

DATE: September 24, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23156

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 to Applicant a Statement of Reasons (SOR) dated August 26, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Paul J. Mason issued an unfavorable security clearance decision dated June 30, 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 failed to consider favorable evidence submitted by Applicant; (2) whether the Administrative Judge erred by finding that Applicant engaged in deliberate falsification; and (3) whether the Administrative Judge erred by not giving Applicant the benefit of the doubt. 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

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline G (Alcohol Consumption). The Judge's findings of fact, conclusions, and formal findings under Guideline G are not at issue on appeal.

1. Whether the Administrative Judge failed to consider favorable evidence submitted by Applicant. Applicant asserts that the documentary evidence which he submitted for consideration by the Administrative Judge demonstrates his real character, and argues that the evidence he submitted deserves more attention than the one sentence the Administrative Judge's decision contains about character evidence. The Board construes Applicant's argument as raising the issue of whether the Judge failed to consider favorable evidence submitted by Applicant.

There is a rebuttable presumption that an Administrative 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. Furthermore, there is no requirement that a Judge specifically discuss every piece of record evidence when making a decision. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3. Applicant's strong disappointment with the Judge's brief mention of the evidence he submitted is not sufficient to rebut the presumption that the Judge considered all the record evidence. Apart from the rebuttable presumption that the Judge considered all the record evidence, the Judge's favorable findings and conclusions with respect to Guideline G (Alcohol Consumption) indicate the Judge took into account the evidence Applicant submitted.

2. Whether the Administrative Judge erred by finding that Applicant engaged in deliberate falsification. The Administrative Judge found that Applicant falsified material facts: (a) on a security clearance application executed in March 1999 by failing to disclose that he had been terminated from a job in January 1999; (b) in an August 6, 1999 written statement he gave to a federal investigator by denying that he had consumed any alcohol since 1996; and (c) in

an August 6, 1999 written statement he gave to a federal investigator by stating that he had not received any alcohol-related treatment or counseling since October 1996. On appeal, Applicant argues that he gave answers to the best of his ability and never had any intent or purpose of falsifying the facts or deceiving the federal government about his past.

Applicant's denials of any intent to falsify were relevant and material evidence that the Administrative Judge had to consider, but the Judge was not bound to accept Applicant's denials; rather, the Judge had to consider Applicant's denials in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. As the trier of fact, the Judge had to decide whether to accept Applicant's denials or reject them.

The Administrative Judge's finding that Applicant falsified a security clearance application in March 1999 reflects a reasonable interpretation of the record evidence as a whole. Given the record evidence in this case, the Judge reasonably could find that Applicant's failure to disclose his January 1999 job termination in the security clearance application was a deliberate falsification.

The Administrative Judge's finding that Applicant falsified an August 6, 1999 written statement is problematic. In responding to the SOR, Applicant denied that he falsified the August 6, 1999 written statement. Accordingly, Department Counsel had the burden of proving the two SOR paragraphs that alleged Applicant falsified that written statement. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Even under the relaxed evidentiary standard applicable to these proceedings,⁽¹⁾ Department Counsel failed to meet its burden of proving the SOR allegations that Applicant falsified an August 6, 1999 written statement. There is no copy of the August 6, 1999 written statement in the record evidence, and no explanation by Department Counsel as to why a copy of that document was not offered as evidence. Nor is there other documentary evidence in the record that indirectly or circumstantially proves the contents of that document.⁽²⁾ Furthermore, in responding to the SOR and the File of Relevant Material, Applicant did not admit that he falsified the August 6, 1999 written statement. Absent some record evidence as to the contents of the August 6, 1999 written statement, the Judge could not simply rely on disbelief of Applicant's denials to find that Applicant falsified that written statement.⁽³⁾

3. Whether the Administrative Judge erred by not giving Applicant the benefit of the doubt. Applicant also asks the Board to re-examine his conduct "in light of the benefit of the doubt." As noted earlier in this decision, the Board does not review a case *de novo*. Accordingly, the Board will not review the record evidence in order to make its own findings of fact and draw its own conclusions about Applicant's case. Furthermore, nothing in Executive Order 10865 or the Directive entitles Applicant to be given "the benefit of the doubt." To the contrary, in security clearance decisions, any doubts as to the security eligibility of an applicant must be resolved in favor of the national security, not in favor of the applicant. *See* Directive, Enclosure 2, Item E2.2.2.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. The Administrative Judge's sustainable finding of falsification of the security clearance application provides a sufficient basis for the Judge's adverse security clearance decision.

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. An Administrative Judge's findings of fact can be based on less than the preponderance of the evidence, but they must be based on more than a scintilla of evidence. *See, e.g.*, ISCR Case No. 01-10301 (December 30, 2002) at p.5 n.3.
2. In cases involving alleged falsification, trying to prove falsification without any evidence of the written or oral statement(s) alleged to have been falsified is like trying to prove homicide without direct or circumstantial evidence of a deceased victim.
3. Absent some evidence supporting a finding of misconduct by an applicant, an Administrative Judge's disbelief of an applicant's denials is not sufficient to support a finding that the applicant engaged in misconduct. *See* ISCR Case No. 97-0356 (April 21, 1998) at p. 3.