

DATE: August 25, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-21183

## 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 19, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated May 23, 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 certain findings of fact made by the Administrative Judge are erroneous; (2) whether the Administrative Judge erred by finding Applicant falsified a security clearance application; and (3) whether the Administrative Judge erred by concluding Applicant had not mitigated his alcohol abuse. 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 <sup>(1)</sup>

1. Whether certain findings of fact made by the Administrative Judge are erroneous. On appeal, Applicant contends the Administrative Judge erred by making the following findings of fact: (a) Applicant used marijuana from 1995-1996; (b) Applicant used illegal drugs in the 1980s when he was employed by Company A; (c) Applicant did not disclose his use of dangerous drugs until 1985; and (d) Applicant used drugs other than marijuana up to 1985.

Applicant's first claim of factual error lacks merit. Given the record evidence in this case, including Applicant's July 2003 written statement to a Special Agent of the Defense Security Service (Government Exhibit 6), the Administrative Judge had a sufficient basis to find that Applicant used marijuana as late as 1995-1996.

Applicant's second claim of factual error is not persuasive. Given the record evidence in this case, the Administrative Judge had a sufficient basis to find that Applicant used illegal drugs after he became employed by Company A in 1981.

Applicant's third claim of factual error is based on a misreading of the Administrative Judge's decision. The passage from the Judge's decision referred to in Applicant's appeal brief does not contain a finding that Applicant failed to disclose his use of dangerous drugs until 1985. Rather, that passage refers to Applicant's June 2003 interview with a Special Agent of the Defense Security Service, and includes a finding by the Judge that *during that interview* Applicant did not disclose that his use of various illegal drugs, other than marijuana, had continued to 1985.

Applicant's fourth claim of factual error lacks merit. There is sufficient record evidence, including admissions by Applicant, to support the Administrative Judge's finding that Applicant used illegal drugs, in addition to marijuana, up to 1985.

2. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The

Administrative Judge found Applicant falsified material facts about his drug use when he completed a security clearance application in August 2002 and when he gave a written statement to a Special Agent of the Defense Security Service in June 2003. On appeal, Applicant challenges the Judge's finding of falsification.

During the proceedings below, Applicant denied the falsification allegations. Applicant's explanations about his omissions from the security clearance application and the June 2003 written statement were relevant and material evidence, but they were not binding on the Administrative Judge. As the trier of fact, the Judge had the obligation to consider Applicant's explanations in light of her assessment of the credibility of Applicant's testimony, and in light of the record evidence as a whole. Considering the record as a whole, the Judge had a rational basis to conclude that Department Counsel had presented evidence in support of the SOR allegations concerning falsification that was sufficient to shift the burden to Applicant to present evidence of refutation, explanation, extenuation or mitigation,<sup>(2)</sup> and to conclude that Applicant's denials and explanations were not credible or sufficient to preclude findings of falsification.

3. Whether the Administrative Judge erred by concluding Applicant had not mitigated his alcohol abuse. The Administrative Judge found the following: (a) in 2002, Applicant was diagnosed as alcohol dependent and received inpatient treatment for alcohol abuse; (b) Applicant was told to not use alcohol; (c) Applicant completed the treatment program and was discharged on Antabuse and directed to followup in an outpatient program; (d) it was recommended that Applicant become involved in a 12-step community support program; (e) Applicant's prognosis was "improving," but there were concerns expressed about his ambivalence, problems with follow through, and his unstable life style; (f) after attending an initial evaluation session with a counselor from the outpatient program, Applicant decided to not pursue the aftercare counseling or Alcoholics Anonymous, and not take prescribed medications; (g) Applicant resumed drinking alcohol a few months later; and (h) Applicant continues to consume alcohol. The Judge concluded Applicant had not presented sufficient evidence of reform or rehabilitation to mitigate his history of alcohol abuse.

On appeal, Applicant contends the Administrative Judge erred and asserts that his alcohol abuse was limited to a brief period during 2002 and claims that his alcohol abuse "is safely in the past." Considering the record as a whole, the Judge had a rational basis for concluding that Applicant had the burden of presenting evidence to extenuate or mitigate his history of alcohol abuse, and for concluding that Applicant had not satisfied his burden of presenting evidence sufficient to satisfying that burden. The Judge's decision sets forth rational and legally permissible reasons for her adverse conclusions under Guideline G (Alcohol Consumption). The Board does not find persuasive Applicant's contention that the Judge erred by concluding he had failed to demonstrate extenuation or mitigation of his alcohol abuse history sufficient to warrant a favorable security clearance decision.

### **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 Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains a statement indicating he believes his appeal will be forwarded to the Administrative Judge and Department Counsel. Under the Directive, the hearing Judge does not participate in the decision of an appeal. Department Counsel is a party to the appeal just as Applicant is.
2. *See* Directive, Additional Procedural Guidance, Item E3.1.15.