DATE: July 28, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-10380

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 8, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision-security concerns raised under Guideline F (Financial Considerations), and Guideline E (Personal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On May 11, 2005, after the hearing, Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. On December 29, 2005, the Appeal Board issued an Appeal Board Decision and Remand Order with instructions to the Judge to issue a new decision in the case consistent with the rulings set forth in the Decision and Remand Order. On January 6, 2006, the Judge issued a Decision on Remand, and again granted Applicant's request for a security clearance. Department Counsel again timely appealed.

Department Counsel raised the following issue on appeal: whether the Administrative Judge's conclusion that Applicant did not intentionally falsify his security clearance application (hereinafter SCA) was arbitrary, capricious, contrary to law and not supported by the record evidence. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The following findings of fact made by the Administrative Judge are pertinent to the issues raised on appeal:

In answer to Question 38[(1)] on his May 2000 SCA, Applicant failed to divulge his financial delinquencies in excess of 180 days. The Applicant testified credibly that this was an honest mistake and there was clearly no intent to conceal this information. The government was already aware of Applicant's past due debts as they were the subject of a Letter of Intent to Revoke Security Clearance (LOI) issued to Applicant in May 1999. The Applicant's credibility is attested to by three witnesses, a retired Army Colonel, and retired Navy Captain and a reserve Air Force Lieutenant Colonel. In answer to Question 32[(2)] on his May 2000 SCA, Applicant answered "No" to the question which asked, in part, if he had ever had a clearance suspended or revoked. As a result of the May 1999 LOI, the Applicant's security clearance had been revoked/suspended. Although Applicant acknowledged receipt of the Statement of Reasons attached to the LOI, he was unaware that the LOI had actually suspended/revoked his clearance. Applicant's lack of understanding is further

evidenced by his July 9, 1999 response to the LOI in which he states, "Thank you for the opportunity to respond to . . . [the LOI] informing me of your intent to revoke my Sensitive Compartmented Information (SCI) Access Eligibility and Security Clearance. . . ." In a Memorandum written by the Applicant on September 13, 1999, he makes reference to the possibility that his clearance was suspended, but also notes he is "confused" and asked the addressee's "professional expertise in explaining why the course outlined in your letter [of September 2nd, not in the case file] differs so widely from the Department of Defense directive." A Letter of Revocation of Security Clearance (LOR) was issued to Applicant on September 23, 1999, but the Applicant was unaware of the LOR, as he had left his employment a week earlier on September 17, 1999.

There is other record evidence not made the basis of a finding of fact by the Administrative Judge that nevertheless is pertinent to the issues raised on appeal. That evidence is: (a) at the time he held his security clearance in 1999, Applicant was a Civil Service term employee; (b) on August 17, 1999 Applicant was informed that his term appointment would not be extended and would expire on September 17, 1999; (c) on September 2, 1999 Applicant received a memorandum from his employer clarifying for him the impact that the impending expiration of his employment term would have on the ongoing processing of the government's proposal to revoke his security clearance; (d) the September 2, 1999 memorandum informed Applicant that it was likely that his term employment appointment would expire before the government completed its decision making process regarding his clearance; (e) the September 2, 1999 memorandum also informed Applicant that once his term appointment expired, the remainder of the investigative process regarding his security clearance would stop, and his clearance adjudicative file would be forwarded to a records repository; (f) the September 2, 1999 memorandum also informed Applicant, that should he desire to seek employment elsewhere which required a security clearance, the agency to which he applied should request a transfer of his records from the repository for review and update; (g) On September 13, 1999 Applicant responded to his employer regarding the September 2, 1999 memorandum with a memorandum of his own; (h) in the September 13, 1999 memorandum, Applicant referenced an earlier request he made that his security clearance case be continued and asked that he be scheduled for a hearing; (i) in the September 13, 1999 memorandum Applicant formally requested a Personal Appearance; (j) in the September 13, 1999 memorandum in support of his request, Applicant wrote:

"On the other hand, I quote DOD Directive 52206, as follows:

'Actions pursuant to this directive (DODD 52206) shall cease upon termination of the applicant's need for access to classified information except in cases in which:

A. A hearing has commenced;

B. A clearance decision has been issued, or,

C. The Applicant's Security Clearance was suspended and the Applicant provided a written request that the case continue.'

Since I believe that I clearly fall within the purview of subparagraph C, above, of DOD Directive 52206, in that my Security Clearance was suspended and I have provided a written request that the case continue, I am confused and must request your professional expertise in explaining why the course outlined in your letter differs so widely from the Department of Defense directive. Quite frankly, the DOD Directive makes good sense to me because if we are to follow the course of action you prescribe [halting the clearance adjudication because Applicant no longer needed one] these false allegations will remain on the books unchallenged, investigators may find witnesses and accusers have transferred or vanished, and the burden of the procedure will fall upon the acquiring Agency which can utilize my unique background and experience;"

(k) in his answer to the DOHA Statement of Reasons, Applicant indicated that he answered Question 38 on his May 2000 SCA because he misread the question; (l) during his hearing testimony, Applicant indicated that he answered Question 38 on his May 2000 SCA because it was the first time he had completed a Standard Form 86 on a computer.

B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial record evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

On appeal, Department Counsel asserts that the Administrative Judge's finding that Applicant's erroneous response to Question 38 (financial difficulties) was clearly not the result of an intent to conceal was unsupported by the record evidence. Department Counsel also asserts that, regarding Applicant's incorrect response to Question 32 (security clearance), the Judge's finding that Applicant was unaware that the May 14, 1999 LOI had revoked/suspended his security clearance was unsupported by the record evidence. Department Counsel stresses on appeal that, considering the record as a whole, the Judge could not reasonably have accepted Applicant's explanations for the multiple inaccuracies in his responses to the SCA questions. Department Counsel's arguments have merit.

Regarding Question 38, the record evidence establishes that Applicant was well aware of his numerous outstanding financial delinquencies as a result of the ay 1999 LOI and did not contest them. He indicated in his hearing testimony that he had been working with his creditors and had established payment plans. His hearing testimony regarding his intent when answering Question 38 amounted to a general statement that he had simply made a mistake. When Applicant did attempt to provide an explanation for his error, his answers were varied. In his answer to the SOR he attributed the error to misreading the question. In his testimony, he cited his unfamiliarity with the electronic format of the SCA. Given this record evidence (which establishes Applicant's familiarity with the details of his financial delinquencies, and which indicates explanations for the false answer which are cryptic and changing), and the instructions from the remand decision and order, the Administrative Judge finding on remand that Applicant made an honest mistake is not sustainable.

The Administrative Judge's finding that Applicant did not falsify his answer to Question 38 is based, in large part, on his favorable assessment of Applicant's credibility. This favorable credibility determination, in turn, is based in significant part upon the testimony of the three military officers who know Applicant and vouched for his integrity and truthfulness. The Administrative Judge was entitled to consider the testimony of these three witnesses, but he was required to weigh their testimony--and there is no indication in the record that these witnesses had any familiarity whatsoever with the facts and circumstances of Applicant's case--in a manner that was reasonable given the other evidence in the case. Given the entirety of the record, which includes evidence that clearly detracts from a favorable assessment of Applicant's credibility, the Judge could not rely solely on Applicant's three character witnesses. The Judge also used his assessment of Applicant's credibility (as established by these witnesses) as a substitute for record evidence in order to find that Applicant did not intend to falsify his answer to question 38.

Although the Board must give deference to a Judge's credibility determinations, those determinations are not immune from review. *See*, *e.g.*, ISCR Case No. 96-0316 at 3 (App. Bd. Feb. 24, 1997); *See also*, *NLRB v. Cook Family Foods*, *Ltd.* 47 F.3d 809, 816 (6th Cir. 1995). The Judge's finding that Applicant testified credibly when he indicated he did not intentionally falsify his answer to Question 38 of the May 2000 SCA is not reasonably supported by the evidence in light of all the contrary record evidence for the reasons already stated and for reasons that will be discussed subsequently in dealing with Department Counsel's assignment of error regarding the Judge's finding that Applicant did not falsify his answer to Question 32 of the SCA.

Another component of the Administrative Judge's resolution of the issue of Applicant's alleged falsification of Question 38 was his finding that the government was already aware of Applicant's past debts, as they were the subject of the LOI issued to the Applicant in May of 1999. The Judge made a similar finding in his initial decision in this case. In its Decision and Remand Order, the Board concluded that the Administrative Judge failed to explain how the fact that the government knew about the extent of Applicant's indebtedness over 180 days (the substance of the inquiry of question 38) at the time Applicant filled out the SCA clarified the question of Applicant's intent. The Board concluded such failure was error. In his remand decision, the Judge makes the identical factual finding but perpetuates his earlier error by again failing to offer any explanation of the relevance of his finding that the government already knew about

Applicant's debts.

Regarding Question 32 of the SCA, which Applicant answered by stating "No," Department Counsel argues that the record evidence runs contrary to the Judge's finding that Applicant did not know his clearance was suspended when he filled out the SCA. When addressing this issue, several matters should be clarified at the outset. First of all, Question 32 required Applicant to indicate whether he had ever had a clearance that was either suspended or revoked. Secondly, suspension of clearance actions are separate and distinct from revocation of clearance actions and were clearly delineated in this case as separate and distinct actions. The Judge's multiple references in his decision to a "revoked/suspended" action are troublesome and could be misleading. Thirdly, on appeal, Department Counsel argues only that the Judge's factual findings are unsupportable regarding the clearance suspension action, as opposed to the revocation action (while there is arguably substantial evidence to support the Judge's finding that Applicant was unaware of the clearance *revocation* action and therefore he did not falsify his answer to Question 32 regarding the revocation, the Board need not decide this issue since it is not presented on appeal). Department Counsel is correct in asserting there is significant evidence that detracts from the Judge's findings regarding the clearance *suspension* issue.

The Administrative Judge's finding that Applicant was unaware that his security clearance had been suspended at the time he answered Question 32 on his SCA in May 2000 is (a) not supported by the record evidence and (b) runs contrary to the Board's holding in its December 29, 2005 decision ordering remand.[(3)] The record evidence establishes that Applicant received the May 14, 1999 LOI. The LOI clearly indicates that Applicant's clearance was being suspended as of that date and the word "suspended" appears in bold in the typed LOI document. The record evidence contains no plausible explanation from Applicant as to why, having received the LOI document with its clear reference to the suspension action, he had no knowledge of it. Moreover, the parts of the record cited by the Judge in Paragraph 2b on page 4 of his decision do not support his finding that Applicant was unaware of the suspension action. Indeed, they negate Applicant's claim in his response to the SOR that, in May 2000, when he signed the SCA, he mistakenly thought that the LOI did not suspend his clearance. In the portions of the cited record where Applicant does discuss the state of his awareness, he is speaking of his awareness of the clearance revocation as opposed to the suspension. In his decision, the Judge finds that Applicant's lack of understanding as to his clearance status is further evidenced by Applicant's July 9, 1999 response to the LOI wherein he thanked the issuing agency for the opportunity to respond to the LOI "informing me of your intent to revoke my . . . Security Clearance." This does nothing to support the notion that Applicant lacked understanding or knowledge of the clearance suspension.

The September 13, 1999 memorandum written by Applicant to his employer provides considerable insight into Applicant's awareness of the suspension action and therefore speaks clearly to the issue of Applicant's intent when he answered "No" to Question 32. In his remand decision, the Administrative Judge makes findings of fact about the September 13 memorandum that are clearly refuted by the record evidence. The Judge finds that in the September 13, memorandum, the Applicant "makes reference to the possibility that his clearance was suspended." A clear reading of the September 13, 1999 memorandum reveals that Applicant knew his clearance had been suspended and affirmatively relied on that knowledge. Indeed, Applicant is making an argument to his employer that the processing and adjudication of his security clearance eligibility should continue despite the fact that his employment (and therefore continued need for access to classified information) was ending. Applicant's entire argument was based on the fact that his clearance had been suspended and he articulated this in clear and unequivocal terms. The Judge also makes reference to the fact that Applicant indicated in the September 13, 1999 memorandum that he was "confused." While the Judge does not give a clear indication in his decision as to what the Applicant is confused about, when the Judge's language is read in context it is evident that he is making a finding that Applicant was confused about the status of his security clearance suspension. This finding is flatly contradicted by the argument Applicant was trying to make and by the part of the memorandum where Applicant indicates he is confused. A reading of the memorandum clearly reveals that Applicant's confusion had nothing to do with the status of his security clearance. Applicant states that he is confused as to why the government was electing to discontinue the adjudication of his security clearance eligibility when DOD Directive 52206 indicated that the adjudication process should continue based on the fact that Applicant's clearance had been suspended and he had requested the case continue.

The Administrative Judge's finding that Applicant did not falsify Question 32 is also based, in part, on his favorable assessment of Applicant's credibility. As Department Counsel points out on appeal, it is arbitrary and capricious for a Judge to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other

record evidence. Factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Thus, the Board must consider whether a Judge's acceptance of an applicant's explanation for his or her conduct is consistent with a reasonable interpretation of the record evidence as a whole. *See*, *e.g.*, ISCR Case No. 00-0620 at 3 (App. Bd. Oct. 19, 2001). In this case there is significant record evidence that seriously detracts from Applicant's insistence that he lacked knowledge about his security clearance and therefore did not intend to falsify his answer to Question 32. Thus, the Judge's favorable finding as to Applicant's credibility as to Question 32 cannot stand.

A case involving alleged falsification requires a Judge to make a finding of fact as to an applicant's intent or state of mind when the alleged falsification occurred. As a practical matter, when an applicant denies that he or she engaged in a falsification, proof of the applicant's intent or state of mind is rarely based on direct evidence, but rather often must rely on circumstantial evidence. In this case Department Counsel argues that the circumstantial evidence does not support the Judge's findings that Applicant had no intent to falsify when he answered Questions 38 and 32 on his May 2000 SCA. Department Counsel's argument has merit. In this appeal, Department Counsel does more than simply disagree with the Administrative Judge's weighing of the record evidence, or merely set forth a plausible interpretation of the record evidence that differs from the Judge's interpretation. Rather, Department Counsel makes arguments that challenge the Judge's decision on grounds that: (i) the Judge makes some findings of fact that do not reasonably take into account all the record evidence that runs contrary to those findings; and (ii) the Judge's decision reflects arbitrary and capricious reasoning.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

The Administrative Judge made findings of fact which were both unsustainable and contrary to the Appeal Board's previous ruling in its remand decision and order. The Administrative Judge's conclusions regarding the case under Guideline E are merely a reiteration of those findings. Accordingly, the Judge's conclusions under Guideline E are not sustainable as the findings upon which they are wholly based are not sustainable and contrary to the Board's instructions.

Department Counsel has demonstrated several errors below that, taken cumulatively, warrant reversal.

Order

The judgment of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jeffery D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. Question 38 reads: "In the last 7 years, have you been over 180 days delinquent on any debt(s)?"

2. "Your Investigation Record- Clearance Actions. To your knowledge have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment? (Note: An administrative downgrade or termination of a security clearance is not a revocation.)"

3. "In light of the two items in Government Exhibit 1 that contradict the Judge's premise (neither of which is mentioned in the Judge's decision) that Applicant did not know his clearance had been suspended, that premise is not sustainable." ISCR Case N0. 03-10380 at 4 (App. Bd. Dec. 29, 2005).