

DATE: June 17, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-07826

## **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 May 7, 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), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated February 3, 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 SOR contained certain factual inaccuracies; (2) whether the Administrative Judge erred by concluding that Applicant was vulnerable to exploitation concerning a 1998 incident for which the criminal charges were subsequently dismissed; (3) whether it was arbitrary or capricious for the Administrative Judge to conclude Applicant's falsification of a security clearance application was not mitigated; and (4) whether it was arbitrary or capricious for the Administrative Judge to conclude Applicant's criminal conduct had not been successfully mitigated. 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

1. Whether the SOR contained certain factual inaccuracies. Applicant takes exception with the wording of SOR paragraph 2.a, contending: (a) he was not charged with the second offense listed in that paragraph; and (b) he was not fined and ordered to pay court costs.

An SOR is an administrative pleading that does not have to satisfy the strict requirements of a criminal indictment. All that is required is an SOR that places an applicant on adequate notice of the allegations being made against the applicant so that the applicant has a reasonable opportunity to respond to the SOR allegations and prepare a defense. <sup>(1)</sup> Nothing in the record below indicates or suggests that the wording of the SOR failed to give Applicant adequate notice of the allegations against him, deprived him of a reasonable opportunity to respond to the SOR allegations, or impaired his ability to prepare for the hearing. Indeed, at the hearing, Applicant was represented by an attorney, who did not object to the wording of the SOR and who did not claim that the wording of the SOR interfered with Applicant's ability to prepare for the hearing or present his defense.

Moreover, the Administrative Judge did not find that Applicant was charged with the second offense listed in SOR paragraph 2.a, or that Applicant was fined in connection with the state court proceedings. Accordingly, Applicant's complaints about the listing of the second offense in SOR paragraph 2.a and the wording about being fined are immaterial to the Board's review of the Judge's decision. Finally, the Judge's finding that Applicant was ordered to pay court costs in connection with the criminal matter covered by SOR paragraph 2.a is supported by the record evidence.

2. Whether the Administrative Judge erred by concluding that Applicant was vulnerable to exploitation concerning a

1998 incident for which the criminal charges were subsequently dismissed. There is no dispute that in early 1998, Applicant was charged with committing a lewd and lascivious act based on his being observed masturbating in his car, and that the charges were later dismissed for reasons unrelated to Applicant's culpability for the act. The Administrative Judge concluded that the 1998 incident had been mitigated by the passage of time, Applicant's counseling after the incident, and the absence of any similar incidents since then. However, the Judge concluded that Applicant was vulnerable to exploitation because he was still hiding that incident from other people. On appeal, Applicant asserts: (a) the Judge ignored evidence that Applicant's manager, Applicant's Employee Assistance Program, and Applicant's wife know about the 1998 incident; (b) he has shown that he is willing to inform those people who need to know about the 1998 incident.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.<sup>(2)</sup> That presumption is not rebutted merely because Applicant strongly disagrees with the Judge's interpretation of the record evidence. There is record evidence that Applicant has disclosed the 1998 incident to some people, and there is record evidence that Applicant is embarrassed about the 1998 incident and has taken steps to conceal it from other people (e.g., when he failed to disclose the 1998 incident in September 2002 when completing a security clearance application). The presence of such conflicting record evidence had to be taken into account by the Judge, but it did not preclude the Judge from weighing that conflicting record evidence and making findings and reaching conclusions about Applicant's case.<sup>(3)</sup> Considering the record evidence as a whole, the Judge had a sufficient basis for concluding that Applicant was in a position of possible vulnerability because of his sensitivity over other people finding out about the 1998 incident, his affirmative act of trying to conceal the 1998 incident in September 2002 when he completed a security clearance application, and his implausible explanations for his failure to disclose the 1998 incident.

3. Whether it was arbitrary or capricious for the Administrative Judge to conclude Applicant's falsification of a security clearance application was not mitigated. The Administrative Judge found: (a) Applicant falsified a security clearance application in September 2002 by failing to disclose he had been charged in connection with the 1998 incident; and (b) Applicant's falsification was a violation of 18 U.S.C. 1001, a federal felony. The Judge concluded that Applicant's falsification was not mitigated. On appeal, Applicant contends the Judge should have concluded his falsification was mitigated under Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 5.

Applicant's argument concerning Personal Conduct Mitigating Condition 2<sup>(4)</sup> lacks merit. Applicant's disclosures to the investigator do not warrant application of Personal Conduct Mitigating Condition 2.<sup>(5)</sup> Moreover, given the record evidence concerning the facts and circumstances of Applicant's disclosures to the investigator, the Administrative Judge was not compelled, as a matter of law or logic, to conclude Applicant's disclosures qualified for application of Personal Conduct Mitigating Condition 3.<sup>(6)</sup>

Applicant's argument concerning Personal Conduct Mitigating Condition 5<sup>(7)</sup> is not persuasive. As discussed earlier in this decision, there is sufficient record evidence to allow the Administrative Judge to conclude Applicant was in a position of possible vulnerability because of his sensitivity over other people finding out about the 1998 incident, and his affirmative act of trying to conceal the 1998 incident in September 2002. Given that sustainable conclusion, the Judge was not required to apply Personal Conduct Mitigating Condition 5.

4. Whether it was arbitrary or capricious for the Administrative Judge to conclude Applicant's criminal conduct had not been successfully mitigated. The Administrative Judge concluded the 1998 incident was mitigated under Criminal Conduct Mitigating Condition 1<sup>(8)</sup> and Criminal Conduct Mitigating Condition 2.<sup>(9)</sup> However, the Judge entered a formal finding against Applicant with respect to Guideline J based on his conclusion that Applicant's falsification had not been mitigated by the passage of time. Applicant contends the Judge erred because: (a) falsification is not listed as a concern under Guideline J; and (b) he presented evidence of rehabilitation that warranted application of Criminal Conduct Mitigating Condition 6.<sup>(10)</sup> Applicant's claim of error is not persuasive.

Applicant's falsification of a security clearance application was alleged in the SOR, under Guideline J, as a violation of 18 U.S.C. §1001. As noted earlier in this decision, the Judge found that Applicant falsified the security clearance application and that the falsification was a violation of 18 U.S.C. §1001. Given those findings, which are supported by

the record evidence as a whole, the Judge properly considered Applicant's falsification as criminal conduct under Guideline J.<sup>(11)</sup> Furthermore, Applicant's argument concerning the applicability of Criminal Conduct Mitigating Condition 6 is irrelevant to the Judge's adverse formal findings about the falsification. Even if the Judge had concluded that the record evidence cited by Applicant on appeal (*i.e.*, Applicant Exhibit E) was clear evidence of successful rehabilitation with respect to the 1998 incident,<sup>(12)</sup> Applicant Exhibit E is irrelevant to, and has no probative value concerning, Applicant's falsification of the security clearance application.

### **Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

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

1. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 4.

2. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.

3. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5 (noting that it is not unusual for a Judge to be faced with conflicting record evidence, and that the Judge must make findings of fact and reach conclusions despite the presence of conflicting record evidence).

4. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).

5. *See, e.g.*, ISCR Case No. 99-0557 (July 10, 2000) at p. 4 and ISCR Case No. 97-0289 (January 22, 1998) at p. 3 (explaining why Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2, applies to cases involving a claim that a falsification was later corrected).

6. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.3).

7. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress (Directive, Adjudicative Guidelines, Item E2.A5.1.3.5).

8. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).
9. "The crime was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.2).
10. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).
11. *See United States v. Yermian*, 468 U.S. 63 (1984)(case involving falsification of a security clearance application being prosecuted under 18 U.S.C. §1001).
12. Although the Administrative Judge did not cite or refer to Criminal Conduct Mitigating Condition 6 in connection with the 1998 incident, as discussed earlier in this decision, the Judge concluded that the 1998 incident had been mitigated by the passage of time, Applicant's counseling after the incident, and the absence of any similar incidents since then.