

DATE: March 6, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-03735

## **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) declined to grant Applicant a security clearance. On April 8, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline M (Misuse of Information Technology Systems) and Guideline E (Personal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 27, 2005, after the hearing, Administrative Judge David S. Bruce denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge erred in concluding that Applicant had falsified two security clearance applications in which Applicant omitted information related to his forced retirement from the Navy following allegations that he had used a government computer to access pornographic web sites and otherwise misused a government controlled computer system.

The dispositive findings of fact are as follows:

Applicant has been employed by a defense contractor as an engineer technician since October 2002. He was previously employed by other federal contractors since he retired from the Navy in September 2000. He served over 21 years in the Navy and retired at the paygrade of E-8, and was honorably discharged.

In November and December 1999, Applicant used a government computer system to access and share materials from pornographic web sites. As a result, Applicant was given the option by his commander to retire or face Captain's Mast (Article 15 Uniform Code of Military Justice) proceedings concerning his conduct. Applicant chose to retire and was transferred to another duty station pending discharge. In accordance with Applicant's agreement with his commander, there was no record made in Applicant's personnel file regarding the reason for his 'early' retirement.

In response to Question 20, "Your Employment Record," on Applicant's Security Clearance Applications (SF 86), dated December 11, 2002, [\(1\)](#) and April 16, 2003, Applicant answered "No" when asked whether he had ever left a job by mutual agreement or any other reason under unfavorable circumstances during the period covered by each application.

On appeal, Applicant does not challenge the Administrative Judge's findings and conclusions with respect to Guideline

M, but disputes the Judge's conclusions that he intentionally omitted the incident from his two security clearance applications. Applicant contends that his commanding officer had stated to him that upon retirement all records concerning the incident would be destroyed and no marks would appear in his service record. Since there was no recording of the reason for his retirement, Applicant believes that he should not be "punished" for omitting the incident from the applications.

The Administrative Judge considered the record evidence, including Applicant's credibility and demeanor, and also considered Applicant's circumstances under the whole person concept. An omission from a security clearance application is not necessarily indicative of falsification. Even if the Judge erroneously analyzed Applicant's credibility based on the assumption that the first security clearance application was dated December 11, 2000, and not December 11, 2002, the Judge's credibility determination is sustainable based on the record evidence. Accordingly, such an error is harmless because, upon consideration of the record as a whole, there is not a significant chance that, but for the error, the Administrative Judge would have reached a different result. *See, e.g.*, ISCR Case No. 00-0250 at 6 (App. Bd. Jul. 11, 2001). The Administrative Judge did not err in denying Applicant a clearance.

### **Order**

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

### **Concurring Opinion of Chairman Emilio Jaksetic:**

For the reasons that follow, I agree that the Administrative Judge's decision should be affirmed.

Even making allowances for Applicant's *pro se* status, I do not read Applicant's appeal brief as raising any identifiable claim of error with respect to the Administrative Judge's findings and conclusions under Guideline M (Misuse of Information Technology Systems). Therefore, I agree with my colleagues that Applicant's appeal is limited to raising claims of error under Guideline E (Personal Conduct).

I construe Applicant's brief as raising the following issues: (1) whether the Administrative Judge erred by finding that Applicant falsified two security clearance applications; (2) whether Applicant is being punished for failing to disclose that he had retired early from the Navy due to his misuse of a government computer to access pornographic Web sites; and (3) whether Applicant should be allowed to have a security clearance so he can continue to perform his duties.

As a preliminary matter, I note that Applicant's brief makes some factual assertions about discussing his case with his facility security officer. Those factual assertions constitute new evidence because they are offered to supplement the record evidence that was before the Administrative Judge. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29.

Whether there is sufficient record evidence to support the Administrative Judge's findings of fact is a question of law,

(2)

not one of fact. In considering whether a Judge's challenged findings are supported by the record evidence, I do not have to decide whether I agree with the Judge's particular findings of fact. All I have to do is consider 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. Given the totality of the record evidence in this case, the Judge had sufficient evidence to find that Applicant acted deliberately, and with the intent to conceal, when he failed to disclose that he had retired early from the Navy due to misuse of a government computer. (3)

Security clearance decisions are not intended to be punitive in nature. Rather, they are intended to ascertain whether or not it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant. In this case, I do not read the Administrative Judge's decision as being punitive in nature. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960)(security requirements include consideration of a person's honesty, judgment, and sense of his or her obligations), *aff'd*, 367 U.S. 886 (1961). Given the Judge's unchallenged findings about Applicant's misuse of a government computer (Guideline M) and the Judge's sustainable findings about Applicant's falsifications (Guideline E), the Judge had a rational, legally permissible basis for his unfavorable security clearance decision. Applicant's claim that he is being punished lacks merit.

The possible adverse effect that an unfavorable security clearance might have on Applicant's job situation does not demonstrate the Administrative Judge erred. A Judge must evaluate an applicant's conduct and circumstances to assess the applicant's judgment, reliability, and trustworthiness and reach a reasonable conclusion as to whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. The possibility of adverse job or career consequences following from an unfavorable security clearance decision is not relevant or material to a Judge's assessment of an applicant's security eligibility. An applicant is not made more, or less, suitable for a security clearance based on how a security clearance decision might affect the applicant. *See, e.g., ISCR Case No. 02-11570* at 8 (App. Bd. May 19, 2004). Because the possible adverse effects that an unfavorable security clearance decision might have on Applicant's job situation do not have any probative value as to whether he extenuated or mitigated the security concerns raised by his conduct under Guideline E and Guideline M, Applicant's claim on this point does not demonstrate the Judge erred.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Decision at 3 states that the date of this Application was December 11, 2000, but the record indicates that this Application, admitted as Government Exhibit 3, without objection by Applicant, should be December 11, 2002. *See* Transcript at 13-14. The Judge also partially analyzed Applicant's credibility on the erroneous assumption that Government Exhibit 3 was dated in December 2000.

2. *See, e.g., Greenhow v. Secretary of Health and Human Services*, 863 F.2d 633, 635 (9th Cir. 1988).

3. The Administrative Judge's reference to his credibility determination is a bit confusing because it does not appear to be related to his explanation for finding that Applicant engaged in falsification. However, since the Judge's findings of falsification do not appear to be dependent on his reference to Applicant's credibility, I conclude that -- to decide the issues raised on appeal -- I need not decide whether the Judge's reference to Applicant's credibility is error, harmless or not.