

DATE: December 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03357

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 27, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision, dated May 23, 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 is raised on appeal: whether the Administrative Judge's security clearance decision is arbitrary, capricious, or contrary to law. 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 ⁽¹⁾

Whether the Administrative Judge's security clearance decision is arbitrary, capricious, or contrary to law. In his appeal, Applicant disagrees with the Judge's adverse findings and conclusions about his personal conduct. The instances of misconduct alleged in paragraph 1.a of the SOR were the subject of an Air Force investigation against him conducted in 1996. Applicant argues that the allegations were made by persons who were trying to cause him to lose his job and that the Air Force investigators relied on the statements of persons who were hostile to Applicant and did not interview individuals who worked most closely with him. He maintains that the majority of information obtained in the investigation was "hearsay, double hearsay or what individuals concluded from what others were saying." Applicant points out that the investigation was closed due to insufficient evidence and that he was never charged with any crime pursuant to the investigation. He maintains that there is insufficient evidence in the Air Force investigation to establish unfavorable findings under the SOR allegations. Applicant cites letters of recommendation, awards, and other favorable materials pertaining to his career which he submitted as part of his response to the SOR. Applicant offers an explanation for his failure to list on his security clearance application a series of EEO grievances and a federal law suit related to his job, and indicates that he held a security clearance in the military and is still qualified to hold one. The Board interprets Applicant's arguments as raising the issue of whether the Administrative Judge's security clearance decision is arbitrary, capricious, or contrary to law.

On appeal, Applicant challenges the Administrative Judge's findings and argues that the information contained in the Air Force investigation constitutes insufficient evidence upon which to base adverse formal findings under paragraph 1.a. of the SOR. The Board must review an Administrative Judge's factual findings to determine whether they "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." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Item E3.1.32.1 language reflects one version used by federal courts to describe the substantial evidence test, which is less than the preponderance of the evidence. *See, also, Department of Navy v. Egan*, 484 U.S. 518, 531 (1988)(security clearance decisions not based on preponderance of the evidence standard); DISCR Case No. 90-1054 (July 20, 1992) at

p. 4 (standard of proof in industrial security cases is less than the preponderance of the evidence). Considering the record as a whole, there is substantial record evidence (including admissions by Applicant) to support the Administrative Judge's adverse findings under paragraph 1.a. of the SOR.

There is a rebuttable presumption that the Administrative Judge has considered all the record evidence. Applicant's disagreements with the Judge's findings, standing alone, are not sufficient to rebut that presumption. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 4. Moreover, there is no presumption of error below, and a judge's weighing of the record evidence will not be disturbed on appeal, absent a showing that the Judge weighed the evidence in an arbitrary and capricious manner. Here, Applicant denied the allegations against him and submitted a series of commendations, awards, etc. to support his denials. The Judge had to consider all the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Applicant's ability to argue for a more favorable weighing of the record evidence is not sufficient to demonstrate error. *Id* at p. 4. Applicant's failure to be prosecuted for any of the allegations against him did not prevent the Judge from finding against him as to those allegations. ISCR Case No. 02-06926 (November 25, 2003) at p. 5.

On appeal, Applicant asserts that he never attempted to deliberately conceal the fact that he was a party to several civil lawsuits, including one federal court civil action, that he did not list on his security clearance application and did not mention to the government investigator at the time of his security clearance interview. Applicant's statements about his state of mind when he completed the security clearance application and interviewed with the agent are relevant and material evidence that the Administrative Judge had to consider. However, those statements were not binding on the Judge; rather, the Judge had to consider Applicant's statements in light of his assessment of Applicant's credibility and the record evidence as a whole. Considering the record as a whole, the Board concludes the Judge's finding of falsification reflects a reasonable interpretation of the record evidence that is sustainable. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Administrative Judge's finding of falsification is erroneous. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 4.

Applicant argues that he held a security clearance in the military and has not mishandled classified material. The government is not required to wait until an applicant has mishandled or failed to safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Furthermore, nothing in Executive Order 10865 or the Directive requires a showing that there has been a security violation before an adverse decision can be made. Even if there has been no showing that an applicant has committed a security violation, an Administrative Judge must consider the record evidence as a whole to determine whether an applicant possesses or lacks the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 02-03414 (November 20, 2003) at p. 5. Given the record evidence in this case, the Judge's findings and conclusions provide a rational basis for the Judge's adverse conclusions under Guideline E, and provide a sufficient basis for his adverse security clearance decision.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's decision.

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Judge found in Applicant's favor on subparagraphs 1.a(2), 1.a(3), and 1.b. The Judge's findings and conclusions regarding those areas are not at issue on appeal.