

DATE: February 19, 1999

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0595

## APPEAL BOARD DECISION AND REMAND ORDER

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

#### *Pro Se*

Administrative Judge John R. Erck issued a remand decision, dated May 29, 1998, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Order for Remand.

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

Applicant's appeal presents the following issues: (1) whether the Administrative Judge failed to comply with the Board's ay 22, 1998 Decision and Remand Order; and (2) whether the Administrative Judge's Remand Decision is arbitrary, capricious, or contrary to law.

#### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated September 2, 1997. The SOR was based on Criterion H (Drug Involvement) and Criterion E (Personal Conduct).

A hearing was held on December 17, 1997. The Administrative Judge subsequently issued a written decision in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. That unfavorable decision was appealed by Applicant. On May 22, 1998, the Board issued a Decision and Remand Order (Remand Order), in which it concluded the Administrative Judge made errors that warranted remand.

The Administrative Judge issued a Remand Decision, dated May 29, 1998. The Remand Decision was sent to the attorney who had represented Applicant at the hearing level, but who did not represent Applicant on appeal. The attorney who represented Applicant on the first appeal did not get a copy of the Remand Decision until September 9, 1998.

On September 24, 1998, the Board received a letter dated September 23, 1998. The Board Chairman construed the September 23, 1998 letter as a notice of appeal and accepted it late because the Remand Decision had not been sent to

the proper attorney.

## Appeal Issues

### 1. Whether the Administrative Judge failed to comply with the Board's May 22, 1998 Decision and Remand Order.

Applicant asserts the Remand Decision is based on an erroneous finding of falsification that demonstrates the Administrative Judge repeated the error identified by the Board on the first appeal. Applicant also asserts the Judge's Remand Decision constitutes an "abuse of the system" that is an "injustice" to Applicant. These assertions raise the issue of whether the Administrative Judge did not comply with the Board's Remand Order.

On the first appeal, the Board concluded the Administrative Judge erred because: (a) the Judge decided to not apply Personal Conduct Mitigating Guideline 3 to Applicant's case based on an unsustainable finding of falsification, and reasoning that was arbitrary and capricious; and (b) the Judge used language that indicated he was judging Applicant's conduct against an impermissible *per se* rule. For the reasons that follow, the Board concludes the Judge committed a variation of his first error when he issued the Remand Decision.

On remand, the Administrative Judge did not repeat his unsustainable finding that Applicant falsified the SF 86 (Government Exhibit 1) by failing to disclose his cocaine use that occurred more than seven years earlier. However, the Judge proceeded to justify his adverse conclusions about Applicant's proven SF 86 falsification (*i.e.*, failure to fully disclose his past marijuana use) by relying, in part, on an unsustainable finding that Applicant falsified the SF 86 by denying that he had purchased marijuana.

The Administrative Judge's finding that Applicant falsified the SF 86 by denying he had purchased marijuana is not supported by the record evidence. The Judge's finding flies in the face of the plain language of the Question 24.c. of the SF 86, which reads: "In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis *for your own intended profit or that of another?*" (Government Exhibit 1 at p. 8)(emphasis added). Although there is record evidence that Applicant occasionally purchased marijuana for his personal use, there is no record evidence that Applicant ever purchased marijuana or any other illegal drug for his profit or the profit of another. Given the record evidence in this case, the Judge's finding about the falsification of Question 24.c. is unsustainable.

The Administrative Judge issued a new decision that did not commit errors identical to those identified by the Board in its Remand Order. However, the Judge repeated his mistake of trying to base his adverse conclusions, in part, on a finding of falsification that is not supported by the record evidence. That mistake is simply a variation of the Judge's earlier reliance on an unsustainable finding of falsification about cocaine use. The Judge's error deprived Applicant of a new decision in violation of Item 35 of the Additional Procedural Guidance. *See* Directive, Additional Procedural Guidance, Item 32.b. ("The Appeal Board shall . . . determine whether or not: . . . The Administrative Judge adhered to the procedures required by . . . this Directive.").

The right of the parties to due process is not limited to receiving due process at the hearing level. The right to due process also includes the right of the parties to receive due process at the appeal level, including the right not to be deprived of the benefit of legal rulings won on appeal once a case has been remanded to a Judge under Item 35 of the Additional Procedural Guidance. Accordingly, the Board must give strict scrutiny to a remand decision that fails to reflect compliance with the Board's rulings.

Under the harmless error doctrine, the Board could affirm the Administrative Judge's Remand Decision if it concluded that there is not a significant chance that the identified errors fatally affected an otherwise sustainable decision. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 6. Considering the Remand Decision as a whole, the Board concludes the Administrative Judge's errors in this case are not harmless. The Judge based his adverse conclusions, in part, on a finding that Applicant used marijuana "as often as weekly between 1984 and 1995 -- meaning that he could have actually used it 400 times or more." However, that finding is not supported by the record evidence. Even if the record evidence is viewed in the light most unfavorable to Applicant and the Judge was justified in questioning the credibility of Applicant's testimony, the record evidence could support a finding that Applicant used marijuana a maximum of twice a month for 12 years, a total of 288 times. While that amount of marijuana use is obviously not trivial, it is clearly short of the Judge's "400 times or more" finding. The Judge's finding of "400 times or more" does not reflect a

reasonable or plausible interpretation of the record evidence in this case. The Board will not sustain such a finding on appeal. Directive, Additional Procedural Guidance, Item 32.a. Viewed in conjunction with the Judge's erroneous finding about falsification of Question 24.c. of the SF 86, the Judge's erroneous finding about the frequency of Applicant's marijuana use undercuts the persuasiveness of the Judge's reasoning and his analysis of Applicant's case.

2. Whether the Administrative Judge's Remand Decision is arbitrary, capricious, or contrary to law. Applicant's appeal arguments also raise the issue of whether the Administrative Judge's Remand Decision is arbitrary, capricious, or contrary to law.

The Administrative Judge's Remand Decision is arbitrary and capricious because: (a) it fails to articulate a satisfactory explanation for its conclusions; and (b) it offers an explanation for the decision based on findings that are not supported by the record evidence. *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 6; DISCR Case No. 94-0215 (April 13, 1995) at pp. 4-5. And, the Judge's Remand Decision is contrary to law for the reasons stated in the Board's discussion of the first appeal issue.

## **Conclusion**

Applicant has met his burden on appeal of demonstrating error that warrants remand. Pursuant to Item 33.b. of the Additional Procedural Guidance, the Board remands the case to the Administrative Judge. After correction of the errors identified in this decision, the Judge must issue a new decision consistent with the requirements of Item 35 and 25 of the Additional Procedural Guidance.

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