

DATE: May 19, 2000

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 99-0500

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

William S. Fields, Esq., Department Counsel

#### **FOR APPLICANT**

Thomas J. Gagliardo, Esq.

Administrative Judge Robert R. Gales issued a decision, dated November 29, 1999, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by considering Applicant's drug use older than the seven-year limitation set forth in the security questionnaire Applicant completed, and by finding Applicant was a polysubstance abuser; (2) whether the Administrative Judge's decision was unlawfully based on Criterion H, which was not in the Statement of Reasons issued to Applicant; and (3) whether the Administrative Judge erred by not finding Applicant's falsifications were mitigated.

### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 23, 1999 to Applicant. The SOR was based on Criterion E (Personal Conduct). Applicant submitted an answer to the SOR, in which he indicated he wanted a hearing in his case. Applicant later withdrew his request for a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to it. The case was later assigned to the Administrative Judge for determination.

The Administrative Judge issued a written decision, dated November 29, 1999, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's unfavorable security clearance decision.

### **Appeal Issues**

1. Whether the Administrative Judge erred by considering Applicant's drug use older than the seven-year limitation set forth in the security questionnaire Applicant completed, and by finding Applicant was a polysubstance abuser. In the decision below, the Administrative Judge discussed Applicant's history of drug abuse, including his use of marijuana as

early as 1975-1976, and characterized Applicant as a polysubstance abuser. Applicant contends the Judge erred because: (a) any drug abuse by Applicant prior to the seven-year period indicated in the security questionnaire drug question <sup>(1)</sup> was irrelevant to the case; and (b) the Judge's characterization of Applicant as a polysubstance abuser was not supported by the record evidence.

The Administrative Judge's findings about Applicant's drug abuse history go beyond what is relevant and material to the SOR allegations against Applicant, which focus on Applicant's falsifications about his drug abuse history, not his drug abuse history. <sup>(2)</sup> However, when the Judge considered pertinent Adjudicative Guidelines and set forth his conclusions about the negative security significance of Applicant's conduct, the Judge properly focused on Applicant's falsifications in 1996 and 1998, and not Applicant's drug abuse history. Viewed in the light of the Judge's decision in its entirety, the Judge's findings about Applicant's drug abuse history are not harmful error. *See, e.g.*, ISCR Case No. 99-0417 (February 24, 2000) at p. 5 ("An Administrative Judge's decision is not measured against a standard of perfection."); ISCR Case No. 98-0619 (September 10, 1999) at p. 8 (error is harmless when there is not a significant chance that it fatally affects an otherwise sustainable decision). Similarly, the Judge's characterization of Applicant as a polysubstance abuser was harmless error.

2. Whether the Administrative Judge's decision was unlawfully based on Criterion H, which was not in the Statement of Reasons issued to Applicant. Applicant correctly notes the Administrative Judge's Formal Findings section cites Criterion H, not Criterion E. Applicant contends the Judge's citation of Criterion H and his findings about Applicant's drug abuse history, taken together, demonstrate he improperly found against Applicant based on a Criterion not alleged in the SOR.

In general, an Administrative Judge cannot base an adverse security clearance on matters not alleged in the SOR issued to an applicant unless the SOR has been amended. *See, e.g.*, ISCR Case No. 97-0595 (May 22, 1998) at p. 6. The Judge's citation of Criterion H in the Formal Findings section of the decision below appears to be a simple typographical error. Such a typographical error does not warrant remand or reversal. *See, e.g.*, DISCR Case No. 94-0164 (January 19, 1995) at pp. 5-6 (typographical error in Formal Findings section of Judge's decision is harmless error). The Judge's discussion of Applicant's drug abuse history is not a mere typographical error. However, as indicated earlier in this decision, the Judge's discussion and analysis of the negative security implications of Applicant's conduct addressed Applicant's falsifications, not his drug abuse. Considering the totality of the decision below, the Judge's discussion of Applicant's drug abuse history does not persuade the Board that the Judge based his adverse security clearance decision on a Criterion not alleged in the SOR.

3. Whether the Administrative Judge erred by not finding Applicant's falsifications were mitigated. The Administrative Judge concluded that Applicant's 1996 and 1998 falsifications were not extenuated or mitigated. Applicant contends the Judge erred by failing to apply Personal Conduct Mitigating Conditions E2.A5.1.3.2, <sup>(3)</sup> E2.A5.1.3.3, <sup>(4)</sup> and E2.A5.1.3.5. <sup>(5)</sup> Applicant's contention lacks merit.

Applicant's reliance on Personal Conduct Mitigating Condition E2.A5.1.3.2 is misplaced. Given the facts and circumstances of this case, Personal Conduct Mitigating Condition E2.A5.1.3.3 is more appropriate to consider than Personal Conduct Mitigating Condition E2.A5.1.3.2. *See, e.g.*, ISCR Case No. 99-0417 (February 24, 2000) at p. 3. Even if the Board were to assume solely for purposes of deciding this appeal that Personal Conduct Mitigating Condition E2.A5.1.3.2 could be considered by the Judge, it was proper for the Judge to not apply it given the particular facts and circumstances of Applicant's case. Specifically, Applicant engaged in two separate instances of falsification (once in 1996 and once in 1998). Accordingly, this case does not involve "an isolated incident" of falsification within the meaning of E2.A5.1.3.2. Furthermore, the Judge had a rational basis for concluding Applicant's 1998 falsification was recent in time.

Applicant's reliance on Personal Conduct Mitigating Condition E2.A5.1.3.3 is not well-founded. The record evidence supports the Administrative Judge's finding that Applicant engaged in deliberate falsifications in 1996 and July 1998 and did not disclose his drug abuse history to the government until he was interviewed in March 1999. Applicant's disclosures in March 1999 were not "prompt" within the meaning of Personal Conduct Mitigating Condition E2.A5.1.3.3. *See, e.g.*, ISCR Case No. 99-0201 (October 12, 1999) at pp. 3-4 (discussing what constitutes a prompt,

good-faith disclosure).

Applicant's argument concerning Personal Conduct Mitigating Condition E2.A5.1.3.5 is not persuasive. The Administrative Judge specifically listed that mitigating Condition as being pertinent to an evaluation of Applicant's case. The mere presence or absence of Adjudicative Guidelines for or against clearance is not solely dispositive of a case. Rather, a Judge must consider applicable Adjudicative Guidelines in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0012 (December 1, 1999) at pp. 3-4. The Judge was not required to render a favorable security clearance decision merely because he indicated that Personal Conduct Mitigating Condition E2.A5.1.3.5 was pertinent. A Judge must consider the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6. Applicant's arguments do not persuade the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted a security clearance. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Applicant's falsifications concerning his past drug abuse history in 1996 and 1998 provide a rational basis for the Administrative Judge's adverse conclusions about his security eligibility. *See, e.g.*, ISCR Case No. 99-0431 (January 28, 2000) at p. 3.

### Conclusion

Applicant has failed to meet his burden of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's November 29, 1999 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. Question 27 reads, in pertinent part: "**Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs** Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance . . . or prescription drugs."

2. Given the SOR allegations in this case, Applicant's drug abuse history is relevant only to the extent it pertains to Applicant's falsifications in 1996 and 1998.

3. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct

information voluntarily."

4. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

5. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."