

DATE: September 14, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04543

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Jennifer R. Piper, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 30, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct). Administrative Judge Carol G. Ricciardello issued an unfavorable security clearance decision, dated March 15, 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 issue has been raised on appeal: whether the Administrative Judge erred by concluding Applicant's history of criminal conduct was not mitigated sufficiently to warrant a favorable security clearance decision. 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 Issue**

Whether the Administrative Judge erred by concluding Applicant's history of criminal conduct was not mitigated sufficiently to warrant a favorable security clearance decision. Applicant does not challenge the Administrative Judge's findings of fact about his history of criminal conduct, which included: (1) a conviction in 1998 for driving under the influence of alcohol and leaving the scene of an accident; (2) a conviction in 1998 for visible air pollution; and (3) a 2003 conviction for disturbing the peace and trespassing. However, Applicant contends the Judge erred by not concluding his history of criminal conduct was mitigated sufficiently to warrant a favorable security clearance decision. In support of this contention, Applicant argues: (a) Administrative Judges have issued favorable decisions in other DOHA cases involving more serious misconduct; and (b) the Judge should have concluded his conduct was mitigated under Criminal Conduct Mitigating Conditions 1, 2, 3, 4, and 6. For the reasons that follow, the Board concludes Applicant has not demonstrated the Judge erred.

(a) A decision by a Hearing Office Administrative Judge is not legally binding precedent that must be followed by the Judge's colleagues in other cases. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Judges). The Judge in this case was not bound to follow or distinguish decisions by her colleagues in other cases. Moreover, Applicant has not made any cogent argument as to why the Board should consider the cases cited in his appeal brief to be persuasive authority. Applicant's reliance on other DOHA hearing-level decisions does not demonstrate the Judge erred in this case.

(b) Application of the Adjudicative Guidelines is not reducible to a simple formula, but rather requires an Administrative Judge to exercise sound judgment within the parameters set by the Directive when deciding which Adjudicative Guidelines for or against clearance should be applied in a given case. *See, e.g.*, ISCR Case No. 02-00602 (March 3, 2004) at p. 5. For the reasons that follow, the Board concludes Applicant has not demonstrated the Judge erred in her evaluation of his case under the Criminal Conduct mitigating conditions.

It was not arbitrary or capricious for the Administrative Judge to conclude that Applicant's 2003 conviction was too recent to warrant application of Criminal Conduct Mitigating Condition 1. [\(1\)](#)

Because Applicant was convicted on three separate occasions, it is not tenable for him to contend the Administrative Judge should have applied Criminal Conduct Mitigating Condition 2. [\(2\)](#)

There is no record evidence that Applicant was coerced or pressured into committing the conduct that resulted in his second and third convictions. As to Applicant's first conviction, Applicant testified that he was forced to leave the scene of the accident because of the actions of other persons there. The Judge had to assess the credibility of that testimony, and she was not required, as a matter of law, to accept that testimony at face value or consider it in isolation from the rest of the record evidence. Considering the record as a whole, and giving due deference to the Judge's credibility determinations, [\(3\)](#) the Board concludes that Applicant has not demonstrated the Judge erred by not applying Criminal Conduct Mitigating Condition 3. [\(4\)](#)

Applicant's argument concerning Criminal Conduct Mitigating Condition 4 [\(5\)](#) is not persuasive. For the reasons discussed in the preceding paragraph, the Administrative Judge was not required to conclude that Applicant did not voluntarily commit the acts that resulted in his three convictions. Moreover, because of the Judge's conclusion about the recency of the 2003 conviction and her finding that Applicant was still on probation in connection with that conviction, the Judge was not compelled, as a matter of law or logic, to conclude that Applicant's criminal conduct was not likely to recur.

Although Applicant offered evidence in support of his claim of reform and rehabilitation, the Administrative Judge was not required to conclude that that evidence was sufficient to warrant application of Criminal Conduct Mitigating Condition 6. [\(6\)](#) Moreover, the Judge articulated a rational basis for her conclusion that application of Criminal Conduct Mitigating Condition 6 was not warranted in this case (*i.e.*, the recency of the 2003 conviction and the fact that Applicant was still on probation in connection with that conviction).

Given Applicant's history of criminal conduct, the Administrative Judge properly concluded that the burden shifted to Applicant to present evidence of refutation, extenuation or mitigation sufficient to warrant a favorable security clearance decision. [\(7\)](#) Applicant has not demonstrated that the Judge acted in a manner that is arbitrary, capricious, or contrary to law when she concluded that Applicant had not presented evidence that was sufficient to satisfy his burden of persuasion.

### Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).
2. "The crime was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.2).
3. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
4. "The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.3).
5. "The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.4).
6. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).
7. *See* Directive, Additional Procedural Guidance, Item E3.1.15.