DATE: March 28, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-01578

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Gregory T. Sulzer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 2, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. Department Counsel requested a hearing in the case. On July 14, 2005, after the hearing, Administrative Judge James A. Young denied Applicant's request for a security clearance. Applicant timely appealed, and Department Counsel timely cross-appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (1) whether the Administrative Judge erred by finding Applicant falsified a security clearance application and his written statement to a Defense Security Service investigator; and (2) in the alternative, whether the Administrative Judge erred by concluding Applicant had not mitigated his conduct under Personal Conduct Mitigating Condition 4.

Department Counsel raised the following issue in its cross-appeal: whether the Administrative Judge erred by excluding certain record evidence based on his post-hearing ruling that Department Counsel had not made a timely request for a hearing.

We affirm the Administrative Judge's decision to deny the clearance.

I. Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge's findings of fact about Applicant's involvement in an auto accident in July 2000, and a civil lawsuit filed against Applicant in July 2002 by a pedestrian injured by the accident, are not at issue on appeal.

The Administrative Judge found Applicant falsified a security clearance application he completed in January 2003 by answering "NO" to Question 40 even though a civil lawsuit had been filed against him in July 2002.[(1)] The Judge also found Applicant falsified a written statement he gave to a Defense Security Service investigator in August 2003 that

described the July 2000 auto accident but failed to disclose the fact that two pedestrians had been struck in the accident and that fact that one of those pedestrians later sued him.

B. Discussion

On appeal, Applicant challenges the Administrative Judge's findings of falsification. In reply, Department Counsel contends the Judge's findings of falsification are supported by the record evidence.

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant argues Department Counsel did not establish a *prima facie* case of falsification, and that the Administrative Judge erred by dismissing his explanation for why he did not disclose in the August 2003 written statement the fact that he had been civilly sued in connection with the July 2000 auto accident. These arguments challenge the Judge's finding that he falsified the written statement.

The Administrative Judge's finding of falsification is a bit perfunctory, and relies heavily on his rejection of Applicant's explanation for the omission. Applicant argues the Judge should have accepted his explanation for the omission as credible and sufficient to rebut the allegation of falsification. Department Counsel argues the Judge's finding of falsification is sustainable, asserting the Judge did not err by rejecting Applicant's explanation because "no reasonable person, having been told by his civilian attorneys not to discuss a civil case, could interpret that to mean that it's all right to not mention the mere existence of the case on a security clearance application." Standing alone, proof of an omission is not enough to permit a Judge to find that Department Counsel met its burden of proving a controverted allegation of falsification. In this case, there is more than just the proof of the omission. Given the totality of the evidence about the July 2000 auto accident, the subsequent civil lawsuit filed against Applicant, Applicant's "NO" answer to Question 40 of the security clearance application, and the contents of the August 2003 written statement, it was not arbitrary or capricious for the Judge to conclude that Applicant's omissions about the civil lawsuit were suspect and not reasonable. Giving deference to the Judge's credibility determination, the Board cannot say it was unreasonable for the Judge to reject Applicant's explanation for the omissions.[(2)] Taken together, the totality of the record evidence concerning the omissions and the Judge's negative credibility determination are sufficient to support his finding of falsification.

II. Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Applicant also argues that the Administrative Judge erred by failing to conclude he had mitigated his conduct under Personal Conduct Mitigating Condition 4 ("Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided"). In support of this claim, Applicant asserts he reasonably relied on the advice of the insurance company lawyers when he answered "NO" to Question 40 of the security clearance application and omitted material facts about

the auto accident and subsequent civil lawsuit from his August 2003 written statement. Department Counsel persuasively argues that it was not arbitrary or capricious for the Judge to conclude that Applicant's omissions were not mitigated under Personal Conduct Mitigating Condition 4 because Applicant could not reasonably interpret the advice of insurance company lawyers as meaning he should conceal from the federal government the existence of the civil lawsuit filed against him.

III. Whether the Administrative Judge Adhered to the Provisions of the Directive

On cross-appeal, Department Counsel challenges the Administrative Judge's ruling that its request for a hearing was not timely, and that he would not consider the testimony of Department Counsel's witness, the document authenticated by the witness, Department Counsel's cross-examination of Applicant, or any argument referencing that evidence (Decision at 2). Department Counsel contends that its request for a hearing was timely under Directive ¶ E3.1.7,[(3)] that the Judge misinterpreted the meaning of ¶ E3.1.7, and the Judge's decision to not consider certain evidence developed at the hearing was arbitrary and capricious and contrary to law.[(4)]

The Administrative Judge misinterpreted and misapplied Directive ¶ E3.1.7. Department Counsel makes a persuasive argument (based on the plain language of that provision, canons of statutory construction and practical considerations) that the 20-day period in Directive ¶ E3.1.7 refers to the time when Department Counsel receives an applicant's answer to the SOR, as opposed to other components of DOHA. The plain language of Directive ¶ E3.1.7. belies the Judge's assertion that the Directive is unclear as to whether the Department Counsel's 20-day time period begins to run when the Applicant's answer is received by DOHA or received by Department Counsel. The Judge attempts to resolve the lack of clarity he perceives by stating categorically that "the better position is that the 20-day period begins to run when DOHA receives the answer." The Judge offers no basis, authority, or rationale in his decision as to why his interpretation is "the better position." Department Counsel, as opposed to other components of DOHA, is uniquely qualified to make the decision on behalf of the government concerning the desirability of holding a hearing. In this case, Applicant responded to the SOR in a letter dated June 17, 2004, at which time he requested his case be determined without a hearing. An administrative component of DOHA in a city geographically distant from the location of Department Counsel received Applicant's letter on July 7, 2004. The letter was then forwarded to the Director, DOHA on July 28, 2004, and the case was not assigned to Department Counsel until August 6, 2004. Department Counsel then made its request for a hearing on August 25, 2004-nineteen days after receiving the case and Applicant's answer and within the stated limit of Directive ¶ E3.1.7. By the Administrative Judge's interpretation of Directive ¶ E3.1.7., the 20-day time period expired many days before the answer first reached Department Counsel through a process of administrative routing of the case over which Department Counsel had no control. At no time in this case did Applicant object to the holding of a hearing and there is no evidence or proffer of evidence before the Board indicating that either party was prejudiced by the lapse of time prior to Department Counsel's election of its right to a hearing. The action of the Administrative Judge in denying Department Counsel a right granted to it under the Directive by excluding certain evidence developed at the hearing was arbitrary and capricious.

Department Counsel also persuasively argues that the Administrative Judge's execution of his decision to not consider certain evidence developed at the hearing was arbitrary, capricious, and contrary to law. As Department Counsel points out, the Judge did not enforce his ruling in the manner he said he would -- *i.e.*, reducing the record to create a situation where only evidence that would have come in via a File of Relevant Material (FORM) would be considered. A consistent, even-handed approach would have allowed for consideration of all of Applicant's documentary evidence, but not his direct testimony and not the testimony of his witnesses. Also, aside from the Judge's arbitrary and capricious enforcement of his ruling, the ruling itself is problematic because we cannot be sure exactly what the FORM evidence would have looked like had this case proceeded as a FORM case in the normal course. It would be speculative to assume what documents Department Counsel would have included in a FORM and more speculation to assume what response, if any, Applicant would have made to a FORM in a context where, unlike the present case, both parties clearly understood that the case would not be going to a hearing.

Although the Administrative Judge's challenged rulings are arbitrary, capricious, and contrary to law, the error does not warrant remand or reversal. Department Counsel, not Applicant, was the party substantially prejudiced by the Judge's error. Remand or reversal is not required to remedy the prejudicial harm to Department Counsel.

Order

The judgment of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic:

I agree with the lead opinion's conclusion that the Administrative Judge's finding of falsification is sustainable in light of the record evidence in this case. When the Board reviews a Judge's challenged findings of fact, the Board must decide whether there is sufficient record evidence to support the challenged findings of fact. In order to decide whether there is sufficient record evidence to support a challenged finding of fact, the Board does not have to decide what weight the Judge gave to particular pieces of record evidence or try to decide what particular combination of record evidence persuaded the Judge to make a particular finding of fact. All the Board has to do is decide whether the record evidence, as a whole, provides a sufficient evidentiary basis for a reasonable trier of fact to make the findings of fact that the Judge did. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Under that standard, the Judge's finding of falsification is sustainable, given the totality of the record evidence in this case. Applicant is incorrect in asserting that the Judge had to accept his explanation for the omissions or his denial of any intent to falsify. Applicant's explanation for the omissions and his denial of any intent to falsify were part of the record evidence that the Judge had to consider, but there is no legal requirement that the Judge had to accept Applicant's explanation for the omissions or his denial of any intent to falsify. It was legally permissible for the Judge to reject Applicant's explanation as not being credible in light the record evidence as a whole. Applicant's disagreement with the Judge's negative credibility determination -- standing alone -- is not enough to overcome the deference owed to such determinations under Directive, Additional Procedural Guidance, Item E3.1.32.1

I agree with the lead opinion's resolution of Applicant's claim of error concerning Personal Conduct Mitigating Condition 4.

I agree with my colleagues that the cross-appeal issue raised by Department Counsel has merit and demonstrates the Administrative Judge erred. I write separately to express my views about the cross-appeal issue.

In its cross-appeal brief, Department Counsel asks the Board to consider -- for limited procedural purposes -- two documents pertaining to the facts and circumstances surrounding its request for a hearing. Department Counsel makes that request based on its assertion that the documents were not made part of the case record during the proceedings before the Administrative Judge because neither the Judge nor Applicant had raised any concern about Department Counsel's request for a hearing. A review of the case record shows no indication that Applicant or the Judge raised a question about the timeliness of Department Counsel's request for a hearing. Accordingly, Department Counsel's request that the Board consider the two documents for the limited purpose of addressing the procedural question raised by the cross-appeal is reasonable.[(5)]

Department Counsel argues that the decision to request a hearing "is to be made by the two parties or principals involved" (Cross-Appeal Brief at 8), that the right to a fair hearing accrues to applicants and Department Counsel (Cross-Appeal Brief at 9-10), and that the Administrative Judge's exclusion of certain evidence prejudiced its rights under the Directive (Cross Appeal Brief at 5-6 and 9-10; Reply Brief at 4) and was arbitrary and capricious because it was directed at limiting Department Counsel without applying similar constraints on Applicant (Cross Appeal Brief at 11; Reply Brief at 4). As noted in the preceding paragraph, there is no indication in the case record that the Applicant raised any concern or objection about the timeliness of Department Counsel's request for a hearing. Absent an objection by Applicant to Department Counsel's request for a hearing, it is not clear what basis there is for the Judge to raise the matter as he did, especially without notice to the parties before his decision was issued. The right to request a hearing

belongs to the parties, not the Judge.[(6)] The parties are entitled to make their own decisions about invoking or waiving their rights under the Directive.[(7)] And, implicit in the concept of a fair proceeding[(8)] is the notion that the parties should receive reasonable notice of actions that could affect their rights (including procedural ones) and a reasonable opportunity to be heard before such actions are undertaken. Accordingly, it is not clear what legal basis there was for the Judge's post-hearing ruling. oreover, the Judge's ruling that he would not consider certain evidence was the functional equivalent of an *ad hoc* exclusionary rule. The exclusionary rule has its basis in criminal law cases and is not applied in civil cases or administrative proceedings.[(9)] In addition, the Directive has several provisions that show it favors the consideration of relevant and material information, not its exclusion.[(10)] Having conducted the hearing without objection from Applicant, and having received relevant and material evidence at the hearing, the Judge had no discernible legal basis for *sua sponte* holding that he would not consider various portions of the record evidence. Finally, I agree with the lead opinion's conclusion that the Judge also erred by enforcing his post-hearing ruling in an arbitrary and capricious manner that did not reach the result he claimed to be achieving.

For all the foregoing reasons, I conclude Department Counsel's cross-appeal issue has merit. When a party identifies prejudicial harm to its rights, the Board must decide what remedy is appropriate within the parameters of the Directive. In this case, Department Counsel was prejudiced by the Judge's post-hearing procedural ruling. Because the Judge's decision was unfavorable, a reversal would make Applicant the unwarranted beneficiary of an error prejudicial to Department Counsel. Moreover, a remand is not required because: (a) it is highly improbable that the Judge would change his unfavorable decision based on consideration of the previously excluded evidence presented by Department Counsel,[(11)] and (b) as a practical matter, a remand in this case would not serve to vindicate Department Counsel's procedural rights any more than the Board's holding that the Judge's post-hearing ruling was arbitrary, capricious, and contrary to law. Accordingly, I agree with the choice to affirm the decision below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Dissenting Opinion of Administrative Judge Michael Y. Ra'anan

As far as can be determined from the record in this case, no one had raised a claim or concern that there was anything improper about the May 26, 2005 hearing by the time that event was concluded and the Administrative Judge said, "Okay. Very well, the record is closed the hearing is adjourned. Thank You." (Hearing Transcript, page 80). Both parties had acted as one might expect in the context of a case with a hearing. The Judge had not put the parties on notice that he might later conclude that the proceedings suffered from a defect from their inception. It is not practicable to guess what tactical or strategic decisions either party might have made in light of the assumption that the case was to be decided based on a hearing.

The first identification of a problem is in the Administrative Judge's decision, wherein the Judge states that the Department Counsel's request for a hearing was 49 days after DOHA received Applicant's request for a determination without a hearing. The Judge makes the following decisions (some of which appear in the footnotes): 1) Department Counsel is required by Directive ¶ E3.1.7 to issue a request for a hearing within twenty days of DOHA's receipt of the Applicant's answer to the SOR (*vice* Department Counsel's receipt), 2) Department Counsel failed to establish she filed the request for a hearing within twenty days of her receipt or that DOHA received her request within the twenty day time period, 3) The Judge will not consider substantial portions of the hearing testimony and one exhibit because "This effectively limits the scope of information to that which would have been received had this matter been decided without hearing..."

I believe the Administrative Judge's first decision was not warranted under the circumstances. Nobody had raised the issue, the parties were not advised of his intent to address the issue or offered an opportunity to state their positions, and the record was already closed. I state no opinion as to whether, in a case where the issue is properly raised, the twenty

days is intended to commence at DOHA's receipt or Department Counsel's receipt. Indeed, it is not clear that the Judge, or the Board need have any say in the matter at all, since the prescriptive portion of ¶ E3.1.7 is aimed at the entity that assigns the case to the Administrative Judge. The Judge's second decision is an error, given that there is no basis in the record to believe that Department Counsel was on notice that she was expected to establish anything regarding the twenty day time period. The Judge's third decision raises novel issues within the industrial security clearance program. The Judge having decided, after the record is closed and without notice to the parties, that the case was improperly assigned to him for a hearing, fashioned a remedy for the problem. The Directive offers no remedy. (Sometimes, in law, as in life, no remedy is available for a violation). In this case, where it is not clear there was a violation, or (if there was one) who is responsible for addressing it, or by what authority the Judge can address it after the close of the record and without notice to the parties, the Judge devised a remedy that almost certainly prejudices *both* parties. (I note that Applicant, the seeming beneficiary of the Judge's ruling cites, on appeal, to testimony discarded by that ruling).

In light of the above, I believe the proper resolution is to remand the case for a decision to be issued based on the record as a whole. I conclude that, absent such a decision, it is premature to address the other issues raised on appeal.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. On appeal, Applicant argues the Administrative Judge erred in concluding that he had falsified his personnel security questionnaire concerning a July 2000 alcohol-related incident (SOR paragraph 1.a). Applicant also notes that there is a discrepancy between the Judge's finding for Applicant as to SOR paragraph 1.a (Decision at 5) and the Judge's formal finding against Applicant as to SOR paragraph 1.a (Decision at 6). The Board reads the Judge's decision as finding that Applicant did not falsify the security clearance application as alleged in SOR paragraph 1.a (Decision at 5), with the formal finding against Applicant as to SOR paragraph 1.a being a typographical error.

2. Apart from the deference owed to an Administrative Judge's credibility determination under Directive ¶ E3.1.32.1, there is no rule of law that compels a Judge to accept at face value an applicant's testimony or written statements. Rather, it is proper for a Judge to consider and weigh an applicant's testimony and written statements in light of the record evidence as a whole and the Judge's assessment of the credibility of the applicant's hearing testimony.

3. "If the applicant has not requested a hearing with his or her answer to the SOR and Department Counsel has not requested a hearing within 20 days of receipt of the applicant's answer, the case shall be assigned to the Administrative Judge for a clearance decision based on the written record."

4. Nothing in the case record indicates the Administrative Judge asked the parties to address his concerns about the timing of Department Counsel's request for a hearing.

5. *See, e.g.*, ISCR Case No. 03-00543 at 4 n.2 (App. Bd. May 21, 2004)("If an Administrative Judge were to preclude a party from having a meaningful opportunity to make an objection or raise a procedural matter on the record (either in writing or orally), then -- as a practical matter -- the only way that the aggrieved party could seek appellate review of the objection or procedural matter would be to go outside the record.").

6. *See, e.g.*, ISCR Case No. 01-20579 at 4 (App. Bd. Apr. 14, 2004).

7. DOHA proceedings are adversarial in nature. *See, e.g.*, ISCR Case No.02-09209 at 3-4 (App. Bd. Jun. 9, 2004). *See also* "Prehearing Guidance for DOHA Industrial Security Clearance Hearings at 1 (informing the parties that "The hearing is an adversarial proceeding in which the parties have the responsibility to present their respective cases."). Implicit in an adversarial proceeding is the premise that the respective parties are entitled, within the bounds of the law, to make their own tactical decisions on how to proceed with presenting their case and responding to the other party's case. The party that does not raise an objection may have made a conscious choice to not raise a particular objection, for

reasons that are not necessarily apparent to either the other party or the Judge. Even if the nonobjecting party is making a tactical mistake by not raising a particular objection, a Judge would risk becoming a surrogate advocate for the party making the tactical mistake if the Judge raises the objection *sua sponte*. And, a Judge may create otherwise avoidable appeal issues if either party concludes its rights were prejudiced by the Judge's *sua sponte* raising of an objection.

8. Directive, Additional Procedural Guidance, Item E3.1.10.

9. *See, e.g.*, DISCR Case No. 86-3479 at 2 (App. Bd. May 4, 1988) (citing various federal decisions). *Accord* ISCR Case No. 97-0184 at 2 (App. Bd. Jun. 16, 1998).

10. *See, e.g.*, Directive, Section 6.3; Directive, Adjudicative Guidelines, Item E2.2.1; Directive, Additional Procedural Guidance, Item E3.1.19.

11. *See, e.g.*, ISCR Case No. 00-0250 at 6 (App. Bd. Jul. 11, 2001)(discussing harmless error doctrine).