

DATE: May 17, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-07839

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Brogstrom, Esq., Department Counsel

#### **FOR APPLICANT**

William F. Savarino, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 14, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge LeRoy F. Foreman issued an unfavorable security clearance decision, dated December 9, 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 by finding Applicant falsified a security clearance application; (2) in the alternative, whether the Administrative Judge erred by concluding Applicant's falsification of a security clearance application was not mitigated; and (3) whether the Administrative Judge erred by concluding that Applicant's past criminal conduct was not 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 Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in December 2000 by not disclosing that he had been charged in December 1992 with grand larceny and burglary, both of which were felony charges.<sup>(1)</sup> On appeal, Applicant challenges the Judge's finding of falsification. In support of that challenge, Applicant argues: (a) the Judge failed to properly consider Applicant's state of mind when he completed the security clearance application; (b) the Judge's finding of falsification does not reflect a reasonable interpretation of the record evidence as a whole; and (c) the Judge's finding of falsification is based on invalid premises and erroneous reasoning.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome by Applicant's disagreement with the Judge's assessment of the credibility of Applicant's hearing testimony, or the Judge's choice to weigh the record evidence differently from how Applicant would have liked the Judge to weigh it.

There is conflicting record evidence concerning Applicant's intent or state of mind when he completed the security clearance application. However, the presence of conflicting record evidence does not diminish the Administrative Judge's responsibility as the trier of fact. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5 (Board noting that it is not unusual for a Judge to be faced with the need to consider and weigh conflicting record evidence, and then make findings of fact). The Judge had to consider the record evidence as a whole, assess the credibility of the testimony of Applicant and the investigator who interviewed Applicant, and make a finding as to Applicant's intent or state of mind when he completed the security clearance application. *See, e.g.*, ISCR Case No. 02-15935 (October 15, 2003) at p. 6 (discussing need for Judge to consider record evidence as a whole to make a finding of fact about an applicant's intent or

state of mind in a falsification case). Giving due deference to the Judge's credibility determinations,<sup>(2)</sup> the Board concludes that the Judge's finding of falsification reflects a plausible, legally permissible interpretation of the record evidence as a whole. Applicant's strong disagreement with the Judge's finding of falsification is not sufficient to persuade the Board that the finding is not sustainable in light of the record evidence in this case.

2. In the alternative, whether the Administrative Judge erred by concluding Applicant's falsification of a security clearance application was not mitigated. Applicant contends, in the alternative, that if the Administrative Judge's finding of falsification is sustainable, the Judge should have concluded that Applicant's falsification was mitigated. In support of this contention, Applicant argues: (a) the Judge should have concluded his falsification was mitigated under Personal Conduct Mitigating Condition 2; (b) the Judge erred by concluding Personal Conduct Mitigating Condition 3 does not apply; and (c) the Judge erred by concluding that Applicant's reference to his 2002 reckless driving citation as merely speeding was evidence of his propensity for untruthfulness.

Department Counsel correctly notes that Applicant's theory about the significance of his disclosures to the investigator who interviewed him does not warrant application of Personal Conduct Mitigating Condition 2,<sup>(3)</sup> but rather raises the question of whether the Administrative Judge should have applied Personal Conduct Mitigating Condition 3.<sup>(4)</sup> *See, e.g.,* ISCR Case No. 01-06166 (October 25, 2001) at p. 3 (in cases involving correction of a falsification, Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2, is the relevant mitigating condition to be considered); ISCR Case No. 00-0671 (August 15, 2001) at p. 3 (noting that Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3 apply to different situations). Furthermore, given the record evidence in this case, the Judge reasonably could conclude that the facts and circumstances of Applicant's disclosures to the investigator did not warrant application of Personal Conduct Mitigating Condition 3.

The Board is not persuaded that the Administrative Judge erred by concluding that Applicant minimized the seriousness of his reckless driving offense by describing it as a speeding incident. The Board does not review isolated sentences in a Judge's decision. *See, e.g.,* ISCR Case No. 02-10215 (January 30, 2004) at p. 6 n.4. Reading the decision below in its entirety, the Board concludes the Judge's challenged statement forms a part of the Judge's evaluation of the overall facts and circumstances surrounding Applicant's disclosures to the government about his past conduct. Furthermore, in evaluating Applicant's falsification of the security clearance application, the Judge reasonably could consider whether there was record evidence that shed light on whether Applicant's falsification was an isolated incident or otherwise mitigated. *See, e.g.,* ISCR Case No. 02-23365 (March 22, 2004) at p. 5 (Judge can consider record evidence of conduct or circumstances not alleged in the SOR to assess an applicant's credibility; evaluate an applicant's evidence of extenuation, mitigation or changed circumstances; consider whether an applicant has demonstrated successful rehabilitation; or decide whether a particular provision of the Adjudicative Guidelines is applicable). Considering the record as a whole, and giving due deference to the Judge's assessment of the credibility of Applicant's testimony, the Board concludes Applicant has not shown that it was arbitrary or capricious for the Judge to conclude that Applicant was minimizing the seriousness of the 2002 reckless driving offense by characterizing it as a speeding incident.

3. Whether the Administrative Judge erred by concluding that Applicant's past criminal conduct was not mitigated. Applicant contends the Administrative Judge should have concluded that his 2002 reckless driving offense was mitigated under Criminal Conduct Mitigating Condition 1,<sup>(5)</sup> Criminal Conduct Mitigating Condition 2,<sup>(6)</sup> and Criminal Conduct Mitigating Condition 6.<sup>(7)</sup> In support of this contention, Applicant argues: (a) the 2002 reckless driving incident is more than two years old; (b) the record evidence concerning the facts and circumstances of the 2002 reckless driving incident show it was not serious or aggravated in nature; (c) the 2002 reckless driving incident was isolated; and (d) the 2002 reckless driving incident occurred ten years after the 1992 incident that resulted in grand larceny and burglary charges against Applicant.

Given the Administrative Judge's sustainable finding that Applicant falsified the security clearance application, the Judge properly concluded that Applicant's falsification was a violation of 18 U.S.C. 1001, a felony. *See United States v. Yermian*, 468 U.S. 63 (1984)(case involving conviction under 18 U.S.C. 1001 for falsification of a security clearance application). That conclusion by the Judge undercuts Applicant's argument concerning the isolated nature of the 2002 reckless driving incident. Furthermore, Applicant's arguments concerning the nature, seriousness, and recency of the 2002 reckless driving incident reflect an alternate interpretation of the record evidence, but they fail to demonstrate the

Judge engaged in reasoning that is arbitrary, capricious, or contrary to law when he evaluated that incident in assessing Applicant's security eligibility. Considering the record evidence as a whole, Applicant has not demonstrated that the Judge was compelled, as a matter of law or logic, to apply Criminal Conduct Mitigating Conditions 1, 2, and 6 to his case. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p. 4 n.3 (noting that the application of the Adjudicative Guidelines is not reducible to a simple formula, but rather requires the exercise of sound judgment within the parameters set by the Directive).

### **Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge also found that Applicant did not falsify the security clearance application by providing incorrect dates for his college education. That favorable finding is not at issue on appeal.

2. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

3. "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).

4. "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).

5. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).

6. "The crime was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.2).

7. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).