

DATE: October 13, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33312

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

Joseph P. Casale, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 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 E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge Joan Caton Anthony 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 issue has been raised on appeal: whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. 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 Issue**

Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. Under Guideline E (Personal Conduct), the Administrative Judge found that Applicant earned money while collecting unemployment compensation and did not report the income to state unemployment officials or to state or federal income tax authorities. The Administrative Judge also found under Guideline E, that in interviews with investigators, Applicant falsified facts about the above activity and about a verbal threat to kill his former spouse. The Judge concluded, under Guideline J (Criminal Conduct), that the falsifications by Applicant constituted a violation of 18 U.S.C. § 1001. Applicant makes several arguments which the Board interprets as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

Applicant argues that the Administrative Judge erred in: (1) relying on Applicant's admissions in an interview on October 11, 2002, when there is no documentary evidence to corroborate Applicant's admissions; (2) not giving sufficient weight to documentation Applicant supplied regarding his tax status for the period 1993 through 1996 and his impaired memory, as well as the numerous work and character references Applicant submitted; (3) not applying Personal Conduct Mitigating Conditions; (4) finding against Applicant as to Guideline J, even though he was never charged with a crime regarding the unreported income and the charge that he threatened his ex-wife was dismissed, and (5) failing to apply the "whole person" standard.

(1) The Administrative Judge relied on Applicant's sworn statement of October 11, 2002, in which Applicant contradicted his earlier sworn statements and admitted that: (a) he had worked for his brother between December 1993 and September 1996 and been paid in cash; (b) he did not report the cash income to the state unemployment compensation authorities or for federal or state income tax purposes; and (c) he knew he should have reported the income but did not because he needed the money. In the October 2002 statement he also, in contradiction of an earlier sworn statement, admitted threatening his ex-wife. It was not arbitrary, capricious, or contrary to law for the Judge to rely on the admissions in Applicant's October 11, 2002 written statement. Applicant has not demonstrated error on this

issue.

(2) In his answer to the SOR, Applicant attempted to recant or withdraw his admission to the investigator in October 2002 regarding unreported income, and for that purpose submitted his tax returns from 1993 and 1994. He also submitted information regarding his memory impairment, along with character references and documentation of his successful military career. On appeal, Applicant argues that the Administrative Judge should have given more weight to these pieces of evidence. In deciding a case, a Judge must weigh the evidence, and the Board will not disturb the Judge's weighing of the evidence absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law. The fact that Applicant would have weighed the evidence differently is not indicative of error. *See, e.g.*, ISCR Case No. 02-11489 (September 11, 2003) at p. 4.

(3) Once Applicant admitted the conduct alleged in the SOR or Department Counsel presented evidence sufficient to prove controverted allegations, Applicant had the burden of presenting evidence to rebut, explain, extenuate, or mitigate the admitted or proven conduct. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant argues that the Administrative Judge should have applied Personal Conduct Mitigating Condition 1. <sup>(1)</sup> He also pointed out that the behavior cited in the SOR occurred seven to ten years before Applicant filed out his security clearance application, apparently arguing that the passage of time plus Applicant's memory problems negated a finding of willful falsification. In her conclusions, the Judge explained why Applicant's behavior reflected on his judgment, trustworthiness, and reliability. Given the record evidence in this case, the Judge's explanation is not arbitrary, capricious, or contrary to law. Applicant's challenge to the Judge's findings of falsification is not persuasive. There is conflicting evidence on the issue of Applicant's intent or state of mind. Considering the record as a whole, the Judge's findings of willful falsification are sustainable. Applicant has not met his burden of demonstrating that the Judge's findings of falsification are erroneous or that the Judge's conclusions are arbitrary, capricious, or contrary to law.

(4) In this case, it is irrelevant that Applicant was never charged with a crime in connection with his unreported income between 1993 and 1996, and that the charge involving a threat against his former spouse was dismissed. The conduct alleged under Guideline J involved falsification of statements to a federal investigator, not the conduct underlying the falsifications. False statements to a federal investigator fall under 18 U.S.C. § 1001, a criminal statute. The absence of any criminal prosecution under the statute did not bar the Judge from concluding Applicant's falsifications constituted criminal conduct under Guideline J. *See, e.g.*, ISCR Case No. 02-06926 (November 25, 2003) at p. 5.

(5) Applicant argues that the Judge did not apply the "whole person" concept. <sup>(2)</sup> In making this argument, Applicant emphasizes his successful military career and the character references he provided. He contends that the evidence he provided should have led the Judge to reach a favorable security clearance decision. In making this argument, he weighs the record evidence differently than the Judge and reaches different conclusions. His ability to do so is not sufficient to demonstrate that the Judge failed to apply the "whole person" concept or weighed the evidence in a manner that was

arbitrary, capricious, or contrary to law. The Judge has a duty to make findings and conclusions that reflect a reasonable interpretation of the record evidence as a whole and adequately take into account an applicant's overall conduct and circumstances. *See, e.g.*, ISCR Case No. 02-06194 (July 15, 2004) at p. 4. The Judge's findings and conclusions in this case reflect an interpretation of the record evidence that is consistent with the "whole person" concept.

### **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 information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." *See Directive, Adjudicative Guidelines, Item E2.A5.1.3.1.*

2. "The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of the national security must be an overall common sense determination based upon careful consideration of the following [guidelines], each of which is to be evaluated in the context of the whole person..." *See Directive, Adjudicative Guidelines, Item E2.2.3. See also Directive, Section 6.3.*