

DATE: December 8, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0184

## APPEAL BOARD DECISION AND REVERSAL ORDER

### APPEARANCES

#### FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

#### FOR APPLICANT

Larry H. Lawton, Esq.

Administrative Judge Wilford H. Ross, issued a remand decision, dated August 17, 1998, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses the Administrative Judge's remand decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by finding that Government Exhibit 1 was not a true statement of facts; (2) whether the Administrative Judge's favorable credibility determination concerning Applicant is sustainable; and (3) whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law.

### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated April 7, 1997 to Applicant. The SOR was based on Criterion D (Sexual Behavior), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct). The SOR alleged that Applicant engaged in criminal sexual conduct in March 1986 and January 1996, and falsely denied to government investigators in November 1987 and December 1996 that he had engaged in such criminal conduct.

A hearing was held on August 26, 1997. The Administrative Judge issued a written decision, dated February 11, 1998 (hereinafter "Decision"), in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed the favorable Decision.

On June 16, 1998, the Board issued its Appeal Board Decision and Order for Remand (hereinafter "Remand Order"). In that decision, the Board held: (1) there was no factual or legal basis for the Administrative Judge to find that Government Exhibit 1, a statement Applicant gave to a federal investigator, was given under duress; (2) the Judge's favorable credibility determination of Applicant was flawed because it limited itself to Applicant's hearing testimony and ignored record evidence that clearly detracted from that testimony; (3) there was no basis in the record evidence for

the Judge's suggestion that the decision to investigate Applicant and issue the SOR were improperly motivated by impermissible animus against Applicant's sexual orientation; and (4) the Board could not sustain the Judge's favorable findings and conclusions that were based on his unsustainable finding that Government Exhibit 1 was given under duress. The Board rejected an argument by Department Counsel that the Judge could not find that Department Counsel presented evidence that supported the SOR allegations and also find that Applicant successfully rebutted or refuted the evidence against him. The Board remanded the case to the Judge for issuance of a new decision after correction of the errors identified by the Board.

The Administrative Judge issued a new decision, dated August 17, 1998 (hereinafter "Remand Decision"). In the Remand Decision, the Administrative Judge found that: (a) Government Exhibit 1 was not a true statement of facts because "[Applicant] may have felt under duress, intimidated, or just plain tired and said what he thought the agent wanted to hear in order to get out of [the interview]"; (b) Applicant did not engage in criminal sexual misconduct in March 1986 or January 1996; (c) Applicant did not falsify material facts in connection with his November 1987 written statement or during his December 1996 interview; and (d) apart from the falsity of Applicant's admissions (in Government Exhibit 1) to engaging in criminal sexual misconduct in 1986 and lying about it during earlier interviews, Applicant was a credible witness and his statements of innocence "were credible, consistent and believable." The Judge made formal findings for Applicant under Criteria D, E, and J, and concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is before the Board on Department Counsel's appeal from the Administrative Judge's favorable Remand Decision.

## Appeal Issues

### 1. Whether the Administrative Judge erred by finding that Government Exhibit 1 was not a true statement of facts.

Department Counsel contends the Administrative Judge erred by finding Government Exhibit 1 was not a true statement of facts. In support of this contention, Department Counsel argues: (a) the Judge's finding is based on reasoning that is contrary to the law of the case as set forth in the Board's Remand Order; and (b) the record evidence does not support the Judge's finding concerning the Government Exhibit 1. For the reasons that follow, the Board finds Department Counsel's contention persuasive.

As the trier of fact, the Administrative Judge has the primary responsibility for weighing the evidence and making findings on fact. Directive, Additional Procedural Guidance, Item 25. However, a Judge's factual findings are not immune from challenge on appeal. The Board must consider not only whether there is evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. Directive, Additional Procedural Guidance, Item 32.a. Whether there is sufficient evidence to support a Judge's findings is a question of law, not one of fact. *See, e.g.*, ISCR Case No. 97-0803 (June 19, 1998) at p. 3. The Board will not sustain factual findings that lack sufficient record evidence or which do not reflect a reasonable interpretation of the record evidence. *See, e.g.*, ISCR Case No. 97-0821 (October 15, 1998) at p. 3 (Board concluding there was insufficient record evidence to support Administrative Judge's finding of rehabilitation); ISCR Case No. 97-0625 (August 17, 1998) at p. 6 (Board refusing to sustain factual finding that "does not reflect a reasonable interpretation of the record evidence as a whole").

On remand, the Administrative Judge found "[Applicant] may have felt under duress, intimidated, or just plain tired and said what he thought the agent wanted to hear in order to get out of [the interview]." Furthermore, the Judge stated "[T]here are reasons, other than knowledge of guilt, that would persuade a person to [admit to criminal conduct]. I believe that is so in this case." As indicated in the Board's Remand Order, "[t]here is no record evidence showing that the actions of the Special Agent were coercive, oppressive o[r] reasonably calculated to overbear Applicant's will." Without any record evidence of conduct by the Special Agent that might be coercive, oppressive, or reasonably calculated to overbear Applicant's will, the Judge had no basis in the record evidence to find that Applicant's admissions of guilt in Government Exhibit 1 were not voluntary. *See* Remand Order at p. 3.

The Administrative Judge's analysis of Government Exhibit 1 makes sense only if he were using some form of subjective standard of duress. The Judge's use of a subjective standard of duress was error for a number of reasons. First,

the Judge's application of a subjective standard of duress is contrary to the law of the case as set forth in the Board's Remand Order. The Judge had no authority or discretion to disregard or ignore the Board's ruling concerning Government Exhibit 1. *See, e.g.*, DISCR Case No. 90-0279 (June 9, 1994) at p. 7 (Board ruling "is the law of the case and on remand is binding on both the parties and the Judge"); DISCR Case No. 92-0284 (November 8, 1993) at p. 2 ("The Judge has no authority or discretion to ignore, disregard, or refuse to comply with the Board's rulings and instructions."). *See also* Directive, Additional Procedural Guidance, Item 35 (on remand, the Judge "shall make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board").

Second, application of a subjective standard of duress is not appropriate in these proceedings. The United States has a compelling interest in protecting and safeguarding classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). 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. 508, 511 n.6 (1980); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Furthermore, the government can deny or revoke a security clearance where the applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3. It would be contrary to common sense and inconsistent with the national security interests of the United States to hold applicants to a subjective standard of conduct that would necessarily shift on a case-by-case basis and frequently would involve a standard below that of a reasonable person. Indeed, the Board has noted that an applicant's conduct must be evaluated against the standard of conduct expected of a reasonable person. *See* ISCR Case No. 97-0176 (January 22, 1998) at p. 3 ("For purposes of evaluating an applicant's security eligibility, the applicant's conduct must be evaluated against the standard of a reasonable person, not merely the applicant's subjective beliefs."). *See also* ISCR Case No. 97-0783 (August 7, 1998) at p. 3 (upholding Administrative Judge's conclusion that applicant's course of action in dealing with outstanding debts was not reasonable); ISCR Case No. 95-0578 (October 2, 1996) at p. 4 (noting "Applicant's repeated failure to take reasonable steps to deal with his state and federal income tax obligations was aggravating, not mitigating"). Furthermore, the Board has applied the reasonable person standard in evaluating an applicant's statements or omissions in falsification cases. *See* ISCR Case No. 97-0752 (December 4, 1998) at p. 4; DISCR Case No. 91-0109 (July 1, 1993) at p. 4. *Cf.* DOHA Case No. 95-0904 (November 15, 1996) at p. 3 (Administrative Judge's finding that applicant's explanation for omission of arrest was credible held to be unsustainable because applicant's explanation was not reasonable). It would not be appropriate to apply a different, lesser standard in evaluating an applicant's statements to determine whether they were voluntary. [\(1\)](#)

Third, the Administrative Judge's finding about Government Exhibit 1 would not be sustainable even if the Board were to evaluate that finding under the subjective standard of duress. Even under the line of cases applying the subjective standard of duress, there must be a showing of conduct on the part of another person that was directed at the person claiming he or she was coerced or placed under duress. *See, e.g.*, *United States v. Bedford Associates*, 657 F.2d 1300, 1312-14 and n.13 (2d Cir.1981), *cert. denied*, 456 U.S. 914 (1982); *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285, 1290-91 (8th Cir. 1977); *Laemmar v. J. Walter Thompson Co.*, 435 F.2d 680, 682 (7th Cir. 1970). *See also* 25 *Am. Jur. 2d*, Duress and Undue Influence, Section 11 at pp. 522-23 ("It is a subjective test, looking not to the nature of the threats, but rather to the state of mind induced in the victim. The threats must have been actually made and the person alleged to have been influenced must have believed they would be carried out, to constitute duress."). The purely subjective belief of a person, standing alone, is not enough to support a finding of duress. *See, e.g.*, 25 *Am. Jur. 2d*, Duress and Undue Influence, Section 3 at p. 513 ("The fear of financial embarrassment or reluctance to act will not alone constitute duress. And mere susceptibility to duress, without a wrongful or improper act or threat, will not establish duress."); 17 *C.J.S.*, Contracts, Section 168 at p. 945 ("Since duress must be imposed from without and cannot come from within, it cannot be the creature of the victim's own mind. Thus the mere fact that a contract was induced by fear does not mean it was induced by duress where the other party did not cause such state of mind."). In this case, there is no evidence of any improper conduct by the Special Agent or threat directed at Applicant during the interview or in connection with the preparation of Government Exhibit 1. Applicant's subjective feelings and beliefs are inadequate, as a matter of law, to support the Judge's finding about Government Exhibit 1, even under the subjective standard of duress.

For all the foregoing reasons, the Board concludes the Administrative Judge's finding about Government Exhibit 1 is arbitrary, capricious, and contrary to law.

2. Whether the Administrative Judge's favorable credibility determination concerning Applicant is sustainable.

Department Counsel contends the Administrative Judge's favorable credibility determination concerning Applicant is not supported by the record evidence as a whole. For the reasons that follow, the Board finds Department Counsel's contention persuasive.

On remand, the Administrative Judge complied with the Board's ruling by not limiting himself to Applicant's hearing testimony when assessing Applicant's credibility. However, that does not end the Board's analysis of Department Counsel's challenge to the Judge's credibility determination.

As indicated in the Remand Order (at p. 4), the deference owed to an Administrative Judge's credibility determinations does not immunize them from review. A credibility determination may be set aside or reversed if:

(a) it is unreasonable, contradicts other findings, or is based on an inadequate reason, *N.L.R.B. v. CWI of Maryland, Inc.*, 127 F.3d 319, 326 (4th Cir. 1997); *Asarco, Inc. v. N.L.R.B.*, 86 F.3d 1401, 1406 (5th Cir. 1996); *Bobo v. U.S. Department of Agriculture*, 52 F.3d 1406, 1416 (6th Cir. 1995); *3-E Co., Inc. v. N.L.R.B.*, 26 F.3d 1, 3 (1st Cir. 1994); *N.L.R.B. v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994);

(b) it is "patently without basis in the record," *Caterair International v. N.L.R.B.*, 22 F.3d 1114, 1120 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 575 (1994); or

(c) it is "inherently improbable or discredited by undisputed fact," *Washington v. Garrett*, 10 F.3d 1421, 1430 (9th Cir. 1993).

Furthermore, a reviewing tribunal owes no deference to a credibility determination by a hearing officer when "objective inconsistency or fundamental implausibility is at issue." *Dray v. Railroad Retirement Board*, 10 F.3d 1306, 1314 (7th Cir. 1993).

As the Administrative Judge recognized, the damaging admissions Applicant made in Government Exhibit 1 could not be reconciled with Applicant's other statements, written and testimonial. To find Applicant credible, the Judge had to find Applicant's damaging admissions in Government Exhibit 1 were not truthful. As discussed earlier in this decision, the Judge's rationale for rejecting the truth of the damaging admissions Applicant made in Government Exhibit 1 lacks a rational basis in law and the record evidence. Since that rationale was pivotal to the Judge's favorable assessment of Applicant's credibility, the Judge's credibility assessment is seriously undermined.

The Administrative Judge's favorable credibility assessment is not saved by his statement that "[T]here are reasons, other than knowledge of guilt, that would persuade a person to [admit criminal conduct]. I believe that this is so in this case." The first sentence is a general statement about possibilities that is speculative and proves nothing about this particular case. The second sentence is a conclusion by the Judge that lacks a rational basis in law and record evidence.

The Administrative Judge's favorable assessment of Applicant's credibility is based, in large part, on reasoning that does not find support in the law or the record evidence. Since the Judge's reasons for discounting Government Exhibit 1 are not supported by the law or the record evidence, the Judge was left with an objective inconsistency between the damaging admissions made by Applicant in that written statement and Applicant's other denials of wrongdoing. Considering the record as a whole, Applicant's explanation for his damaging admissions in Government Exhibit 1 is improbable and implausible.

3. Whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. Department Counsel makes several arguments to support its contention that the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law: (a) it was arbitrary and capricious for the Judge to rule that Department Counsel made a *prima facie* case under Criteria E, D, and J and then conclude that the factual predicates for those Criteria were not present in the case; (b) it was arbitrary and capricious for the Judge to rule that Department Counsel made a *prima facie* case under Criteria E, D, and J and then fail to apply any of the Adjudicative Guidelines' Disqualifying Conditions that pertain to those Criteria; (c) the Judge's favorable conclusions under Criteria E, D, and J are contrary to the record evidence; (d) the Judge failed to comply with the law of the case in connection with his evaluation of Government Exhibit 1; (e) the Judge erred by failing to give weight to the admissions of criminal conduct Applicant made in Government Exhibit 1;

(f) the Judge erred by holding against Department Counsel its decision to not amend the SOR at the hearing; and (g) the Judge's favorable decision fails to articulate a satisfactory explanation for its conclusions, does not consider relevant factors, reflects a clear error of judgment, fails to consider an important aspect of the case, and offers explanations that run contrary to the law of the case. The Board will address these arguments in turn.

(a) Department Counsel's first argument is merely a variation of an argument Department Counsel made on the first appeal that was specifically rejected by the Board (Remand Order at pp. 5-6). Department Counsel's reliance on an argument specifically rejected during the first appeal of this case constitutes an abuse of the appeal process. A party has no right to claim an Administrative Judge erred on remand based on an argument that was made by the party and rejected by the Board on an earlier appeal in the same case.

(b) Department Counsel's second argument is predicated on its first argument. Since the predicate of Department Counsel's second argument lacks merit, the second argument collapses and does not warrant further discussion.

(c) Department Counsel's third argument is a variation of Department Counsel's last argument. It will be discussed in connection with that last argument.

(d) As discussed earlier in this decision, the Administrative Judge's evaluation of Government Exhibit 1 was contrary to the law of the case. It is arbitrary, capricious, and contrary to law for a Judge to fail to comply with the law of the case on remand.

(e) An Administrative Judge cannot ignore an applicant's admissions of wrongdoing. *See, e.g.*, ISCR Case No. 95-0176 (August 15, 1996) at p. 2. Because there is no basis in law or the record evidence for the Judge to dismiss Applicant's admissions of wrongdoing in Government Exhibit 1, it was arbitrary, capricious, and contrary to law for the Judge to not give weight to those admissions.

(f) At the hearing, the Administrative Judge asked Department Counsel if he wanted to amend the SOR to allege that Applicant falsified Government Exhibit 1. Department Counsel declined to do so. In footnote 4 of the Remand Decision, the Judge relies on Department Counsel's decision not to amend the SOR to support his analysis of Government Exhibit 1. Department Counsel cites a prior Board decision (ISCR Case No. 95-0178, March 29, 1996) in support of its contention that the Judge erred.

This case present a situation that falls within the reasoning set forth in the following passage from that prior Board decision:

"This case presents an unusual fact pattern. Here, Applicant raised an affirmative defense grounded in an assertion of alternate (but uncharged) misconduct similar to that in the SOR, namely his claim to have made false statements to the DIS during his security clearance investigation, but not those specifically alleged in the SOR. If the Judge finds that affirmative defense of alternative misconduct believable, then it would be unduly stringent for the Judge to ignore such admitted misconduct in deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See* DISCR Case No. 87-1028 (March 14, 1988), *aff'd*, (December 23, 1988). After all, Applicant was on fair notice that the Government was seeking to deny or revoke his access to classified information based on, among other things, alleged falsification during a security clearance investigation. It would not comport with the common sense requirement of Section F.3. for Applicant to claim successfully that the Government's security clearance concerns growing out of his alleged falsifications are unjustified because they missed his genuine falsifications. To then have the Judge ignore Applicant's claim of his own misconduct on the basis that Department Counsel did not move to amend the SOR to contradict its own case against Applicant would further defeat the objectives of comportment with common sense and seeking a result clearly consistent with the national interest. Furthermore, the Judge may consider uncharged acts in deciding whether an applicant is a credible witness. *Cf.* ISCR Case No. 94-1159 (December 4, 1995) at p. 5." ISCR Case No. 95-0178 (March 29, 1996) at pp. 5-6.

The next to last sentence of the quoted passage has a footnote 3 that reads as follows: "Department Counsel reasonably can be held to a duty to move to amend an SOR to include new allegations based on evidence adduced at the hearing when such amendments do not require Department Counsel to abandon existing SOR allegations that it has presented evidence to prove. However, it is not reasonable to hold Department Counsel to the dilemma of trying to guess whether

the Judge believes Department Counsel's case in support of the SOR allegations or an applicant's affirmative defense that admits similar but uncharged misconduct in order to avoid the gravamen of the specific SOR allegations." ISCR Case No. 95-0178 (March 29, 1996) at p. 6 n.3.

On remand, the Administrative Judge committed the kind of errors identified in the cited Board decision.

(g) Department Counsel persuasively argues that the Administrative Judge's favorable conclusions under Criteria E, D, and J are contrary to the record evidence. The Judge's favorable conclusions under Criteria E, D, and J are predicated on his unsustainable finding that Government Exhibit 1 does not reflect a true statement of facts. As noted in the Remand Order (at p. 5 n.3), "[a]n Administrative Judge decision can be arbitrary and capricious if: 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." The Judge's Remand Decision is arbitrary and capricious because it: (1) does not comply with the law of the case as set forth in the Board's Remand Order; (2) fails to articulate an explanation for its conclusions that is based on pertinent legal principles and the record evidence; (3) offers explanations for the decision that run contrary to the weight of the record evidence; and (4) does not reflect a common sense decision within the meaning of Section F.3. of the Directive.

One argument raised in Applicant's reply brief warrants separate discussion. In general, Applicant contends the Administrative Judge's Remand Decision is correct and should be affirmed. Applicant argues, in the alternative, that even if the Judge's Remand Decision is in error, the Board should not reverse, but rather should remand the case to the Judge for consideration in light of the fact that "Even the President of the United States/Commander-in-Chief of the Armed Forces claims a right to keep his job even when he has participated in sex related incidents and lied about it." (Applicant's Reply Brief at pp. 3-4).

These proceedings are not the proper forum to address, directly or indirectly, the merits of matters that are committed to the authority and jurisdiction of another governmental body. *Cf.* ISCR Case No. 96-0525 (June 17, 1997) at pp. 3-4 and n. 4 (unless a recognized exception to collateral estoppel doctrine is applicable, DOHA must give "full recognition and respect" to a judgment obtained in state or federal court). The relief Applicant seeks would require DOHA to incorporate into its decision making process matters totally outside its authority and jurisdiction. Such relief cannot be granted.

## **Conclusion**

Department Counsel has met its burden of demonstrating errors that warrant reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's August 17, 1998 Remand 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 criminal cases relied on by the Board (Remand Order at p. 3) apply a reasonable person standard to evaluate the voluntariness of confessions. In addition, those cases involve situations similar to Special Agent interviews of applicants. As such, they provide a better analytical framework for evaluating the voluntariness of applicants' statements to investigators than civil cases that involve business dealings between private parties.