

DATE: January 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-19513

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated February 19, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline E (Personal Conduct). Administrative Judge Joan Caton Anthony issued an unfavorable security clearance decision, dated September 3, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. 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 in finding credible Government's Exhibit 7 and the testimony of the Defense Security Service Special agent who prepared that exhibit, (2) whether the Administrative Judge erred by finding the Applicant's falsifications were deliberate, (3) whether the Administrative Judge erred by finding that none of the Guideline E mitigating conditions were applicable, and (4) whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. 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 in finding credible Government's Exhibit 7 and the testimony of the Defense Security Service Special Agent who prepared that exhibit. On appeal, the Applicant argues that the Judge erred in finding credible Government's Exhibit 7 and the testimony of the DSS agent who prepared that exhibit. The exhibit was a two-page Report of Investigation prepared by the agent subsequent to his 1993 interview of the Applicant. Its purpose was to memorialize statements made by the Applicant to the agent during that 1993 interview. Applicant contends that the Judge should not have found the exhibit and the agent's testimony to be credible because they were "full of errors," and the agent "falsified his testimony" and "did not follow mandated guidelines in the conduct of the interview." In support of those contentions Applicant specifically avers that: (1) the exhibit stated he had been arrested for Driving Under the Influence and found guilty of reckless driving, when in fact he had only been found guilty of a red-light violation, (2) the agent testified he had prepared the exhibit "immediately" after returning to his headquarters, when in fact it had been prepared from his written notes approximately two months after the interview, (3) the agent stated he did not know the Applicant until the time of the interview, when in fact he had previously met him, and (4) the agent improperly "boiler-plated" the exhibit.

A Judge's credibility determinations are entitled to deference on appeal and the party challenging those determinations has a heavy burden of persuasion. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1; ISCR Case No. 00-0628 (February 24, 2003) at p. 4; ISCR Case No. 01-19278 (April 22, 2003) at p. 7. In this case, the Applicant has not met that burden. Given the record evidence in this case, the Judge was not compelled to believe or disbelieve the Applicant or the agent. Rather, the Judge had to assess the demeanor of the Applicant and the agent when they each testified and reach a conclusion as to their credibility based on an evaluation of their testimony in light of the record evidence as a whole. Although the Judge's acceptance of the agent's testimony was not legally required, it was a legally

permissible choice. Applicant's arguments to the contrary are not sufficient to overcome the heavy burden of persuasion required to overturn a Judge's credibility determinations.

2. Whether the Administrative Judge erred by finding the Applicant's falsifications were deliberate. On appeal, the Applicant argues that the omissions from his 1993 and 2000 security questionnaires were not deliberate on his part, but were the result of "clerical errors, administrative mistakes, lack of attention to detail and improper advice from authorized personnel." For the reasons set forth below, we conclude Applicant has not demonstrated the Judge erred.

We have previously held that an applicant's statements about his intent and state of mind when he completed his security clearance questionnaires are relevant evidence, but they are not binding on the Administrative Judge. *See* ISCR Case No. 01-19278 (April 22, 2003) at pp. 6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts the applicant's denial. *Id.* This case involved the omission of information which was of obvious security significance from two separate questionnaires, by an applicant experienced with the security clearance process. Considering the record as whole, the Judge's finding that Applicant deliberately falsified his two questionnaires reflects 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 the Judge's finding of falsification is unsustainable.

3. Whether the Administrative Judge erred by finding that none of the Guideline E mitigating conditions were applicable. The Administrative Judge found that none of the Guideline E mitigating conditions applied in Applicant's case. Applicant contends the Judge erred because Personal Conduct Mitigating Conditions 2-⁽¹⁾

and 3-⁽²⁾

should have been applied by the Judge with respect to the omissions from both the 1993 and 2000 questionnaires and that Personal Conduct Mitigating Condition 4-⁽³⁾

should have also been applied with respect to the omissions to the 1993 questionnaire.

With respect to the omissions from the 2000 questionnaire, we note that we have previously held that when a case involves disclosures by an applicant that are corrections of an earlier falsification, Personal Conduct Mitigating Condition 3 is the proper mitigating condition to consider, not Personal Conduct Mitigating Condition 2. *See* ISCR Case No. 97-0595 (May 22, 1998) at p. 4; ISCR Case No. 97-0289 (January 22, 1998) at p. 3. Since Applicant's disclosures to the investigator in May 2001 were, for all practical purposes, a correction of his falsification of his November 2000 questionnaire, those disclosures did not fall within the scope of Personal Conduct Mitigating Condition 2. Accordingly, the Administrative Judge did not err by not applying Personal Conduct Mitigating Condition 2.

The Judge gave as her reason for not applying Personal Conduct Mitigating Condition 3 the fact that Applicant's disclosures to the investigator were not a "prompt good-faith effort" to correct the falsification because they occurred six months after Applicant executed the questionnaire. The Judge's reasoning in that regard is sustainable. The fact that Applicant voluntarily made the disclosures to an investigator the first time he was interviewed did not preclude the Judge from considering the passage of time between the falsification in November 2000 and the subsequent disclosures in May 2001, and concluding Applicant's disclosures were not prompt within the meaning of Personal Conduct Mitigating Condition 3. Considering the record as a whole, the Judge's reason reflects a plausible interpretation of the record evidence, and it is not arbitrary, capricious, or contrary to law. The ability of a party to argue for an alternate interpretation of the record evidence is insufficient, standing alone, to demonstrate error. *See, e.g.*, ISCR Case No. 97-0202 (January 20, 1998) at p. 4.

With respect to the omissions from the 1993 questionnaire, the Judge's finding that Applicant never provided timely, voluntary information correcting that falsification constituted a permissible interpretation of the record evidence. Therefore, her conclusion that Personal Conduct Mitigating Conditions 2, 3, and 4 did not apply with respect to that falsification is sustainable. Additionally, her conclusion that the falsification was not isolated is sustainable, given Applicant's subsequent omission of the same information from the 2000 questionnaire.

4. Whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. (4)

On appeal, Applicant argues that the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the Judge erred in the application of the "whole person" concept. In support of that argument, Applicant reiterates that the omissions from his questionnaires were not deliberate.

After reviewing the Judge's decision in this case, it is our view that the Judge reasonably considered "whole person" factors (such as the Applicant's age, the circumstances surrounding the conduct, his motivation, and the likelihood of continuance or recurrence) and nevertheless concluded that the evidence presented in the case was insufficient to overcome the security concerns raised by Applicant's conduct. Considering the record as a whole, the Judge's application of the relevant Section 6.3 factors, and her weighing of the record evidence was not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Enclosure 2, Item E2.A5.1.3.2).
2. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Enclosure 2, Item E2.A5.1.3.3).
3. "Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided" (Directive, Enclosure 2, Item E2.A5.1.3.4).
4. Directive, Section 6.3 and Enclosure 2, Items E2.2.1.1 through E2.2.1.9.