

DATE: September 8, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 03-01273

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 25, 2003, 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), Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated June 2, 2004.

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 in relying on Applicant's signed statement to a DSS agent; and (2) whether the Administrative Judge's 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 Issues** <sup>(1)</sup>

1. Whether the Administrative Judge erred in relying on Applicant's signed statement to a DSS agent. The record evidence includes a statement prepared by a DSS agent as a record of an interview with Applicant. The statement was initialed on each page by Applicant to verify its accuracy. Applicant signed the statement dated March 7, 2002. By signing the statement, Applicant averred that he had read the statement and that it contained his answers to the agent's questions. <sup>(2)</sup> In later documents Applicant contradicted the 2002 statement. In his Appeal Brief, Applicant argues that he did not review the statement before signing it and that the agent misrepresented the information Applicant provided to him. The statement was properly part of the file before the Judge for his consideration. While Applicant now disputes the information in the statement, his denial is not binding on the Judge. As the trier of fact, the Judge had to consider Applicant's denials in light of the record evidence as a whole. Given the record evidence in this case, the Judge's findings and conclusions based on the 2002 statement are sustainable. *See* ISCR Case No. 02-18434 (August 13, 2004) at p. 4.

2. Whether the Judge's decision is arbitrary, capricious, or contrary to law. The Administrative Judge found in favor of Applicant with regard to Guideline J (Criminal Conduct) and Guideline F (Financial Considerations), but found against him with regard to Guideline H (Drug Involvement) and two allegations under Guideline E (Personal Conduct). Applicant argued that his drug involvement was far in the past, and he attempted to explain two omissions from his security clearance application.

Applicant's signed statement was part of the record before the Administrative Judge. Also in the record were Applicant's responses to the Statement of Reasons and File of Relevant Material, in which he denied portions of the written statement. The record also contained affidavits Applicant submitted from employers and associates stating that he was of good character and did not use illegal drugs when the affiants were associated with him. The Judge specifically stated

that he would take the affidavits into consideration in reaching his decision. There is a presumption that the Judge took all of the evidence before him into consideration, and Applicant has not rebutted that presumption. The fact that the Judge did not give as much weight to some portions of the evidence (such as the affidavits) as Applicant would have wished is not demonstrative of error. There is sufficient record evidence to support the Judge's conclusions.

As noted above, the Appeal Board must give deference to the credibility determinations of the Administrative Judge. Directive, Additional Procedural Guidance, Item E3.1.32.1. The fact that the Judge made credibility determinations adverse to Applicant is not, by itself, demonstrative of error. Regarding drug use, the Judge believed Applicant's signed statement rather than his later explanations. Applicant has the burden of demonstrating error and has not done so. The Board finds adequate support in the record for the Judge's decision.

### **Conclusion**

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's security clearance decision.

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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. In his Appeal Brief, Applicant discusses each of the allegations in the SOR. The Administrative Judge found in favor of Applicant as to Guideline J, Guideline F, and two subparagraphs under Guideline E. Those allegations are no longer at issue.

2. The relevant portions of the statement pertain to past drug use and involvement and possible future drug use.