant had failed to demonstrate rehabilitation with respect to his acts of falsification. 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. Whether the Directive violates Applicant's rights under the Equal Protection component of the Fifth Amendment to the United States Constitution. Applicant argues "if falsification under Guideline E can be bootstrapped to constitute a violation of Guideline J, then logic would seem to require that . . . [a]s a matter of Fifth Amendment equal protection, the government could not find an applicant was rehabilitated under [Guideline] J for the exact same conduct which violated Guideline E [without allowing] mitigation under [Guideline J]." Applicant's argument fails to raise a claim that demonstrates error by the Administrative Judge.

The Administrative Judge did not make any ruling in this case that would provide a factual predicate for Applicant's claim of error. Specifically, the Judge did not conclude Applicant's conduct was extenuated or mitigated under Guideline J, but not extenuated or mitigated under Guideline E. Indeed, the Judge concluded Applicant's conduct was not extenuated or mitigated under either Guideline. An appeal is a proceeding to litigate claims of factual or legal error in the adjudication of an applicant's case, not a forum to litigate legal hypotheticals or seek advisory opinions from the Board.

2. Whether the Administrative Judge erred by concluding Applicant had failed to demonstrate rehabilitation with respect to his acts of falsification. Applicant does not challenge the Administrative Judge's findings that he engaged in acts of falsification in December 1996, February 1997, and July 2001 by deliberately failing to disclose material facts about his use of marijuana. However, Applicant contends the Judge should have concluded he had demonstrated rehabilitation sufficient to warrant a favorable security clearance decision. In support of that contention, Applicant argues: (a) since his history of marijuana use in the past was not alleged in the SOR, there has been an implicit finding by the government that he is credible; (b) the language in the Directive does not provide him with any meaningful guidance on what he has to prove to demonstrate rehabilitation after his falsifications; (c) it "violates the principles of the Directive" for the Judge to conclude Applicant has not yet demonstrated rehabilitation "without an exposition of the legally-based criteria of how

and when one establishes rehabilitation"; (d) "the [Judge's] decision does not present any evidence to undercut [Applicant's] credibility . . . [because] [t]here is no evidence of any other falsification, lack of candor, or fudging of truth in [Applicant's] life"; and (e) it has been almost three years since his last falsification. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge erred.

(a) The Board finds no merit in Applicant's argument concerning the significance of the fact that the SOR did not allege his past marijuana use under Guideline H (Drug Involvement). First, there is no record evidence concerning the mental processes or reasoning of the DOHA personnel involved in drafting and issuing the SOR in Applicant's case by the Administrative Judge. Second, even if there were such record evidence, it would be legally irrelevant to the adjudication of Applicant's case. An applicant's case must be adjudicated by the Judge based on the record evidence and applicable legal principles, not the opinions and conclusions of DOHA personnel who draft and issue SORs.

(b) Error below is not shown by Applicant's complaint about a lack of guidance in the Directive as to what specifically he must prove to demonstrate rehabilitation after his falsifications. The Hearing Office Administrative Judges and this Board must apply the Directive as it is written. A DOHA proceeding is not a forum to adjudicate the desirability or wisdom of the Directive, or the pros and cons of amending or revising it.

(c) Applicant does not cite or identify any provision of the Directive that supports his contention that the Administrative Judge was obligated to explain how or when Applicant could establish rehabilitation. Under Directive, Additional Procedural Guidance, Item E3.1.25, the Judge was obligated to make findings of fact, reach conclusions, apply pertinent provisions of the Directive, and decide whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Judge was under no obligation to provide Applicant with a roadmap on how he might go about establishing rehabilitation. Indeed, the Judge is required to be a fair and impartial adjudicator, not a surrogate advocate giving advice and guidance on how applicants can go about developing and presenting the best possible case to enhance their chances of receiving a favorable security clearance decision.

Applicant also asserts that the Administrative Judge should have "allowed [some time] to determine whether he will toe the honesty line" and draws an analogy to random drug testing. The analogy is not an apt one. Under the Directive, there is no authority to grant a conditional or probationary security clearance. *See, e.g.*, ISCR Case No. 01-23661 (October 27, 2003) at p. 4.

(d) Applicant's credibility argument is untenable. Given the Administrative Judge's unchallenged findings that Applicant engaged in acts of falsification in December 1996, February 1997, and July 2001, the Judge had ample reason for expressing doubts about Applicant's judgment, reliability, and trustworthiness.

(e) Applicant's argument concerning the passage of time does not demonstrate the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law. A review of the decision below persuades the Board that the Judge considered the facts and circumstances of Applicant's case in light of the pertinent provisions of the Adjudicative Guidelines, and the general factors of Directive, Section 6.3. Applicant does not articulate any persuasive reason for why the Judge should have concluded Applicant's acts of deliberate falsification on three separate occasions were mitigated by the passage of time.

Because Applicant has failed to demonstrate error below, there is no reason for the Board to grant Applicant's request that the case be remanded to the Administrative Judge for issuance of a new decision after further elaboration of his findings and conclusions.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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