

DATE: March 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-19779

**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 November 7, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated November 16, 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) whether the SOR paragraphs are erroneous or based on erroneous assumptions; and (3) whether the Board should reverse the Administrative Judge's unfavorable 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** [\(1\)](#)

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 July 2002 by failing to disclose that he had an unpaid judgment against him and various delinquent debts. Applicant challenges those findings of falsification.

Considering the record evidence as a whole, and giving deference to the Administrative Judge's assessment of the credibility of Applicant's hearing testimony, the Board concludes the Judge's findings of falsification are sustainable. Directive, Additional Procedural Guidance, Item E3.1.32.1. Applicant's strong disagreement with the Judge's findings of falsification is not sufficient to demonstrate those findings are erroneous.

Falsification of a security clearance application constitutes a violation of 18 U.S.C. §1001. *See United States v. Yermian*, 468 U.S. 63 (1984). Given the Administrative Judge's sustainable findings that Applicant falsified a security clearance application, the Judge had a rational basis for concluding Applicant's falsifications constituted a violation of 18 U.S.C. §1001. Applicant's arguments to the contrary lack merit.

2. Whether the SOR paragraphs are erroneous or based on erroneous assumptions. On appeal, Applicant repeats -- almost verbatim -- much of his answer to the SOR and asserts that the SOR paragraphs are erroneous or based on erroneous assumptions. This portion of Applicant's appeal fails to demonstrate the Administrative Judge erred.

Applicant's disagreements with the SOR allegations do not demonstrate any factual or legal error by the Administrative Judge. Applicant's arguments about the SOR allegations reflect his strong disagreement with them. But, Applicant's disagreements with the substance of the SOR allegations are irrelevant to the fact that those allegations are sufficient to

place him on fair notice of the allegations being made against him so that he had a reasonable opportunity to respond to the allegations and prepare for the hearing he requested.

3. Whether the Board should reverse the Administrative Judge's unfavorable security clearance decision. Applicant makes a blanket challenge to all of the Administrative Judge's findings and conclusions, but fails to identify which findings and conclusions he is challenging. As discussed earlier in this decision, an appealing party must raise claims of error with specificity.

Because Applicant does not raise identifiable claims of error with respect to the Administrative Judge's findings and conclusions, the Board need not review each of the Judge's findings and conclusions to determine whether they are supported by the record evidence as a whole or are otherwise sustainable.

Furthermore, Applicant makes some arguments that essentially ask the Board to review the evidence *de novo*, make its own findings of fact, and reach its own conclusions about Applicant's security eligibility. Applicant is asking for a form of review that is not authorized by the Directive.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant offers new evidence in support of his appeal, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. The Board is not bound by Applicant's claim that he does not consider it to be new evidence.