

DATE: September 19, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-24356

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Sabrina Elaine Redd, Department Counsel

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

#### **FOR APPLICANT**

William F. Savarino, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 21, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued a favorable security clearance decision, dated February 25, 2005.

Department Counsel appealed the Administrative Judge's favorable 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 failed to consider an important aspect of the case; (2) whether the Administrative Judge erred by finding that Applicant did not engage in falsification as alleged in the SOR; and (3) whether the Administrative Judge erred by resolving doubts in favor of Applicant instead of in favor of the national security. 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 failed to consider an important aspect of the case. Department Counsel contends the Administrative Judge failed to consider an important aspect of the case because: (a) the Judge ignored the evidence that Applicant submitted a forged letter of recommendation with his answer to the SOR; (b) the Judge erred by concluding Department Counsel offered no proof that the letter of recommendation was a forgery; and (c) it was arbitrary and capricious for the Judge to conclude the letter of recommendation was not a forgery. For the reasons that follow, the Board concludes that this claim of error generally lacks merit and, at most, shows one instance of harmless error.

(a) The provenance of the letter of recommendation was a contested issue during the hearing, and was an important element of Department Counsel's challenge to Applicant's credibility. Applicant correctly points out that the Judge did not ignore the question of the letter of recommendation, but rather the Judge did not accept Department Counsel's theory about the provenance of that letter. Just because the Judge did not make findings or reach conclusions favorable to Department Counsel concerning the disputed letter of recommendation, it does not follow that the Judge ignored that letter of recommendation and the other record evidence concerning it. <sup>(1)</sup> The Judge did not ignore this aspect of the case. Department Counsel's contention to the contrary is wholly unpersuasive.

(b) The Administrative Judge erred by stating Department Counsel offered no proof that the letter of recommendation was a forgery. Department Counsel offered the testimony of the operations manager in support of its claim that the letter of recommendation was a forgery. Even if the Judge did not find that testimony credible or sufficient to prove a forgery had been committed, the Judge could not fairly state that Department Counsel did not offer evidence on the forgery issue.

(c) Although the Administrative Judge erred by stating Department Counsel did not offer proof in support of its forgery claim, it does not follow that the Judge should have found: (i) the letter of recommendation was a forgery; (ii) the letter of recommendation was a forgery committed by Applicant or someone acting on his behalf; or (iii) Applicant knew or should have known the letter of recommendation was a forgery committed by someone else. The Judge was not required, as a matter of law, to find the testimony of the operations manager to be credible. Moreover, even if the Judge had found the operations manager to be a credible witness, the Judge did not have to conclude that her testimony established that Applicant forged her signature on the letter of recommendation, that Applicant asked someone else to forge her signature on the letter of recommendation, or that Applicant knew that someone else had forged her signature on that letter.<sup>(2)</sup> Applicant offered evidence that he received the letter of recommendation under circumstances that would permit him to accept it as authentic. The Judge was not required, as a matter of law, to reject Applicant's evidence about his receipt of the letter of recommendation. (Indeed, there was testimony that indicates the letter of recommendation had indicia of being created and sent to Applicant under circumstances consistent with the ordinary course of business, which testimony appeared to be consistent with Applicant's testimony about how he received the disputed letter of recommendation.). Considering the record as a whole, the Judge was not required, as a matter of law or logic, to find that Applicant forged the letter of recommendation, asked someone else to forge it for him, or knew that the letter was a forgery initiated by someone else.

2. Whether the Administrative Judge erred by finding that Applicant did not engage in falsification as alleged in the SOR. Department Counsel challenges the Administrative Judge's finding that Applicant did not falsify his answer to Question 20 on a security clearance application, and did not falsify material facts about his departure from a former employer during a July 2003 DSS interview. For the reasons that follow, the Board concludes this claim of error lacks merit.

Question 20 has multiple parts, and Applicant's "NO" answer is literally correct as to all but the last part of that question.<sup>(3)</sup> Furthermore, the last part of Question 20 ("Left a job for other reasons under unfavorable circumstances") involves an opinion about what constitutes "unfavorable circumstances."<sup>(4)</sup> Although a person can engage in falsification by deliberately expressing an opinion that the person does not honestly hold,<sup>(5)</sup> proof that a person holds an erroneous opinion is not enough to prove an intent to falsify unless there also is evidence -- direct or circumstantial -- that the person does not honestly hold that opinion. In this case, Department Counsel presented evidence that could allow the Judge to question whether Applicant's opinion that the circumstances of his departure from a former employer in 2002 were not unfavorable is a correct opinion, but that evidence falls short of requiring the Judge, as a matter of law or logic, to find Applicant committed a falsification when he answered "NO" to Question 20. Even if the Judge were to conclude that Applicant was wrong in believing the circumstances of his departure were not "unfavorable," such a conclusion would not require the Judge, as a matter of law, to find Applicant was dishonest or deceptive by answering "NO" to Question 20 in light of the particular record evidence in this case.

Department Counsel does not make much of an argument in support of its claim that the Administrative Judge should have found Applicant falsified material facts (about his departure from a former employer) during the July 2003 interview. Department Counsel seems to be arguing the Judge should have found Applicant engaged in falsification during the July 2003 DSS interview because the Judge should have found Applicant falsified the security clearance application. Considering the record evidence as a whole, the Board concludes that Department Counsel did not meet its burden of presenting evidence to prove the controverted fact<sup>(6)</sup> covered by SOR paragraph 1.b. Mere disbelief in Applicant's denial of falsification would not be enough to satisfy Department Counsel's burden of proof.<sup>(7)</sup>

The Board does not have to agree with the Administrative Judge's weighing of the record evidence or his findings of fact to conclude Department Counsel has failed to demonstrate the Judge erred by finding Applicant did not engage in falsification as alleged in the SOR.

3. Whether the Administrative Judge erred by resolving doubts in favor of Applicant instead of in favor of the national security. Department Counsel is correct that doubts must be resolved in favor of the national security, not in favor of an applicant.<sup>(8)</sup>

But Department Counsel does not identify how the Administrative Judge violated that principle in this case. Because the Judge's findings that Applicant did not engage in falsification are sustainable, the Judge was not faced with a situation where Department Counsel had proven conduct that would raise doubts about Applicant's security eligibility.

### Conclusion

The Board affirms the Administrative Judge's security clearance decision because Department Counsel has not demonstrated harmful 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 02-18093 (July 15, 2004) at p. 4.
2. A favorable credibility determination does not relieve an Administrative Judge from the need to consider and weigh the testimony of a credible witness in light of the record as a whole and decide what inferences and conclusions reasonably can be reached based on that testimony in light of the evidence as a whole. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at p. 6.
3. The Board does not find persuasive Department Counsel's argument that Applicant's "NO" answer to Question 20 constituted a falsification of the second portion of Question 20 ("Quit a job after being told you'd be fired."). Given the record evidence in this case, that argument lacks merit. Even the most negative reading of Government Exhibit 3 -- viewed in the context of the record evidence of the circumstances under which Applicant left his former employer -- would not require the Judge to make a finding that Applicant left his job in 2002 after being told he would be fired.
4. Not all questions ask for information of a factual nature. *See* DISCR Case No. 89-0168 (March 23, 1990)(dissenting opinion by Chairman Emilio Jaksetic at p. 4 and footnote 2)(noting difference between questions asking about specific facts and questions asking about matters that could involve the expression of an opinion or belief on the part of the responder).
5. *United States v. Amrep Corp*, 560 F.2d 539, 544 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).
6. *See* Directive, Additional Procedural Guidance, Item E3.1.14 ("Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.").

7. *See, e.g.*, ISCR Case No. 02-24452 (August 4, 2004) at p. 4.

8. *See* Directive, Adjudicative Guidelines, Item E2.2.2. *See also* *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).