

DATE: December 17, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-12903

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

Kimberly C. Menchion, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 23, 2004, 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). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision, dated August 23, 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 committed legal error by concluding Applicant was awarded deferred adjudication instead of having adjudication withheld by a state court, and then improperly based his credibility determination on that legal error; and (2) whether the Administrative Judge failed to conclude Applicant's conduct was mitigated by his age at the time of the insurance fraud incident, as well as the application of Criminal Conduct Mitigating Conditions 4 and 6. 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 committed legal error by concluding Applicant was awarded deferred adjudication instead of having adjudication withheld by a state court, and then improperly based his credibility determination on that legal error. Applicant notes that the Administrative Judge concluded (Decision at p. 2) that Applicant was awarded deferred adjudication in connection with a charge of insurance fraud. Applicant contends that conclusion by the Judge is legal error because Applicant was not awarded deferred adjudication, but rather had adjudication withheld by a state court. Applicant goes on to assert that the Judge's legal error concerning the disposition of the insurance fraud charge resulted in the Judge unfairly reaching a negative credibility determination about him.

Applicant's argument concerning the disposition of the criminal charge under state law is not material to the Administrative Judge's decision in this case. For purposes of adjudicating Applicant's security clearance case, it is irrelevant whether Applicant was awarded deferred adjudication or had adjudication withheld. The record evidence clearly supports the Judge's finding that Applicant entered a guilty plea in state court to a charge of insurance fraud. Regardless of how Applicant's status is viewed under state law based on the state court's disposition of the criminal charge, the record evidence that Applicant entered a guilty plea is sufficient for the Judge to conclude that Applicant engaged in the criminal conduct covered by the criminal charge to which he pleaded guilty. *See, e.g.*, ISCR Case No. 99-0116 (May 1, 2000) at pp. 2-3. As noted earlier in this decision, security clearance decisions are adjudicated under federal law, not state law. Accordingly, the nuances of state law concerning the label attached to the disposition of the criminal charge against Applicant did not preclude the Judge from relying on the record evidence that Applicant pleaded guilty to the criminal charge of insurance fraud to make findings and reaching conclusions under Guideline J (Criminal Conduct).

Applicant's argument about the Administrative Judge's credibility determination is not persuasive. Reading the decision below in its entirety, the Board concludes the Judge did *not* base his negative credibility determination on the state court's disposition of the criminal charge against Applicant. Rather, the Judge relied on the record evidence of Applicant's guilty plea to draw a negative inference from Applicant's denial that he engaged in the conduct that was covered by the guilty plea. Because Applicant's guilty plea constituted an admission of the criminal conduct covered by the plea, it was reasonable and legally permissible for the Judge to draw adverse inferences about Applicant's credibility based on Applicant's denial (during these proceedings) that he engaged in the conduct which he admitted (in state court) by pleading guilty.

2. Whether the Administrative Judge failed to conclude Applicant's conduct was mitigated by his age at the time of the insurance fraud incident, as well as the application of Criminal Conduct Mitigating Conditions 4 and 6. Applicant contends the Administrative Judge erred by finding that he is 37 years old, and based on that factual error, the Judge erred by failing to conclude his criminal conduct was mitigated due to his true age at the time of the offense in 2001 (*i.e.*, 24 years). Applicant also contends the Judge erred by not concluding his conduct was mitigated under Criminal Conduct Mitigating Conditions 4<sup>(1)</sup> and 6.<sup>(2)</sup> These contentions are not persuasive.

The record evidence shows Applicant is 27 years old, and was 24 years old at the time of the insurance fraud incident. Accordingly, the Administrative Judge's finding about Applicant's age is not sustainable. However, that error is harmless under the particular facts of this case. Reading the decision below in its entirety, there is not a significant chance that the Judge would have reached a different result if he had made a correct finding about Applicant's age. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine). The Judge was not compelled, as a matter of law or logic, to conclude that a 24-year-old man is not capable of understanding the seriousness of insurance fraud.

The presence of *some* record evidence supportive of a claim of rehabilitation did not compel the Administrative Judge, legally or logically, to conclude Applicant had demonstrated "clear evidence of successful rehabilitation." *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 6. It was reasonable and legally permissible for the Administrative Judge to decide that it is too soon to conclude that Applicant had demonstrated "clear evidence of successful rehabilitation" or that Applicant was not likely to repeat his misconduct based on: (a) the record evidence that Applicant was still on probation; and (b) the Judge's conclusion that Applicant was not willing to accept responsibility for the acts underlying the criminal charge to which he pleaded guilty in state court. *See, e.g.*, ISCR Case No. 96-0710 (June 20, 1997) at p. 3 (evidence that an applicant is still on probation cannot be ignored).

Considering the record evidence as a whole, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had failed to present sufficient favorable evidence to overcome the negative security implications of his insurance fraud and warrant a favorable security clearance decision under the clearly consistent with the national interest standard.

### **Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below that warrants remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.4).
2. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).