

DATE: October 10, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-13152

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

David P. Sheldon, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 19, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision dated June 4, 2003.

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 issues have been raised on appeal: (1) whether the Administrative Judge erred by excluding the results of a polygraph examination offered as evidence by Applicant; and (2) whether the Administrative Judge's adverse conclusions are 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 Issues

1. Whether the Administrative Judge erred by excluding the results of a polygraph examination offered as evidence by Applicant. Before the hearing, Department Counsel submitted to the Administrative Judge a written Motion in Limine, asking the Administrative Judge to exclude polygraph evidence that the Applicant was going to offer at the hearing. At the hearing, Applicant offered as evidence the results of a privately-conducted polygraph examination (proposed Exhibit A). Department Counsel objected to the admissibility of proposed Exhibit A, basing its objection on the reasons set forth in its Motion in Limine. After hearing argument from both counsel, the Judge ruled that proposed Exhibit A should be excluded.

Applicant contends the Administrative Judge erred by excluding proposed Exhibit A. In support of that contention, Applicant argues the Judge's ruling on proposed Exhibit A is contrary to the Board's decisions in ISCR Case No. 96-0785 (September 3, 1998; October 5, 1998; and June 1, 1999). In response, Department Counsel contends the Judge's ruling on proposed Exhibit A was correct because this case is distinguishable from ISCR Case No. 96-0785. Department Counsel argues, in the alternative, that even if the Board were to conclude the Judge erred by excluding proposed Exhibit A, such an error would be harmless. The Board need not decide whether this case is distinguishable from ISCR Case No. 96-0785. Even if the Board were to assume, solely for purposes of deciding this appeal, that the Judge erred by excluding proposed Exhibit A, such an error would be harmless under the particular facts of this case.

Proposed Exhibit A indicates that a polygrapher concluded Applicant did not show deception when he answered ten specific questions. The polygrapher's opinion as to the lack of deception on Applicant's part when he answered those ten questions is irrelevant to the evidentiary and probative value of Applicant's answers to those ten questions in the context of these proceedings. ⁽¹⁾ Even if the Judge had admitted proposed Exhibit A into evidence and concluded that Applicant had answered those ten questions truthfully, Applicant's answers to those ten questions do not undercut the Judge's

findings about Applicant's history of marijuana use and his multiple acts of falsification. Therefore, the Judge's exclusion of proposed Exhibit A did not prejudice Applicant with respect to the Judge's findings about Applicant's history of marijuana use and falsification.

To the extent Applicant argues that proposed Exhibit A would demonstrate the Administrative Judge erred by concluding "a question remains" as to whether Applicant would use marijuana in the future, Applicant's argument is unpersuasive. First, the Judge was not compelled to accept Applicant's stated intention to not use marijuana in the future. Even if an applicant makes a sincere statement that he or she has no intention of using drugs in the future, such a statement does not preclude the Judge from considering it in light of the record evidence as a whole and deciding whether the applicant is likely to adhere to such a commitment in the future. As a matter of common sense and human experience, people do not always successfully adhere to their promises to reform or change their conduct or lifestyle. Second, Applicant's answers to most of the ten questions during the polygraph examination are irrelevant to the question of whether Applicant is likely to use marijuana in the future. Whatever probative value Applicant's answers to the two questions pertaining to drug use since October 1999 might have with respect to the issue of possible future marijuana use, those answers would add essentially nothing to his hearing testimony. And in any event, the Judge accepted Applicant's denial of any drug since approximately September 1999. Therefore, the Judge's exclusion of proposed Exhibit A did not prejudice Applicant in any meaningful way with respect to the Judge's finding about when Applicant last used marijuana.

Finally, even if the Board were to assume, solely for purposes of deciding this appeal, that the Administrative Judge should have admitted proposed Exhibit A into evidence and relied on it to enter formal findings in favor of Applicant with respect to Guideline H (Drug Involvement), proposed Exhibit A would be irrelevant to the Judge's findings that Applicant falsified a security clearance application in 1991, a security clearance application in 1997, and a written statement in 1999.

2. Whether the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of marijuana use, or the Judge's findings of fact about Applicant's acts of falsification on three separate occasions (in 1991, 1997, and 1999). However, Applicant contends the Judge's adverse conclusions are arbitrary, capricious, or contrary to law because: (a) Applicant presented evidence showing that he "has continued to work in vitally important areas in support of our national defense"; (b) Applicant presented evidence showing extenuation and mitigation of his misconduct, and changed circumstances indicative of reform and rehabilitation; (c) the Judge erred by concluding the evidence concerning Applicant's background and counseling was offered as an "excuse" for his marijuana use and false statements; (d) the Directive and the Adjudicative Guidelines do not make Applicant's misconduct *per se* disqualifying of receiving a security clearance; and (e) the Judge ignored evidence showing that the National Security Agency has decided to allow Applicant "to continue his application process for Sensitive Compartmented Information." For the reasons that follow, the Board concludes Applicant has failed to demonstrate error below.

(a) Evidence concerning Applicant's job performance and contributions to the national defense do not demonstrate the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law. Security clearance decisions are not limited to consideration of an applicant's job performance or conduct during duty hours. Good or exemplary job performance does not preclude consideration of the negative security implications of an applicant's off-duty misconduct. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6. Furthermore, whether an applicant has made or can make contributions to the national defense is factually and logically separate from, and independent of, whether the applicant has engaged in conduct that raises questions about the applicant's security eligibility. *See, e.g.*, ISCR Case No. 01-19879 (October 29, 2002) at p. 3. In this case, Applicant's history of marijuana use (including use when he had a security clearance) and multiple acts of falsifications raise serious security concerns, and the favorable evidence cited by Applicant did not preclude the Judge from drawing negative conclusions about Applicant's security eligibility.

(b) Applicant's ability to cite favorable record evidence is not sufficient to demonstrate the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law. The Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Absent a showing that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. Applicant places great significance on the statements made by

other persons attesting to Applicant's integrity, trustworthiness and reliability. Such statements are relevant and material evidence, but they are not binding or conclusive on the Judge. Considering the record evidence as a whole, the Judge was not compelled to conclude that the favorable evidence presented by Applicant was sufficient to overcome the security concerns raised by Applicant's use of marijuana when he had a security clearance, and his multiple acts of falsification.

(c) It was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant was seeking to offer an excuse for his misconduct. The record evidence Applicant presented to explain his misconduct could be viewed as an explanation or as a rationalization. Considering the record evidence as a whole, the Judge's conclusion that Applicant's proffered reasons were an excuse or rationalization reflects a plausible interpretation of the evidence as a whole. Applicant's strong disagreement with the Judge's adverse conclusion is not sufficient to demonstrate the Judge's conclusion is arbitrary, capricious, or contrary to law.

(d) Applicant's argument that the Directive allows an applicant the opportunity to present evidence of extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision is technically correct. However, that argument fails to demonstrate that the Administrative Judge erred in this case. Nothing in the decision below indicates or suggests the Judge was stating or implying that Applicant's conduct was *per se* disqualifying, or that the Judge disregarded or ignored the favorable evidence submitted on Applicant's behalf. The Judge's adverse conclusions about Applicant's history of marijuana use and multiple acts of falsification are not violative of, or inconsistent, with the Directive's requirement that each case be adjudicated on its merits after consideration of the record evidence as a whole.

(e) The Administrative Judge was not required to give great or dispositive weight to Applicant Exhibit E. At most, that exhibit shows the National Security Agency informed Applicant it was willing to allow him to apply and be considered for access to Sensitive Compartmented Information. That exhibit does not indicate or suggest that the National Security Agency has favorably adjudicated or will favorably adjudicate the matter of Applicant's eligibility for access to Sensitive Compartmented Information. Applicant's assumption that the National Security Agency will reach a favorable decision and grant him access to Sensitive Compartmented Information goes beyond the four corners of Exhibit E.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Concurring opinion of Administrative Judge Michael Y. Ra'anan

I fully agree with the analysis of my colleagues in this case. However, I remain of the opinion I expressed in ISCR Case No. 96-0785 (September 3, 1998; October 5, 1998; and June 1, 1999).

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. If the Applicant had answered the ten specific questions at the hearing and the Administrative Judge had concluded that Applicant's answers were credible and believable, the Judge's favorable credibility determination would be separate and independent from what inferences and conclusions the Judge reasonably could draw from Applicant's answers in light of the record evidence as a whole.