

DATE: September 9, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-06770

## **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 August 11, 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) and Guideline J (Criminal Conduct). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision dated April 30, 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 admitting into evidence a police report containing a statement made by a policeman about a 1994 shoplifting incident without affording Applicant an opportunity to cross-examine the policeman; (2) whether the Judge erred in finding that Applicant falsified his Security Clearance Application (SF-86) and his responses to a Defense Security Service agent; and (3) whether the Judge failed to consider Applicant's qualifications under the "whole person concept." 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 admitting into evidence a police report containing a statement made by a policeman about a 1994 shoplifting incident without affording Applicant an opportunity to cross-examine the policeman. On appeal Applicant contends that the statement by the policeman in the police report (Government Exhibit 2) involving Applicant's 1994 shoplifting arrest is hearsay and violates the Directive. In the hearing below, Applicant's hearing attorney did not object to the admissibility of the report as a public document. However, he objected to the hearsay nature of the unsworn statement made by the police officer on the fourth page of the report stating what Applicant told the police officer at the time of the incident. In his appeal Applicant also cites Directive, Additional Procedural Guidance, Item E3.1.22.<sup>(2)</sup> as a basis for exclusion. The Judge admitted all of Exhibit 2 under authority of Directive, Additional Procedural Guidance, Item E3.1.20.<sup>(3)</sup>

DOHA proceedings are civil, administrative proceedings in which strict rules of evidence need not be applied. *See, e.g.*, ISCR Case No. 02-04455 (July 31, 2003) at p. 3. Furthermore, it is well-settled that hearsay evidence can be admitted and considered in federal administrative proceedings, including security clearance adjudications. *See, e.g., Hoska v. U.S. Department of Army*, 677 F.2d 131, 138-139 (D.C. Cir. 1982). *See also* ISCR Case No. 98-0265 (March 17, 1999) at p. 7. Therefore, the Administrative Judge was not legally required to exclude Government Exhibit 2 solely based on Applicant's hearsay objection to the admissibility of that part of the exhibit that contained remarks by a police officer concerning the 1994 incident which resulted in Applicant being charged with shoplifting.

Moreover, police reports are admissible in civil proceedings as evidence of matters personally observed by the reporting police officer. *See* Fed. R. Evid. 803(8)(B). An applicant's right to confrontation in a security clearance adjudication is

not violated by admission of documents that fall within that well-established exception to the hearsay rule. *See e.g.*, ISCR Case No. 96-0575 (July 22, 1997) at p. 3.

Having received and considered page 4 of Exhibit 2, and then having considered the other record evidence, the Judge's findings and conclusions with respect SOR paragraph 1.c are sustainable.

2. Whether the Judge erred in finding that Applicant falsified his Security Clearance Application (SF-86) and his responses to a Defense Security Service agent. Applicant does not dispute that he should have provided the requested information. However, he contends that he did not deliberately fail to list his 1994 shoplifting arrest on his January 2000 SF-86 (SOR paragraph 1.a), nor did he deliberately falsify material facts to an investigator of the Defense Investigative Service in an interview in May 2001 (SOR paragraph 1.b).

The Administrative Judge had the duty to consider the record evidence that was available to him concerning Applicant's explanations for why he did not disclose the 1994 incident on the SF-86, as well as his explanations for not disclosing the information requested by the DSS investigator. However, the Judge was not compelled to accept Applicant's explanations. Rather, the Judge had to consider and weigh Applicant's explanations in light of his assessment of the credibility of Applicant's testimony and the record evidence as a whole, including the DSS investigator's testimony about his interview of Applicant. *See, e.g.*, ISCR Case No. 02-00500 (January 16, 2004) at pp. 3-4. Considering the record as a whole and giving due deference to the Judge's credibility determination, the Board concludes the Judge's findings of falsification are sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

3. Whether the Judge failed to consider Applicant's qualifications under the "whole person" concept. Although he contends that he presented evidence on this issue, Applicant complains that the Judge's findings with respect to the "whole person" concept did not consider that Applicant is a Christian who spent his life "working to be a model citizen in the community, spending countless hours of supporting the community through volunteer service as a youth sports coach and participating in community outreach programs at my church." Applicant also states that he will continue to be a positive role model for his wife, children and many in the community. Along with his appeal brief, Applicant forwarded to the Board supporting documentation to "substantiate" this model citizen aspect of his life. These items were not part of the record below.

Applicant's additional supporting documentation cannot be considered because it is new evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had a reasonable opportunity to present evidence during the proceedings below, and he cannot fairly challenge the Judge's decision based on a proffer of evidence that was not submitted for the Judge's consideration.

Applicant's appeal fairly raises two issues concerning the record evidence that Applicant did present at the hearing: (a) did the Judge consider the record evidence that Applicant provided; and (b) did the Judge properly weigh that record evidence. For the reasons that follow, the Applicant has not proved that the Judge erred.

There is a rebuttable presumption that the Judge considered all record evidence unless the Judge specifically states otherwise. An appealing party's disagreement with the Judge's findings and conclusions is not sufficient to rebut or overcome the presumption that the Judge considered all record evidence. Merely because the Judge did not give as much weight to the evidence presented by the Applicant as he would have liked, it does not follow that the Judge simply ignored the evidence. *See, e.g.*, ISCR Case No. 02-07757 (March 29, 2004) at pp. 4-5. The Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*, and reach a reasonable conclusion as to whether the Applicant has met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Mere disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate error. The Board will not disturb a Judge's weighing of the record evidence unless the appealing party demonstrates the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-07757 (March 29, 2004) at p. 5. Nothing in the Applicant's appeal brief persuades the Board that the Judge weighed record evidence relating to the "whole person" in a manner that was arbitrary, capricious or contrary to law.

## Conclusion

Applicant has not demonstrated error below. Therefore, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

### **Concurring Opinion of Chairman Emilio Jaksetic:**

I concur with my colleagues' decision, but write separately because this case highlights a problem that is obscured somewhat by the procedural posture of this appeal.

Applicant's claim of error concerning Government Exhibit 2 is relevant to the Administrative Judge's findings and conclusions about SOR paragraph 1.c, which alleges that Applicant made a false statement when he told the DSS investigator that the 1994 incident was a matter involving "mistaken identity." Applicant's characterization of the 1994 incident as being one of "mistaken identity" could be viewed as a matter of Applicant's opinion about that incident rather than a simple factual matter. Although it is possible for a person to make a false statement about his or her opinion, it is significantly more difficult to prove a person made a false statement about his or her opinion than to prove that a person made a false statement about a factual matter. Proof that a person holds an unfounded, misguided or unwarranted opinion is not proof that the person has lied about his or her opinion. *See* DISCR Case No. 89-0168 (March 23, 1990)(dissenting opinion of Chairman Jaksetic) at pp. 4-5.

I do not disagree with my colleagues' conclusion that the Administrative Judge's finding of falsification under SOR paragraph 1.c. is sustainable. However, even if I were to conclude -- solely for purposes of deciding this appeal -- that with or without the remarks of the police officer contained in Government Exhibit 2 there was insufficient record evidence for the Judge to find Applicant engaged in falsification as alleged in SOR paragraph 1.c, there is sufficient record evidence (independent of the police officer's remarks in Government Exhibit 2) to support the Judge's findings of falsification as alleged in SOR paragraphs 1.a and 1.b. Therefore, even if I were to conclude that Applicant's claim of error concerning Government Exhibit 2 had merit, it would show only harmless error because the Judge's other findings of falsification are sustainable and sufficient to support his unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Judge issued findings for Applicant under SOR paragraph 1.d; those findings are not in issue on appeal.
2. "A written or oral statement adverse to the applicant on a controverted issue may be received and considered by the Administrative Judge without affording an opportunity to cross-examine the person making the statement . . . when justified by the circumstances, only in either of the following circumstances . . . " [Neither of the two exceptional

circumstances apply here.]

3. "Official records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned, to safeguard classified information within industry under E.O. 10865 . . ."