

DATE: September 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-29563

## **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 to Applicant a Statement of Reasons (SOR), dated March 3, 2004, 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) and Guideline E (Personal Conduct). Administrative Judge David S. Bruce issued an unfavorable security clearance decision, dated July 22, 2005.

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 erred by finding that Applicant falsified a security clearance application; and (2) whether the Administrative Judge lacked a rational basis for his unfavorable security clearance decision. 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 Administrative Judge erred by finding that Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in June 2001 by failing to disclose that he had quit his job with the Department of Defense after he tested positive for cocaine and faced dismissal because the positive drug test result was a violation of a Last Chance Agreement dated August 2, 2000. On appeal, Applicant denies that he falsified the security clearance application.

Because Applicant did not admit the falsification allegation, Department Counsel had the burden of presenting evidence to prove it. *See* Directive, Additional Procedural Guidance, Item E3.1.14. Considering the record as a whole, the Board concludes that the Administrative Judge had sufficient record evidence to find that Applicant falsified the security clearance application when he did not disclose that he quit his job with the Department of Defense under unfavorable circumstances.

2. Whether the Administrative Judge lacked a rational basis for his unfavorable security clearance decision. Applicant also argues that: (a) his use of cocaine in 2000 was the result of the stress he was undergoing due to his mother, son and sister being diagnosed with cancer and his working 11-hour days; (b) he held a security clearance in the past without any problems; (c) he is near retirement age; and (d) he would do nothing to violate security or harm the United States. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge lacked a rational basis for his unfavorable security clearance decision.

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). The federal government is not required to wait until an applicant commits a security violation before it denies or revokes access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An unfavorable security clearance

decision can be based on proof of conduct or circumstances indicating 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. 01-25941 (May 7, 2004) at p. 5.

The Administrative Judge took into account the record evidence that Applicant was under stress when he used cocaine in 2000, but concluded that such stress was not sufficient to extenuate or mitigate Applicant's use of cocaine. Considering the record as a whole, Applicant has not shown that the Judge was compelled to conclude that his cocaine use in 2000 was sufficiently extenuated or mitigated by the evidence of the stress he was under at the time. Moreover, the Judge articulated reasons why he concluded that Applicant demonstrated poor judgment, and a pattern of dishonesty and rule violations. The Judge's adverse conclusions follow rationally from his findings of fact, do not run contrary to the record evidence as a whole, and provide a legally permissible basis for his unfavorable security clearance decision.

Applicant's statement about being near retirement age does not demonstrate any error by the Administrative Judge. Whether an applicant is near retirement or not is irrelevant to evaluating his or her security eligibility. To the extent that Applicant's statement could be construed as a request that he be granted a security clearance until he retires, it seeks relief to which he is not entitled.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board