

DATE: April 19, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-30941

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Juan J. Rivera, Esq., Department Counsel

#### **FOR APPLICANT**

Philip F. Lupo, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated April 30, 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). Administrative Judge Henry Lazzarro issued an unfavorable security clearance decision, dated November 14, 2003.

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.

The following issue is raised on appeal: whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law. For the reasons set forth below, 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 Issue**

### Whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Applicant's appeal asserts that the Administrative Judge's decision is arbitrary, capricious, or contrary to law. In support of his claim, Applicant makes two arguments: 1) the Administrative Judge's decision is inconsistent with other DOHA Hearing Office decisions which addressed similar situations; 2) the Administrative Judge gave inadequate credit to Applicant for record evidence which tended to support Applicant's eligibility for a security clearance.

Applicant's first argument is unpersuasive. The Board has previously noted that decisions of individual Hearing Office Judges are not binding on other Hearing Office Judges, nor are they binding on the Appeal Board. Accordingly, even if the Board were to conclude that the Judge's decision in this case was not consistent with the decisions by his colleagues in other DOHA cases that are cited by Applicant, such a conclusion would not require the Board to hold that the Judge's decision in this case was arbitrary, capricious, or contrary to law. Because the decisions of Hearing Office Judges are not legally binding precedent in other cases, neither a Hearing Office Judge nor the Board is required to distinguish them or justify why they are not persuasive authority. Rather, a party citing such decisions has the burden of demonstrating that the cited decision addressed similar or identical issues and facts, articulated a rational basis for its conclusions, relied on reasoning or analysis that can be applied to the facts and conclusions of the current case, relied on reasoning or analysis that is consistent with governing legal authorities, or that there are sound reasons the Board should follow the reasoning of the cited case. *See*, ISCR Case 01-22606 (June 30, 2003) at pp. 3-5. On appeal, Applicant has failed to demonstrate that the cited cases articulated a rational basis for their conclusions, or that the cited cases relied on reasoning or analysis that can be applied to the facts and circumstances of this case. In light of Applicant's failure to meet his burden, the Board need not consider the cited cases as persuasive authority. Applicant has failed to demonstrate the Judge erred by not following the cited cases.

Applicant's second argument fails for several reasons. An administrative judge is presumed to have considered all the record evidence unless the Judge specifically states otherwise. The Administrative Judge is obliged to weigh all the

record evidence, favorable and unfavorable, before reaching his ultimate conclusion. Absent a showing that the Administrative Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law, the Judge's evaluation will not be disturbed on appeal. A party's disagreement with the Judge's weighing of the evidence or the Judge's findings and conclusions is not adequate to demonstrate that the Judge failed to evaluate the case in a fair, reasonable, and common sense manner. See, ISCR Case 02-18663 (March 23, 2004) at pp. 3-4. Applicant's argument in this case amounts to little more than a disagreement as to what weight the Judge should have given evidence which Applicant believes mitigated the Government's concerns. Applicant has failed to demonstrate that the Judge erred by not weighing the evidence in accordance with Applicant's preferences.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error by the Administrative Judge in his November 14, 2003 decision. Therefore, the Judge's decision is affirmed.

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