

DATE: September 17, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10347

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Dennis J. Sysko, Esq.

Administrative Judge Roger C. Wesley issued a decision dated April 30, 2002, 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 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 evidence not in the record; (2) whether Applicant was denied due process and a fair and impartial hearing; and (3) whether the Administrative Judge's 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 November 28, 2001. The SOR was based on Guideline E (Personal Conduct) and Guideline F (Financial Considerations). A hearing was held on March 1, 2002. A decision dated April 30, 2002 was issued in which the Administrative Judge found for Applicant on Guideline F but against him on Guideline E. The case is before the Board on Applicant's appeal of that adverse decision. The Administrative Judge's favorable findings under Guideline F are not an issue on appeal.

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. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

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 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. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

Appeal Issues

1. Whether the Administrative Judge erred by considering evidence not in the record. The opening paragraph of the Conclusions section in the decision below makes reference to alcohol-related charges and a conviction. There is no record evidence regarding such matters nor any such allegations in the SOR. The subject is not discussed elsewhere in the Administrative Judge's decision. On appeal, Applicant argues that the reference to alcohol-related charges indicates the Administrative Judge considered evidence not in the record. The Board concludes that the Judge's reference to alcohol-related charges is error because there is no record evidence that Applicant was ever involved in alcohol-related incidents. However, the error is harmless because: (a) the subject is not raised elsewhere in the Judge's decision; and (b) considering the Judge's decision in its entirety, there is no indication that the Judge considered evidence of alcohol-related charges when making his findings and conclusions.

2. Whether Applicant was denied due process and a fair and impartial hearing. Applicant contends he was denied due process and a fair and impartial hearing because: (a) the Administrative Judge and Department Counsel left Applicant with an erroneous understanding that he would get a copy of hearing transcript to allow the legal aid attorney to assist him present his case; and (b) the Judge left Applicant with the erroneous impression that the Judge would assist him procedurally, and he relied on that impression to his detriment.

At the hearing, Applicant appeared with a legal aid attorney who had been assisting him in connection with his child support matters. At the beginning of the hearing, Applicant told the Administrative Judge that: (a) he would be representing himself; and (b) the legal aid attorney would be a witness (Hearing Transcript at pp. 4-6). What follows was a somewhat lengthy discussion among the Judge, Applicant, and Department Counsel that covered a variety of topics. After the legal aid attorney testified, she was excused and allowed to leave.

On appeal, Applicant claims: (a) the discussion at the hearing "is confusing even to an attorney"; (b) he was left with "the reasonable, yet legally erroneous belief, left uncorrected by the Administrative Judge, that the transcript will be available for use by [the legal aid attorney] at this hearing"; (c) the Judge's statements left him with the impression that the Judge "would assist the Applicant procedurally"; (d) Applicant relied to his detriment on his impression that the Judge would assist him procedurally; (e) the Judge erred by failing to allow Department Counsel to conduct a cross-examination of Applicant that exceeded the scope of his direct examination; (f) the Judge erred by allowing the legal aid attorney to leave after she testified; and (g) the Judge should have continued the hearing until Applicant received a copy of the hearing transcript to allow the legal aid attorney to assist him. Department Counsel counters that: (i) the record below does not support Applicant's claims that he was denied due process and a fair hearing; and (ii) the Judge was not legally required to limit Department Counsel's cross-examination to the scope of Applicant's direct examination.

After reviewing the hearing transcript, the Board concludes it is understandable for Applicant to characterize the procedural discussion at the hearing as confusing. The issue before the Board is not whether the hearing was perfect, but rather whether, considering the totality of the circumstances, Applicant was denied due process and a fair hearing. For the reasons that follow, the Board concludes Applicant was not denied due process or a fair hearing.

The case file shows that Applicant was provided with a copy of the Directive and a document entitled "Prehearing Guidance for DOHA hearings." The Additional Procedural Guidance portion of the Directive sets forth a description of the hearing process, including: an applicant's right to obtain legal representation; the role of the Administrative Judge; and respective burdens of Department Counsel and an applicant. *See* Directive, Additional Procedural Guidance, Items E3.1.8 through E3.1.27. The "Prehearing Guidance for DOHA hearings" is a four-page document that describes the hearing process and clearly places an applicant on notice that a DOHA hearing is an adversarial proceeding, that an

applicant is responsible for presenting his or her case, and an applicant has the choice of whether to appear with or without the assistance of an attorney.

Although the procedural discussion at the hearing was somewhat disjointed and confusing at times, that should not be considered in isolation from the fact that Applicant was provided with written guidance about the hearing process before the hearing itself which placed him on reasonable notice that he was responsible for presenting his case, and that neither the Administrative Judge nor Department Counsel was responsible for assisting him in doing so. If Applicant had any confusion or uncertainty during the hearing, he had the opportunity to speak up and let the Judge know that he was confused, uncertain, or failed to understand what was happening.

If Applicant wanted a continuance, he could have asked the Administrative Judge for one. At the hearing, Applicant did not ask for a continuance. If Applicant believed that he was not ready to proceed without a copy of the hearing transcript or without the presence and assistance of the legal aid lawyer, he could have told the Judge he was not ready to proceed and the reasons why. At the hearing, Applicant did not tell the Judge he was not ready to proceed. If Applicant had any questions or concerns about the manner in which the hearing was proceeding, he could have asked questions or expressed his concerns about how the hearing was proceeding. To the extent Applicant asked questions or raised concerns during the hearing, he did not ask any questions or raise any concerns that would be reasonably expected to place the Judge on notice that Applicant was not ready to proceed with the hearing. If Applicant believed that the departure of the legal aid attorney would leave him unable to proceed with his case, he could have told the Judge so at the hearing. Applicant raised no concern or objection at the hearing when the Judge indicated the legal aid attorney was free to stay or leave. Applicant cannot reasonably expect the Judge to discern any unexpressed thoughts, concerns, or questions Applicant might have about the hearing process or the actions of the Judge during the hearing. To the extent Applicant claims he was prejudiced by the Judge allowing the legal aid attorney to leave, Applicant's argument lacks merit. This is because at the hearing Applicant stated he wanted the legal aid attorney for her expertise on his financial situation, a matter that the Judge found in Applicant's favor.

Applicant identifies one passage in the hearing transcript that could be interpreted as the Administrative Judge telling Applicant that the Judge would give Applicant procedural assistance. However, that passage cannot be considered in isolation from the written guidance Applicant received before the hearing about the hearing process and the roles of the Administrative Judge, Department Counsel, and an applicant. At most, if Applicant were confused or uncertain about the role of the Judge at the hearing, then he should have expressed his confusion or uncertainty to the Judge during the hearing itself.

The Board finds no merit in Applicant's claim that the Administrative Judge erred by allowing Department Counsel to "substantially exceed the scope of Applicant's direct examination"

Formal rules of evidence do not apply in these proceedings. *See* Directive, Additional Procedural Guidance, Item E3.1.19. In these proceedings, neither party is limited in its cross-examination to the scope of the direct examination. As long as the questions are relevant and material to the issues of the case, they are proper even if they go beyond the scope of the direct examination. And, if Applicant had any concerns about the nature or scope of Department Counsel's questions, then Applicant could have raised those concerns with the Judge during the hearing.

Considering the totality of the record below, the Board concludes: (a) Applicant was placed on reasonable notice of the hearing process; (b) Applicant was placed on reasonable notice of his right to appear at the hearing with or without a lawyer; (c) Applicant was placed on reasonable notice of the roles and responsibilities of the Administrative Judge, Department Counsel, and an applicant during the hearing; (d) Applicant had adequate opportunity at the hearing to raise any questions or concerns he had about the hearing, the actions of the Judge, or the actions of Department Counsel; and (e) Applicant waived any objection he might have had to proceeding with the hearing without a copy of the hearing transcript or the assistance of the legal aid lawyer after she completed her testimony.

3. Whether the Administrative Judge's decision arbitrary, capricious or contrary to law. The Administrative Judge concluded that Applicant's failure to list an arrest and certain financial delinquencies from a security clearance form were intentional falsifications. On appeal, Applicant argues that the Administrative Judge's decision is arbitrary, capricious and contrary to law. Although Applicant denied that his omissions were an intentional falsification, such a

denial was not binding on the Administrative Judge. The Judge could make findings about Applicant's intent or state of mind that run contrary Applicant's statements if such findings have a rational basis in the record evidence. *See, e.g.*, ISCR Case No. 01-06852, (August 21, 2002) at p. 3. Considering the record as a whole, the Judge's finding that Applicant engaged in falsification reflects a reasonable interpretation of the record evidence and is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1 (standard of review for factual findings). Based on such a finding, it was reasonable for the Administrative Judge to conclude against Applicant under Guideline E (Personal Conduct). The Board concludes that the Administrative Judge's decision below was not arbitrary, capricious, or contrary to law.

Conclusions

Applicant has failed to meet his burden on appeal of demonstrating errors that warrant remand or reversal. Accordingly the Board affirms the Administrative Judge's adverse decision below.

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