

DATE: February 22, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-33714

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 16, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 10, 2005, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: (1) whether the Administrative Judge erred by finding that Applicant did not falsify a security clearance application; (2) whether the Administrative Judge's favorable conclusions under Guideline E (Personal Conduct) are arbitrary or capricious; and (3) whether the Administrative Judge's application of Criminal Conduct Mitigating Conditions 1, 2, and 6 is supported by the record evidence. We remand the case to the Administrative Judge.

### **I. Whether the Record Supports the Administrative Judge's Factual Findings**

#### A. Facts

The Administrative Judge found the following:

In 1996, Applicant was charged with felony theft. He was given deferred judgment and the sentence of three years was withheld after a plea of guilty. Applicant was placed on unsupervised probation for three years, ordered to pay \$145.00 and restitution, and ordered to perform 50 hours of community service. Applicant completed his community service and paid the costs.

Applicant believed, based on his understanding with his court-appointed counsel, that his record had been expunged when he completed his application for security clearance in 2002. As a result, Applicant did not report his arrest and conviction on his security clearance application. He also did not report them on an application for private employment in 2000.

Applicant has had no difficulties with law enforcement in the past nine years. Applicant is a high school graduate, is

married, and has two children.

Applicant has a good record with his employer and is valued for his professionalism. He has been employed with the company for more than three years, and his supervisors and colleagues speak highly of him in their letters of support.

In view of the confusion regarding the expungement process in the courts in the county where Applicant's conviction occurred, Applicant's omission was not deliberate, as required by Guideline E, ¶ E2.A5.1.2.2.

## B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

On appeal, Department Counsel challenges the Administrative Judge's finding that the omission from Applicant's security clearance application was not deliberate. In support of this challenge, Department Counsel argues that the record evidence as a whole demonstrates that Applicant intentionally falsified the security clearance application, that the Judge's credibility determination is not supported by the record evidence as a whole, that the wording of Question 21 on the security clearance application is clear and explicit, and that the Judge erred by focusing on Applicant's claim that he had the benefit of an expungement. [\(1\)](#)

Given the record evidence in this case, the Administrative Judge had a sufficient basis to find that Applicant believed that his theft conviction had been expunged. Although Department Counsel correctly notes the record evidence shows Applicant's conviction had not been expunged when he completed the security clearance application, that evidence did not preclude the Judge from considering the record evidence that Applicant believed his conviction had been expunged. But, Department Counsel persuasively contends that the Judge's reliance on Applicant's belief concerning expungement of his conviction does not address whether Applicant reasonably believed his situation was covered by the wording of Question 21 on the security clearance application:

"Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."

Department Counsel persuasively argues that Applicant's belief that his theft conviction had been expunged is relevant only if "Applicant honestly and reasonably misunderstood [Question 21] so as to believe that expungement would exempt him from [disclosing the conviction]."

As noted earlier in this decision, there is sufficient record evidence to permit the Administrative Judge to find that Applicant believed his theft conviction had been expunged. The flaw in the Judge's finding that Applicant's omission from the security clearance application was not a falsification is that the Judge did not explain how the record evidence about Applicant's belief concerning expungement provided Applicant with a reasonable basis for believing that he fell within the terms of the single exception set forth in Question 21: "The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."

For these reasons, the Board cannot sustain the Administrative Judge's finding that Applicant's omission was not a falsification.

## II. Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency . . . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel challenges the Administrative Judge's favorable conclusions under Guideline E and the Judge's application of Criminal Conduct mitigating Conditions 1, <sup>(2)</sup> 2, <sup>(3)</sup> and 6. <sup>(4)</sup> Department Counsel's challenge to those conclusions is predicated on its contention that the Judge erred by finding that Applicant's omission from the security clearance application was not deliberate.

The Administrative Judge's favorable conclusions under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) rely on the Judge's finding that Applicant's omission was not a falsification. The Board is remanding the case to the Judge to correct or explain that finding so that it is sustainable. It is premature for the Board to address arguments which challenge conclusions based on that finding.

## IV. Order

The judgment of the Administrative Judge granting Applicant a clearance is REMANDED.

On remand, the Judge must issue a new decision after correction of the errors identified in this decision. *See* Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

### Concurring Opinion by Chairman Emilio Jaksetic:

I concur with my colleagues' characterization of the issues on appeal, and their decision to remand the case to the Administrative Judge for issuance of a new decision consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25. I write separately to elaborate on my views about this appeal.

1. Whether the Administrative Judge erred by finding that Applicant did not falsify the security clearance application. Department Counsel challenges the Administrative Judge's finding that Applicant did not intentionally falsify the security clearance application (SOR paragraph 1.a). Whether there is sufficient record evidence to support the Judge's findings of fact is a question of law, not one of fact. <sup>(5)</sup> As to questions of law, the Board's scope of review is plenary.

Furthermore, in light of the Board's scope of review as to findings of fact (Directive, Additional Procedural Guidance, Item E3.1.32.1), the Judge's belief as to the sufficiency of the record evidence is not controlling.<sup>(6)</sup> Rather, when a Judge's findings of fact are challenged, the Board has to decide:

- (i) whether the challenged findings of fact are supported by relevant evidence;
- (ii) whether the relevant evidence is adequate for a reasonable mind to accept in support of a factual conclusion<sup>(7)</sup>; and
- (iii) even if the relevant evidence -- standing alone -- is adequate for a reasonable mind to accept in support of a particular factual conclusion, whether there is contrary record evidence that would lead a reasonable mind to not accept the particular factual conclusion reached by the Judge.

A Judge's challenged finding of fact can be found to be unsustainable if it fails at any point in the analysis:

- (a) the challenged finding is not supported by relevant evidence;
- (b) there is not sufficient relevant evidence to support the challenged finding -- even in the absence of any contrary record evidence; or
- (c) even though there is relevant evidence that -- standing alone -- might be sufficient to lead a reasonable person to accept the challenged finding, there is record evidence to the contrary that would lead a reasonable person to not accept the challenged finding.

In this case, the wording of Question 21 is very much relevant,<sup>(8)</sup> but it is not dispositive as to Applicant's intent or state of mind when he completed the security clearance application. Evidence about Applicant's beliefs concerning the legal status of his conviction is relevant to assessing his intent or state of mind. However, the Judge relied solely on Applicant's claimed beliefs (Decision at pp. 2, 3) to make his finding of no intent to falsify without giving any explanation why the Judge concluded Applicant's claimed belief was reasonable in light of the wording of Question 21. Accordingly, I concur with my colleagues' conclusion that the Judge's finding that Applicant's omission from the security clearance application was not deliberate is not sustainable based on the reasons given by the Judge.

2. Whether the Administrative Judge's favorable conclusions under Guideline E (Personal Conduct) are arbitrary and capricious.<sup>(9)</sup> Because the Administrative Judge found no falsification occurred, it is not surprising that he did not discuss the Adjudicative Guidelines pertaining to Guideline E (Personal Conduct) in any detail. However, because the Judge's finding that Applicant's omission from the security clearance application was not deliberate is not sustainable based on the reasoning given by the Judge, the rationale for the Judge's favorable conclusions under Guideline E (*i.e.*, no falsification occurred) collapses and cannot provide legal support for the Judge's favorable conclusions under Guideline E.

3. Whether the record evidence does not support the Administrative Judge's application of Criminal Conduct Mitigating Conditions 1,<sup>(10)</sup> 2,<sup>(11)</sup> and 6.<sup>(12)</sup> Department Counsel's argument is predicated on the following reasoning: (a) the evidence shows Applicant falsified the security clearance application (SOR paragraph 1.a); (b) the Judge should have found Applicant falsified the security clearance application; (c) falsification of the security clearance application is a violation of 18 U.S.C. 1001, a felony; and (d) a finding that Applicant falsified a security clearance application in violation of 18 U.S.C. 1001 should preclude the application of Criminal Conduct Mitigating Conditions 1, 2, and 6.

The Administrative Judge's application of Criminal Conduct Mitigating Conditions 1, 2, and 6 was based on his conclusion that the only criminal conduct was the theft from an auto incident (Decision at pp. 2, 4). Since the Judge's finding of no falsification is not sustainable, the Judge's conclusion that the theft from an auto incident was the only criminal conduct involved is erroneous. A Judge's reasoning can be arbitrary and capricious if:

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 Otor Vehicles Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

The Judge's unsustainable finding that Applicant's omission from the security clearance application was not deliberate means that his reasoning concerning the application of Criminal Conduct Mitigating Conditions 1, 2, and 6 "fails to articulate a satisfactory explanation for its conclusions," "it does not consider relevant factors," or "it offers an explanation for the decision that runs contrary to the record evidence." Accordingly, the Judge's reasoning for applying Criminal Conduct Mitigating Conditions 1, 2, and 6 is arbitrary and capricious.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Department Counsel's appeal brief does not challenge the Administrative Judge's finding that Applicant did not falsify an application for private employment (as alleged in SOR paragraph 1.b).
2. "The criminal conduct was not recent" (Directive, Adjudicative Guidelines, ¶ E2.A10.1.3.1).
3. "The crime was an isolated incident" (Directive, Adjudicative Guidelines, ¶ E2.A10.1.3.2).
4. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, ¶ E2.A10.1.3.6).
5. *See, e.g., Greenhow v. Secretary of Health and Human Services*, 863 F.2d 633, 635 (9th Cir. 1988).
6. By making a finding of fact, an Administrative Judge is concluding (implicitly or explicitly) that the evidence is sufficient to make such a finding of fact. If a Judge's decision to make a particular finding of fact -- standing alone -- were deemed to establish the sufficiency of the evidence to make such a finding of fact, then the Judge's findings of fact would become unreviewable. Acceptance of such reasoning would be untenable because the Directive explicitly provides for appellate review of a Judge's challenged findings of fact. When challenged on appeal, a Judge's findings of fact are reviewable under Directive, Additional Procedural Guidance, Item E3.1.32.1 regardless of the Judge's belief as to the sufficiency of the evidence to support such findings of fact.
7. Although Directive, Additional Procedural Guidance, Item E3.1.32.1 does not use the word "factual" to modify the word "conclusion," such a modifier is logically implied because Item E3.1.32.1 pertains to review of an Administrative Judge's findings of fact, not a Judge's legal reasoning or legal conclusions -- which are reviewed under Directive, Additional Procedural Guidance, Item E.3.1.32.3.
8. Whether a falsification has occurred is not decided as an abstract proposition in a factual vacuum, but rather in light of the evidence concerning the factual context under which an applicant's omissions or statements occur.
9. Department Counsel does not list this as a separate issue, but does make an argument that raises it as an issue (Brief at p. 12).
10. "The criminal behavior was not recent."
11. "The crime was an isolated incident."
12. "There is clear evidence of successful rehabilitation."