

DATE: February 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16155

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Otis K. Forbes, III, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated October 18, 2002 which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based on Guideline E (Personal Conduct), Guideline F (Financial Considerations), Guideline G (Alcohol Consumption), and Guideline J (Criminal Conduct). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision dated October 28, 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's decision not to apply numerous mitigating factors in the Applicant's favor is arbitrary, capricious, or contrary to law; (2) whether the Administrative Judge erred by finding Applicant falsified his answer to a question on a personnel security questionnaire; and (3) whether the Board should recommend this case be further considered for a waiver under 10 U.S.C. §986. For the reasons that follow, the Board affirms the Administrative Judge's adverse security decision and does not make any recommendation about whether this case should be considered further for a waiver under 10 U.S.C. §986.

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's decision not to apply numerous mitigating conditions in the Applicant's favor is arbitrary, capricious, or contrary to law. On appeal Applicant argues that, under each of the four adjudicative guidelines set forth in this case, the record evidence warranted application of various mitigating conditions which in turn mandated an ultimate decision in favor of Applicant. Specifically, Applicant argues the following:

(a) with regard to Criminal Conduct (Guideline J), the evidence shows that Applicant was pressured or coerced into committing criminal acts and those pressures are no longer present in his life, thus establishing Criminal Conduct Mitigating Condition 3⁽¹⁾, and Applicant has shown clear evidence of successful rehabilitation, thus establishing Criminal Conduct Mitigating Condition 6⁽²⁾;

(b) with regard to Alcohol Consumption (Guideline G), the record supports application of Alcohol Consumption Mitigating Conditions 2⁽³⁾ and 3⁽⁴⁾ since Applicant had made positive changes supportive of sobriety and had shown no indication of a recent alcohol problem;

(c) with regard to Financial Considerations (Guideline F), the record supports application of Financial Considerations Mitigating Conditions 3⁽⁵⁾ and 6⁽⁶⁾ given Applicant's situation when the debts were incurred and his efforts to pay off the debts; and

(d) with regard to Personal Conduct (Guideline E), the record supports the application of Personal Conduct Mitigating

Conditions 5 ~~(7)~~ and 7 ~~(8)~~

For the reasons that follow, Applicant has failed to establish error on the part of the Administrative Judge.

The Board's review of the record evidence leads it to conclude that there is support in that record for the Administrative Judge's decision not to apply any of the mitigating conditions listed in the appeal in Applicant's favor. Applicant asserts on appeal that in several instances, the Administrative Judge ignored or otherwise failed to take into account favorable evidence that would have mitigated the government's security concerns. There is a rebuttable presumption that an Administrative Judge has considered all the record evidence unless his decision clearly reflects the contrary. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Here, there is no indication that the Administrative Judge failed to consider mitigating evidence. Indeed, the Administrative Judge found for Applicant on five subparagraphs under Guideline F and in several places in his decision the Administrative Judge specifically acknowledges that there is some evidence of mitigation. Considering the Judge's decision as a whole in light of the record evidence, Applicant fails to overcome the presumption that the Judge considered the entire record, including evidence favorable to Applicant.

Applicant's chief complaint appears to be the Administrative Judge's weighing of the evidence. If an appealing party challenges a Judge's weighing of the record evidence, that party must do more than simply disagree with the Judge's weighing of that evidence. Rather, an appealing party must articulate a specific and cogent reason or argument for how the Judge erred in weighing the record evidence. Applicant's strong disagreement with the Judge's adverse conclusions regarding the applicability of various mitigating conditions is not sufficient to demonstrate that they are arbitrary, capricious, or contrary to law. Similarly, Applicant's ability to articulate an alternative interpretation of the record evidence when arguing against the Administrative Judge's resolution of the case in mitigation is not sufficient to establish that the Judge reached conclusions that are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-15383 (July 29, 2003) at pp. 3-4.

2. Whether the Administrative Judge erred by finding Applicant falsified his answer to a question on a personnel security questionnaire. Applicant asserts that the Administrative Judge ignored his testimony which explained his failure to report his felony arrests and convictions when answering a question on his personnel security questionnaire and also ignored the testimony of his co-workers and superiors which indicated that Applicant is trustworthy. As stated previously, there is a rebuttable presumption that the Administrative Judge has considered all the record evidence. Applicant has failed to overcome this presumption.

Resolving falsification allegations where there is no dispute that the required information was omitted calls on an Administrative Judge to make a determination concerning the applicant's intent or state of mind. Absent an admission of falsification by an applicant, such a determination is rarely

resolved through direct evidence. An Administrative Judge must rely on circumstantial evidence and an assessment of an applicant's credibility in deciding what the applicant intended at the time of the omission. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at p. 6.

In this case, Applicant's statements about his state of mind when he completed the personnel security questionnaire are relevant evidence that the Administrative Judge was required to consider, but those statements were not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 02-09571 (August 5, 2003) at p. 3. Likewise, the testimony of character witnesses on the subject of Applicant's trustworthiness was also relevant, but it was not binding on the Administrative Judge. As the trier of fact, the Judge had to consider Applicant's statements and the statements of supporting witnesses in light of the record evidence as a whole. Applicant's denial of any intent to falsify and the favorable opinions of character witnesses did not preclude the Judge from weighing the record evidence and making a finding that contradicted Applicant's denial. The Judge's finding that Applicant falsified an answer about felony arrests and convictions on the questionnaire arises from legally permissible inferences drawn from the record evidence. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate that the Judge's finding of falsification is unsustainable. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp. 6-7.

3. Whether the Board should recommend this case be further considered for a waiver under 10 U.S.C. §986. The Administrative Judge concluded 10 U.S.C. §986 applied to Applicant's 1993 probation revocation, which followed a

1992 conviction on multiple felony counts. The Administrative Judge did not make any recommendation as to whether Applicant's case should be further considered for a waiver under that statute, citing as his reason the fact that he was finding against Applicant on grounds other than 10 U.S.C. §986. On appeal, Applicant asserts that his case is a meritorious one deserving of a waiver under that statute. The Board construes this assertion as asking the Board to recommend his case be further considered for a waiver under 10 U.S.C. §986.

In a June 7, 2001 memorandum implementing the provisions of 10 U.S.C. §986, the Deputy Secretary of Defense indicated: "The decision as to whether a particular case involves a meritorious case that would justify pursuing a request for waiver shall be the province of the DoD Component concerned (i.e. all Components authorized to grant, deny or revoke access to classified information) beginning with the Director of the Component Central Adjudication Facility (CAF), the Component appellate authority or other appropriate senior Component official." For purposes of the June 7, 2001 memorandum, Director, DOHA is the Director of the Component's Central Adjudication Facility for industrial security clearance cases. To implement the June 7, 2001 memorandum, the Director, DOHA issued an operating instruction (dated July 10, 2001) which indicates the following:

"Administrative Judges are responsible for initial resolution as to whether or not 10 U.S.C. 986 applies to the facts of the case." (Operating Instruction, paragraph 2.e.)

"In the event of an appeal raising an issue as to the applicability of 10 U.S.C. 986, the Appeal Board is responsible for final resolution of the issue." (Operating Instruction, paragraph 2.f.)

"In the event of a final determination that 10 U.S.C. 986 applies to the facts of a case, the Director is solely responsible for the discretionary decision as to whether to recommend to the Deputy General Counsel (Legal Counsel) that 10 U.S.C. 986 should be waived by the Secretary of Defense." (Operating Instruction, paragraph 2.g.)

"If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement 'I recommend further consideration of this case for a waiver of 10 U.S.C. 986' or 'I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.'"

(Operating Instruction, paragraph 3.e.)

"If the Appeal Board issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Appeal Board shall include without explanation either the statement 'The Appeal Board recommends consideration of this case for a waiver of 10 U.S.C. 986' or 'The Appeal Board does not recommend consideration of this case for a waiver of 10 U.S.C. 986.'"

"In any case in which [the] Administrative Judge, or [the] Appeal Board in the event of an appeal, recommends consideration of a waiver of 10 U.S.C. 986, the Director shall within his sole discretion determine whether or not to forward the case to the Deputy General Counsel (Legal Counsel) for further consideration of a possible waiver of 10 U.S.C. 986 by the Secretary of Defense together with such rationale as may be requested by the Deputy General Counsel (Legal Counsel)." (Operating Instruction, paragraph 3.g.)

Under paragraph 2.f. of the Operating Instruction, the Board is responsible for resolving any appeal as to the applicability of 10 U.S.C. §986. In this case, Applicant does not dispute that his case falls under 10 U.S.C. §986. All that remains for the Board to do is consider Applicant's request that it recommend further consideration of his case for a waiver under 10 U.S.C. §986(d).

Under paragraph 3.f. of the Operating Instruction, the Board must make a recommendation for or against a waiver under 10 U.S.C. §986 "[i]f the Appeal Board issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. §986." There is no need for the Board to make any recommendation about whether Applicant's case should be considered further for a waiver under 10 U.S.C. §986(d) because the Administrative Judge specifically stated that he was not basing his adverse decision solely on application of 10 U.S.C. §986 and Applicant has failed to demonstrate error by the Judge.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision, and does not make any recommendation as to whether this case should be considered further for a waiver under 10 U.S.C. §986(d).

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Concurring opinion of Chairman, Emilio Jaksetic:

With one exception, I fully concur with the majority opinion's discussion and resolution of this appeal. Given the absence of any evidence that Applicant has abused alcohol since August 1998, the Administrative Judge failed to articulate a sustainable basis for concluding that Applicant's history of alcohol abuse was not mitigated under Alcohol Consumption Mitigating Conditions 2 and 3 and the general factors of Directive, Section 6.3 and Enclosure 2, Item E2.2.1. However, this error is harmless because the Judge's adverse findings and conclusions under Guidelines E, F, and J are sustainable and sufficient to support his overall adverse conclusions about Applicant's security eligibility. Therefore, I concur with my colleagues' conclusion that the Administrative Judge's unfavorable security clearance decision should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. "The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life" (Directive, Enclosure 2, Item E2.A10.1.3.3).
2. "There is clear evidence of successful rehabilitation" (Directive, Enclosure 2, Item E2.A10.1.3.6).
3. "The problem occurred a number of years ago and there is no indication of a recent problem" (Directive, Enclosure 2, Item E2.A7.1.3.2).
4. "Positive changes in behavior supportive of sobriety" (Directive, Enclosure 2, Item E2.A7.1.3.3).
5. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive, Enclosure 2, Item E2.A6.1.3.3).
6. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive,

Enclosure 2, Item E2.A6.1.3.6).

7. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive, Enclosure 2, Item E2.A5.1.3.5).

8. "Association with persons involved in criminal activities has ceased" (Directive, Enclosure 2, Item E2.A5.1.3.7).