

DATE: July 22, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-33174

## **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 February 4, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated March 16, 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 failed to consider Applicant's July 2002 written statement; (2) whether the Administrative Judge erred by finding Applicant falsified a security clearance application; and (3) whether the Administrative Judge erred by concluding Applicant's misconduct was not mitigated by the absence of criminal conduct since June 2002. 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 failed to consider Applicant's July 2002 written statement. Applicant contends the Administrative Judge disregarded his July 2002 written statement (Government Exhibit 2). Citing page 20 of the hearing transcript, Applicant argues the Administrative Judge did not consider his July 2002 written statement because the Judge merely gave a cursory description of that document when it was admitted into evidence. This claim of error is not persuasive.

When admitting a document into evidence, an Administrative Judge is not required to discuss the contents of that document in extensive detail. The Judge's brief description of Applicant's July 2002 written statement when it was admitted into evidence does not show that the Judge failed to consider that document. There is a rebuttable presumption that a Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Apart from that presumption, a review of the decision below shows that the Judge made findings of fact and reached conclusions--many favorable to Applicant--that reflect consideration of Applicant's July 2002 written statement. The Judge was not required, as a matter of law, to make findings of fact and reach conclusions that were only favorable to Applicant.

2. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant did not falsify a security clearance application as alleged in SOR paragraphs 3.b, 3.c, and 3.d.<sup>(2)</sup> However, the Judge did find that Applicant falsified a security clearance application, as alleged in SOR paragraph 3.a, by failing to disclose that he had been arrested and charged in 1996 and 1998. On appeal, Applicant challenges that finding of falsification.

Considering the record as a whole, there is sufficient evidence to allow the Administrative Judge to conclude that Department Counsel had satisfied its burden of presenting evidence in support of the SOR paragraph 3.a falsification allegation that was sufficient to shift the burden to Applicant to rebut or refute the allegation falsification.<sup>(3)</sup> Applicant's explanation for why he did not disclose the 1996 and 1998 incidents when he completed the security clearance application was relevant evidence that the Judge had to consider, but Applicant's explanation was not binding on the Judge. Rather, the Judge had to weigh Applicant's explanation in light of the Judge's assessment of the credibility of Applicant's testimony about the omissions and the record evidence as a whole, and make a finding of fact about whether the omissions were deliberate or inadvertent. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record evidence as whole, and giving due deference to the Judge's assessment of the credibility of Applicant's testimony,<sup>(4)</sup> the Board concludes the Judge's finding of falsification is sustainable.

Applicant also argues that error was committed because he answered YES to Question 26 on the security clearance application and disclosed a 2002 incident. SOR paragraph 3.a incorrectly alleged that Applicant answered NO to Question 26. However, that mistake in the SOR did not result in any meaningful prejudice to Applicant. The Administrative Judge specifically found that Applicant answered YES to Question 26 and disclosed the 2002 incident (Decision at p. 3). Moreover, the Judge's finding of falsification was not based on any finding that Applicant answered NO to Question 26, but rather a finding that Applicant deliberately failed to disclose the 1996 and 1998 incidents.

Applicant also argues that he has handled classified information without committing a security violation. The federal government is not required to wait until an applicant commits a security violation before it can deny or revoke access to classified information. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The Administrative Judge's findings about Applicant's falsification of a security clearance application provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification).

3. Whether the Administrative Judge erred by concluding Applicant's misconduct was not mitigated by the absence of criminal conduct since June 2002. Applicant argues that he has not engaged in any criminal misconduct since mid-2002. The Board construes this argument as raising the issue of whether the Administrative Judge erred by concluding Applicant's misconduct was not mitigated. This claim of error is not persuasive.

As noted earlier in this decision, the Administrative Judge entered formal findings in favor of Applicant with respect to Guideline F (Financial Considerations) and Guideline J (Criminal Conduct). Therefore, Applicant's argument about the passage of time since the last incident of criminal conduct occurred is moot with respect to those tho Guidelines.

Given the Administrative Judge's findings and conclusions about Applicant's falsification of a security clearance application, the Judge was not compelled, as a matter of law, to conclude Applicant's falsification was mitigated by the passage of time since the last incident of criminal conduct occurred.

### **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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline F (Financial Considerations) and Guideline J (Criminal Conduct). Those favorable formal findings are not at issue on appeal. Because the Judge found in Applicant's favor with respect to Guideline J, Applicant's arguments about his past criminal conduct are moot and need not be discussed to resolve this appeal.
2. Those favorable findings are not at issue on appeal.
3. *See* Directive, Additional Procedural Guidance, Item E3.1.14 (Department Counsel has burden of presenting evidence to prove controverted facts); and Directive, Additional Procedural Guidance, Item E3.1.15 (the burden shifts to the applicant to present evidence to rebut, refute, explain, extenuate or mitigate SOR allegations that have been admitted by the applicant or proven by Department Counsel).
4. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.