

DATE: June 24, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-14624

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Stephen C. Glassman, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated April 9, 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 Joan Caton Anthony issued an unfavorable security clearance decision dated February 18, 2004.

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 has been 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**

On appeal, Applicant does not challenge the Administrative Judge's findings that Applicant engaged in the conduct alleged in the SOR. <sup>(1)</sup> However, Applicant contends: (a) the Administrative Judge erred by concluding Applicant's conduct falls under Guideline E (Personal Conduct); (b) the Administrative Judge erred by concluding Applicant's conduct raises security concerns; and (c) the Judge's decision does not reflect an overall common sense determination as required by the Directive. Applicant's arguments raise the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

Applicant challenges the Administrative Judge's conclusion that his conduct falls under Guideline E (Personal Conduct). In support of this contention, Applicant argues that his conduct does not involve falsification, does not warrant application of Personal Conduct Disqualifying Condition 1, and does not implicate any of the other Personal Conduct disqualifying conditions. Applicant's argument concerning the scope of Guideline E (Personal Conduct) is not persuasive.

Applicant is correct in noting his case does not involve any allegation of falsification. However, the absence of any falsification allegation is not dispositive. The Concern section of Guideline E states "Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information." On its face, that language describes conduct that is not limited to acts of falsification. Given the Administrative Judge's findings of fact, the Judge reasonably could conclude Applicant's conduct falls within the scope of Guideline E. <sup>(2)</sup>

With respect to Personal Conduct Disqualifying Condition 1, <sup>(3)</sup> Applicant argues it fails to provide "an adequate standard" to evaluate the security significance of his conduct. Applicant's argument fails to show the Administrative Judge erred in this case. Given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the

Judge to conclude that Applicant's conduct raised questions about his judgment, reliability, trustworthiness, and willingness to comply with rules and regulations. Given the broad language of the Concern section of Guideline E, the Judge reasonably could conclude that the totality of Applicant's conduct warranted application of Personal Conduct Disqualifying Condition 1.

Applicant also asserts his conduct does not fall under any of the other Personal Conduct disqualifying conditions. Since the Administrative Judge concluded Applicant's conduct warranted application of Personal Conduct Disqualifying Conditions 4 and 5 (Decision at p. 5), Applicant's assertion could be construed as implicitly challenging the Judge's application of those two disqualifying conditions. However, there is no presumption of error below and the appealing party must raise claims of error with specificity. Because Applicant makes no discernable argument that addresses the Judge's application of Personal Conduct Disqualifying Conditions 4 and 5, the Board has no basis or reason to disturb the Judge's application of those two disqualifying conditions. *See* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

The Board does not find persuasive Applicant's argument that the Administrative Judge did not have a rational basis for concluding Applicant's conduct raised security concerns. The Board rejects Applicant's argument that his conduct may raise questions about his suitability for employment, but not his security eligibility. The federal government must repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n. 6 (1980). Furthermore, security requirements include consideration of a person's honesty, judgment, sobriety, and sense of obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Given the totality of Applicant's conduct, the Judge had a rational basis for concluding it raised concerns about his judgment, reliability, and trustworthiness sufficient to shift the burden of persuasion to Applicant to present evidence of extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant also contends the Administrative Judge's decision does not reflect a common sense determination that applies the whole person concept to the record evidence as a whole, both favorable and unfavorable. That contention is not persuasive. To the extent Applicant's argument asserts the Judge ignored evidence favorable to Applicant, it runs afoul of the rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome merely because Applicant is able to point to favorable evidence that he claims the Judge should have given more weight to. *See, e.g.*, ISCR Case No. 02-15935 (October 15, 2003) at p. 6. Moreover, Applicant's ability to proffer an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's decision fails to reflect a common sense determination that applies the whole person concept. A reading of the decision below persuades the Board that the Judge reached reasonable conclusions that take into account the record evidence as a whole -- including the favorable evidence presented by Applicant. Given the record evidence in this case, the Judge's analysis of Applicant's security eligibility is consistent with the whole person analysis required by the Directive. *See, e.g.*, ISCR Case No. 00-0628 (February 24, 2003) at pp. 5-6 (discussing application of whole person concept).

### **Conclusion**

Applicant has not demonstrated error below. Accordingly, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found that Applicant failed to report self-employment income to the Internal Revenue Service for tax year 1997, violated employment rules on various occasions, episodically abused alcohol, had one alcohol-related incident that led to an arrest, continued to drink alcohol after receiving treatment for alcohol abuse, and failed to satisfy various debts he owed in a timely manner.
2. Applicant's references to Department Counsel's opening statement at the hearing do not demonstrate any error by the Administrative Judge.
3. "Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances" (Directive, Adjudicative Guidelines, Item E2.A5.1.2.1).