

DATE: October 12, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-24233

## APPEAL BOARD DECISION AND REVERSAL ORDER

### APPEARANCES

#### FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 7, 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 March 23, 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 erred by concluding Applicant's misconduct had been mitigated under Personal Conduct Mitigating Condition 5; and (2) whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses 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**

The Administrative Judge found that Applicant had been an agent of the Drug Enforcement Agency (DEA) who was dismissed from that agency in 1999 for making false statements under oath in court proceedings on at least 12 occasions between 1991 and 1997. The Judge concluded that Applicant's misconduct was serious in nature, but that such misconduct was mitigated sufficiently to warrant a favorable security clearance decision because: (a) Applicant's disclosures of his misconduct to his family and employer significantly reduce or eliminate his vulnerability to coercion, exploitation or duress based on that misconduct; (b) Applicant is an impressive person of talent who takes great pride in doing a successful job for his employers; (c) the likelihood of recurrence is "totally unlikely in view of his recognition of the error he made and the fact that he is no longer employed in a position that would require a repetition of the mistake"; (d) Applicant's motivation for the misconduct "is perplexing since he had nothing to gain by it, had not used false information to gain employment, and the whole problem when exposed, caused loss of employment and substantial income that continue to the present"; and (e) under a whole person analysis of Applicant, a favorable security clearance decision is warranted based on Applicant's record "both before and after the discharge by DEA."

1. Whether the Administrative Judge erred by concluding Applicant's misconduct had been mitigated under Personal Conduct Mitigating Condition 5. Department Counsel contends the Administrative Judge erred by applying Personal Conduct Mitigating Condition 5 <sup>(1)</sup>

because: (a) the record evidence shows Applicant has not been forthcoming about the circumstances of his employment termination by DEA; and (b) in the alternative, even if the Board concludes the Judge could apply Personal Conduct Mitigating Condition 5, the Judge erred by deciding that its application was sufficient to mitigate Applicant's misconduct. Applicant responds to this claim of error by arguing: (i) the Judge's application of Personal Conduct Mitigating Condition 5 is supported by the record evidence and is consistent with Board decisions concerning Personal

<sup>(2)</sup>

## Conduct Mitigating Condition 5

; (ii) Department Counsel's argument concerning Personal Conduct Mitigating Condition 5 is inconsistent with the position it took during the hearing; and (iii) it is not warranted for Department Counsel to expect the Judge to apply the Adjudicative Guidelines in a rigid, mechanical manner.

To the extent that Department Counsel argues that the Administrative Judge had to analyze the Personal Conduct disqualifying and mitigating conditions in a particular manner, Department Counsel is advocating a position that the Board has rejected in the past. <sup>(3)</sup>

The Board does not have to agree with the Judge to conclude that Department Counsel has failed to show the Judge erred in applying Personal Conduct Mitigating Condition 5.

Department Counsel's alternative argument is not persuasive, either. Reading the decision below in its entirety, the Board concludes that the Administrative Judge did not base his favorable decision solely on his application of Personal Conduct Mitigating Condition 5.

2. Whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law because: (a) application of Personal Conduct Mitigating Condition 5 does not mitigate the poor judgment, unreliability, and untrustworthiness demonstrated by Applicant's acts of falsification, dishonesty, and rule violations; (b) the reasons given by the Judge in support of his favorable conclusions under Guideline E are not supported by the record evidence as a whole, and run contrary to significant unfavorable record evidence; and (c) the Judge failed to articulate a reasonable explanation for his favorable conclusions about Applicant's trustworthiness and reliability in light of the record evidence to the contrary. Applicant contends the Judge's favorable decision is not arbitrary, capricious, or contrary to law because: (i) Department Counsel merely disagrees with the Judge's favorable decision, seeks to punish him for his past conduct, and asks the Board to consider his case in a vacuum; (ii) Department Counsel's appeal arguments are similar to those rejected by the Board in ISCR Case No. 03-11448 (August 10, 2004); (iii) Department Counsel's arguments lack support in the record evidence; (iv) Department Counsel places undue significance on the decision issued by a Merit Systems Protection Board (MSPB) Administrative Law Judge in Applicant's DEA termination case; (v) the Judge's favorable conclusions are supported by his favorable assessment of Applicant's credibility; and (vi) the Judge's decision properly considered his case in terms of the whole person concept.

As discussed earlier in this decision, there is sufficient record evidence to permit the Administrative Judge to conclude that application of Personal Conduct Mitigating Condition 5 was warranted in this case, and the Judge did not rely solely on the application of Personal Conduct Mitigating Condition 5 in reaching his favorable conclusions under Guideline E (Personal Conduct). Rather, the Judge relied on his analysis of Applicant's case under the whole person concept to reach his favorable conclusions about Applicant's security eligibility. Whether the Judge's analysis of Applicant's security eligibility under the whole person concept is sustainable in light of the record evidence as a whole is the gravamen of this appeal issue.

The Board rejects Department Counsel's reliance on a falsification argument in support of its challenge to the Administrative Judge's decision. Applicant correctly notes that the portion of the SOR allegation pertaining to falsification of the SF-171 was dropped during the proceedings below (Hearing Transcript at pp. 41-42), and that Department Counsel conceded during closing argument that it was not taking the position that Applicant falsified the SF-171 (Hearing Transcript at pp. 65-66). Given the procedural history of this case, it is legally untenable for Department Counsel to rely on its falsification argument to challenge the Judge's decision.

The Administrative Judge properly concluded that he had to evaluate Applicant's security eligibility in light of the whole person concept. <sup>(4)</sup>

However, in evaluating an applicant's case under the whole person concept, a Judge must apply that concept in a common sense manner that is supported by the record evidence as a whole and is not arbitrary or capricious. As noted earlier in this decision, in deciding whether a 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.

Department Counsel persuasively argues that the Administrative Judge's conclusion that Applicant is not likely to repeat his past misconduct is based on reasoning that is not supported by the record evidence as a whole, and that the Judge's decision fails to articulate a reasonable explanation for his favorable conclusion about Applicant's trustworthiness and reliability despite significant record evidence that runs contrary to that conclusion.

As Department Counsel correctly points out, the record evidence shows that Applicant has denied that he made false statements under oath during judicial proceedings while he was a DEA agent, and Applicant has sought to minimize the significance of those false statements. Considering the record as a whole, there is significant evidence that runs contrary to the Judge's conclusion that Applicant has recognized his past misconduct and is not likely to repeat it. That evidence includes the following: Applicant's denial that he made false statements under oath while a DEA agent, Applicant's assertion that he exhibited only one instance of poor judgment during his 12-year career with DEA (despite the evidence that he made a false statement under oath on 12 separate occasions), Applicant's claim that he was the victim of a wrongful or improper termination by DEA, and Applicant's expression of remorse over the loss of his job and the adverse effects on his career and financial situation with only meager expressions of regret or remorse over the wrongfulness of his making false statements under oath on multiple occasions while a DEA agent. Given the totality of the record evidence that shows Applicant has resisted admitting his misconduct, sought to minimize the significance of his false statements under oath during judicial proceedings, held himself out as the victim of the DEA termination action, and laments the adverse consequences of his false statements on himself without any acknowledgment of the adverse consequences on the integrity of the judicial proceedings in which the false statements occurred, the Judge failed to articulate a satisfactory explanation for his conclusion that Applicant "understands the gravity of his actions" and has shown "recognition of the error he made."

Furthermore, having concluded that "[f]alse testimony of any kind in a Federal criminal prosecution causes a loss of confidence in the criminal justice system," the Administrative Judge failed to articulate a rational basis or satisfactory explanation for concluding Applicant recognizes the gravity of his false statements under oath. Contrary to the Judge's favorable conclusion, the record evidence shows that Applicant has sought to portray himself as the innocent victim of circumstances and has expressed concern, regret, and remorse about the adverse effects that his false statements ultimately had on his DEA job, his career, and his financial situation -- with only meager expressions of acknowledgment, regret or remorse that his false statements under oath were inherently improper and without any expression of acknowledgment that they posed a threat to the integrity of the judicial proceedings in which he participated. The Judge's conclusion that Applicant understands the gravity of his misconduct and recognizes the error he made is arbitrary and capricious because it rests on a factual predicate that is not supported by the clear weight of the record evidence. <sup>(5)</sup>

In support of the Administrative Judge's favorable conclusions, Applicant cites to the record evidence that he did not receive any personal gain from his past conduct and argues that such evidence shows he was the only one hurt by his false statements under oath. The Judge specifically stated "[Applicant's] motivation for the conduct is perplexing since he had nothing to gain by it, had not used false information to gain employment, and the whole problem when exposed, caused loss of employment and substantial income that continues to present." However, Applicant's argument does not provide a persuasive reason for sustaining the Judge's favorable conclusions. The Judge failed to offer an explanation for why -- despite being perplexed about Applicant's motivation for making the false statements under oath -- he concluded Applicant is not likely to repeat that conduct. Although the Judge found Applicant's motivation for making false statements under oath to be perplexing, the Judge failed to articulate any rational basis for why he nevertheless concluded Applicant was not at risk of repeating similar misconduct. Having found that Applicant engaged in serious misconduct for reasons that the Judge could not fathom, <sup>(6)</sup>

the Judge failed to offer a plausible explanation why he concluded Applicant was not likely to commit similar acts of dishonesty based on the same, or a similar, unfathomable motivation in the future. Additionally, in stating that Applicant

was no longer employed in a position that would "require repetition of the mistake," the Judge failed to articulate a rational basis for his conclusion that Applicant's dishonest conduct would not recur. No job or position requires a person to make false statements under oath and the Judge's characterization of Applicant's conduct merely as a "mistake" ignores the clear weight of the record evidence to the contrary.

To the extent Applicant seeks to attack the findings and conclusions of the MSPB Administrative Law Judge in his DEA termination case, he is collaterally estopped from doing so. Applicant had the benefit of procedural due process rights under the MSPB process, including the right to a hearing before an MSPB Administrative Law Judge, an appeal to the MSPB, and a statutory right to seek judicial review of the MSPB decision. Due process does not entitle Applicant to relitigate the merits of his DEA termination in these proceedings. [\(7\)](#)

For purposes of these proceedings, the Administrative Judge properly took into account the record evidence concerning the MSPB resolution of Applicant's DEA termination, and Department Counsel properly relied on that record evidence in presenting its case before the Judge at hearing and arguing its case on appeal. It is legally untenable for Applicant to argue that the Judge's favorable decision should be affirmed because Applicant contends he was the victim of a wrongful or otherwise improper termination by DEA.

Applicant is correct in noting that security clearance adjudications are not intended to be punitive in nature. With respect to Applicant's making of false statements under oath in various court proceedings, the decision whether to seek to prosecute Applicant rested with appropriate officials of the criminal justice system, and the decision whether to discipline or terminate Applicant rested with appropriate officials under the federal civil service system. However, the actions or inactions of third parties administering the criminal justice system and the federal civil service system are not pertinent to evaluating Applicant's judgment, reliability, and trustworthiness for purposes of making a security clearance decision. The security significance of Applicant making false statements under oath in judicial proceedings while he was a DEA agent does not turn on the manner in which third parties dealt with Applicant as a result of his false statements under oath, or the consequences (or lack thereof) that Applicant faced as a result of his false statements under oath. Applicant cannot fairly argue that punishment is not a proper factor to be considered in these proceedings, but also argue that he should receive a favorable security clearance decision because he has been punished already for his misconduct. Just as an unfavorable security clearance decision should not be based on a notion that Applicant should be punished for his past misconduct, a favorable security clearance decision should not be based on a notion that Applicant has been punished enough for his past misconduct. Accordingly, Applicant cannot reasonably assert that the Administrative Judge's favorable decision is supported by the record evidence that he has suffered adverse employment consequences as a result of his making false statements under oath during court proceedings.

Applicant is correct that Department Counsel, as the appealing party, must do more than just disagree with the Administrative Judge's decision. As noted earlier in this decision, there is no presumption of error below, and the appealing party has the burden of showing factual or legal error below. As discussed elsewhere in this decision, some of Department Counsel's appeal contentions lack merit. However, Department Counsel raises other claims of error that go beyond merely disagreeing with the Judge's decision. Applicant's reliance on the Board decision in ISCR Case No. 03-11448 (August 10, 2004) is misplaced because that case is distinguishable from this case in two significant ways. First, ISCR Case No. 03-11448 is factually distinguishable because it involved a single incident of falsification of a security clearance application, while this case involves Applicant making false statements under oath during judicial proceedings on at least 12 occasions while he was a DEA agent. Second, in ISCR Case No. 03-11448 the Board concluded that the specific arguments and claims of error raised by Department Counsel lacked merit and were not supported by the record evidence or applicable law. In this case, Department Counsel raises some claims of error that have merit in light of the record evidence and applicable law.

Finally, Applicant's argument concerning the Administrative Judge's favorable credibility determination does not demonstrate Department Counsel's appeal contentions lack merit or that the Judge's favorable conclusions about Applicant's security eligibility are sustainable. First, Department Counsel does not challenge the Judge's favorable credibility determination. The absence of such a claim does not preclude Department Counsel's challenge to the Judge's decision on other grounds. [\(8\)](#)

Second, a Judge's credibility determination, whether favorable or unfavorable is not a substitute for record evidence. An



unfavorable favorable credibility determination is not a substitute for record evidence in support of controverted SOR allegations. A favorable credibility determination is not a substitute for record evidence in support of a claim of reform or rehabilitation. [\(9\)](#)

Third, a favorable credibility determination does not relieve a Judge from the need to consider and weigh the testimony of a credible witness and decide what inferences and conclusions reasonably can be reached based on that testimony in light of the record evidence as a whole. [\(10\)](#)

Accordingly, the Judge's conclusion that Applicant was a credible witness did not mean that the Judge was free to accept Applicant's testimony in an uncritical manner without regard to its meaning and significance in light of the record evidence as a whole.

For the foregoing reasons, taken cumulatively, the Board concludes the Administrative Judge's evaluation of Applicant's security eligibility under the whole person concept is arbitrary and capricious, and therefore, unsustainable.

A favorable security clearance decision should not be made unless there is an affirmative determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant, [\(11\)](#)

and such a conclusion is supported by the record evidence as a whole and is consistent with application of pertinent provisions of the Directive. [\(12\)](#)

The Administrative Judge's favorable decision cannot be sustained because the Judge made a favorable security clearance decision based on reasoning and conclusions that are arbitrary and capricious.

### **Conclusion**

Department Counsel has met its burden of demonstrating error below that warrants reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

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. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or

duress" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.5).

2. In support of this argument, Applicant's reply brief lists two decisions (00-0435.a1 and 98-067.h1). Those citations appear to contain typographical errors. However, the Board need not concern itself with identifying the correct citations because it concludes Department Counsel has failed to demonstrate the Administrative Judge erred by applying Personal Conduct Mitigating Condition 5 in this case.

3. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6 (under the Directive, security clearance adjudications are not left to the unfettered discretion of security clearance adjudicators, nor are they reduced to mechanical, formula adjudication; rather they require the exercise of sound judgment in the evaluation of the particular facts and circumstances of a case in light of the record evidence as a whole and the application of pertinent provisions of the Directive, including the Adjudicative Guidelines).

4. *See* Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.

5. *See, e.g. Center for Auto Safety v. Federal Highway Administration*, 956 F.2d 309, 314 (D.C. Cir. 1992)("An agency action is arbitrary and capricious if it rests upon a factual predicate that is unsupported by substantial evidence."); *Lauvik v. INS*, 910 F.2d 658, 660 (9th Cir. 1990) ("There is some point at which the evidence, though it exists, becomes so slight and so thoroughly outweighed by contrary evidence, that it would be an abuse of discretion to base a decision upon it."). *See also* ISCR Case No. 97-0595 (February 19, 1999) at p. 4 (a Judge's decision is arbitrary and capricious when "it offers an explanation for the decision based on findings that are not supported by the record evidence").

6. The Administrative Judge's conclusion that Applicant's motivation for making false statements under oath "is perplexing" implies the Judge did not accept Applicant's proffered explanation for his misconduct.

7. *See, e.g.*, ISCR Case No. 01-08410 (May 8, 2002) at p. 4; ISCR Case No. 00-0596 (October 4, 2001) at pp. 2-3; ISCR Case No. 99-0116 (May 1, 2000) at p. 2.

8. *See, e.g.*, ISCR Case No. 03-02486 (August 31, 2004) at p. 7 (noting that appealing party does not have to challenge an Administrative Judge's credibility determinations in order to raise claims of error).

9. *See, e.g.*, ISCR Case No. 02-20110 (June 3, 2004) at p. 6 n.12 ("The Board has repeatedly held that a credibility determination is not a substitute for record evidence.")(citing earlier Board decisions); ISCR Case No. 02-08032 (May 14, 2004) at p. 6 (a negative credibility determination is not a substitute for record evidence that an applicant used marijuana after a certain date).

10. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at p. 6; ISCR Case No. 02-14995 (July 26, 2004) at p. 6; ISCR Case No. 01-26893 (October 16, 2002) at p. 7.

11. Executive Order 10865, Section 2; Directive, Section 4.2. *See also* Directive, Adjudicative Guidelines, Item E2.2.2 (any doubt as to whether to grant access to classified information should be resolved in favor of the national security).

12. *See* Directive, Additional Procedural Guidance, Items E3.1.25 (requirements an Administrative Judge's decision must meet) and Item E3.1.32 (enumerating elements of review of an Administrative Judge's decision).