

DATE: September 22, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-08525

## **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 27, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated April 6, 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 Administrative Judge erred by not taking into account Applicant's claim that a female coworker with a grudge against him was the source of some of the allegations against him; (2) whether the Administrative Judge failed to give sufficient consideration to Applicant's disclosures about his past conduct; (3) whether some of the Administrative Judge's findings of fact are not supported by the record evidence; and (4) whether the Administrative Judge should have concluded Applicant's conduct and circumstances were mitigated sufficiently to warrant a favorable security clearance decision. 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

Applicant's appeal brief contains several arguments that essentially ask the Board to evaluate his security eligibility and reach a favorable security clearance decision. The Board does not retry a case on appeal. Rather, the Board reviews an Administrative Judge's decision to determine whether the appealing parties have identified any factual or legal error in the Judge's decision. *See* Directive, Additional Procedural Guidance, Item E3.1.32. The Board will address only those arguments made by Applicant that can be construed as challenging the Judge's decision. <sup>(1)</sup>

1. Whether the Administrative Judge erred by not taking into account Applicant's claim that a female coworker with a grudge against him was the source of some of the allegations against him. In response to the SOR and the File of Relevant Material, Applicant asserted that a female coworker with whom he had an intimate relationship in the past made false accusations against him and revealed things about him to his employer and the Department of Defense to start a review of his security eligibility. On appeal, Applicant repeats that claim and argues the Judge should have taken it into account in evaluating his security clearance.

Apart from Applicant's assertions, there is no record evidence that indicates whether the female coworker identified by Applicant provided information about him to the Department of Defense in connection with the investigation of his case. Significantly, the File of Relevant Material does not contain any written statement by the female coworker about Applicant. Moreover, it is legally irrelevant whether the female coworker identified by Applicant did or did not provide information about him to the Department of Defense. The File of Relevant Material contains documentary evidence not provided by the female coworker which provides a legally permissible basis for the Judge to make findings and reach

conclusions about Applicant's security eligibility.

2. Whether the Administrative Judge failed to give sufficient consideration to Applicant's disclosures about his past conduct. Applicant asserts that, apart from his falsification of the security clearance application concerning his past drug use, he has been honest about his conduct and circumstances with his facility security officer and the federal government. He also argues that his honesty shows he is trustworthy and should be granted a security clearance. The Board construes this argument as raising the issue of whether the Judge failed to give sufficient consideration to Applicant's disclosures about his past conduct.

Applicant's disclosures about his conduct and circumstances did not preclude the Administrative Judge from considering the security significance of his conduct and circumstances.<sup>(2)</sup> The Judge was not required to conclude the security concerns raised by Applicant's conduct and circumstances were extenuated or mitigated by Applicant's disclosures.<sup>(3)</sup>

3. Whether some of the Administrative Judge's findings of fact are not supported by the record evidence. Applicant contends the Administrative Judge erred by finding: (a) his girlfriend was only 13 years old in 2003; (b) he molested a minor; (c) he cheated in his academic work for six years; and (d) he falsified a security clearance application by not disclosing that he had been suspended from summer employment in 2000 for providing alcohol to underage students.

Given the record evidence in this case, the Administrative Judge erred by finding Applicant's girlfriend was 13 years old in 2003. However, the record evidence supports the Judge's finding that Applicant fondled his girlfriend's breasts before she reached the age of consent under applicable state law.

The Administrative Judge did not find that Applicant cheated in his academic work for six years. Rather, the Judge found Applicant cheated on his university examinations at least five times between 1997 and 2003. That finding by the Judge is supported by record evidence.

Considering the record as a whole, there is not sufficient record evidence to sustain the Administrative Judge's finding that Applicant falsified a security clearance application by not disclosing he had been suspended from summer employment in 2000. However, that error is harmless because the Judge's other sustainable findings are sufficient to support his overall adverse conclusions under Guideline E (Personal Conduct).

4. Whether the Administrative Judge should have concluded Applicant's conduct and circumstances were mitigated sufficiently to warrant a favorable security clearance decision. Applicant makes various arguments that the Board construe as raising the issue of whether the Administrative Judge should have concluded Applicant's conduct and circumstances were mitigated sufficiently to warrant a favorable security clearance decision. Those arguments can be summarized as follows: (a) although he gave money to his Mexican girlfriend's family, he did not have control over how they used that money; (b) the illegal activities of two Mexican uncles should not be held against him; (c) there is no evidence that his relatives in Mexico are agents of a foreign power or that they are in a position to be exploited by a foreign power in a manner that would force him to choose between them and the United States; (d) his falsification of the security clearance application was mitigated under Personal Conduct Mitigating Condition 2; (e) the record evidence shows he has exhibited a pattern of maturity, compassion, reliability, and honesty; (f) he has learned from his past mistakes and has accepted responsibility for them; and (g) he would never do anything to jeopardize the national security.

Considering the record evidence as a whole, it was not arbitrary or capricious for the Administrative Judge to conclude that the overall facts and circumstances of Applicant's giving money to the family of his Mexican girlfriend (who Applicant knows is an illegal alien in the United States) raised security concerns. It was not arbitrary or capricious for the Judge to conclude that the facts and circumstances of Applicant's action placed him in a situation of vulnerability because his money was used to smuggle other illegal aliens into the United States.

There is record evidence to support the Administrative Judge's finding that Applicant has two uncles who were involved, in the past, with importing illegal drugs from Mexico into the United States. Nothing in the decision below indicates or suggests that the Judge held Applicant responsible for the illegal drug activities of those two uncles. Considering the record as a whole, it was not arbitrary or capricious for the Judge to consider Applicant's past

association with those two uncles as part of his evaluation of the security significance of the totality of Applicant's contacts and ties with relatives in Mexico under Guideline B (Foreign Influence).<sup>(4)</sup>

There is no record evidence that Applicant's Mexican girlfriend or her relatives are agents of a foreign power. However, the absence of such evidence did not compel the Administrative Judge to apply Foreign Influence Mitigating Condition 1.<sup>(5)</sup> Foreign Influence Mitigating Condition 1 is not applicable unless both (a) an applicant's immediate family members or associates in question are not agents of a foreign power; and (b) an applicant's immediate family members or associates in question are not in a position to be exploited by a foreign power.<sup>(6)</sup> Furthermore, Applicant's appeal argument appears to assume that Department Counsel must present evidence to affirmatively disprove the applicability of Foreign Influence Mitigating Condition 1. Department Counsel is not required to disprove the applicability of Adjudicative Guidelines mitigating conditions; rather, an applicant has the burden of presenting evidence sufficient to warrant application of such mitigating conditions.<sup>(7)</sup> Applicant has not presented any persuasive argument for why the Judge should have concluded that Foreign Influence Mitigating Condition 1 is applicable in light of the record evidence in this case.

Applicant's argument concerning Personal Conduct Mitigating Condition 2<sup>(8)</sup> is not persuasive. Given the record evidence in this case, Applicant's disclosures to the DSS investigator might warrant consideration of Personal Conduct Mitigating Condition 3,<sup>(9)</sup> not Personal Conduct Mitigating Condition 2.<sup>(10)</sup> As to the applicability of Personal Conduct Mitigating Condition 3, the record evidence in this case did not compel the Judge to find, as a matter of law, that Applicant made prompt, good-faith disclosures to the DSS investigators before he was confronted with the facts of his misconduct.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information.<sup>(11)</sup> The federal government does not have to wait until an applicant commits a security violation before it can decide to deny or revoke access to classified information.<sup>(12)</sup> Considering the record as a whole, the Administrative Judge had a rational basis for concluding that the totality of Applicant's conduct and circumstances raised security concerns under both Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Moreover, given the record evidence available to the Judge, it was not arbitrary or capricious for the Judge to conclude Applicant had not demonstrated extenuation or mitigation of the security concerns raised by the totality of his conduct and circumstances. It was not arbitrary or capricious for the Judge to conclude that Applicant had not presented evidence that showed that he had learned from his past mistakes and would not repeat them.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. The Administrative Judge entered a formal finding in favor of Applicant with respect to Guideline C (Foreign Preference). That favorable formal finding is not at issue on appeal.
2. *See, e.g.*, ISCR Case No. 02-10454 (November 23, 2004) at p. 6 ("[A]n applicant's honesty with the government does not preclude the government from considering the security significance of the conduct that an applicant admits.").
3. Applicant's argument about the applicability of Personal Conduct Mitigating Condition 2 to his disclosures to a Defense Security Service (DSS) investigator will be discussed later in this decision.
4. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at p. 4 ("Under the whole person concept, the Judge had to evaluate the security significance of the totality of Applicant's family ties and contacts, not just each one separately. Applicant is not entitled to have the Judge engage in a piecemeal analysis of his family ties and foreign contacts.") (footnotes omitted).
5. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could be force the individual to choose between loyalty to the person(s) involved and the United States" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1).
6. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4.
7. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6.
8. "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).
9. "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).
10. *See, e.g.*, ISCR Case No. 01-19513 (January 22, 2004) at pp. 4-5 (discussing the difference between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3).
11. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).
12. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).