

DATE: June 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23553

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Philip D. Cave, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated May 5, 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 a favorable security clearance decision dated February 5, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 or address all the record evidence; (2) whether the Administrative Judge erred by finding Applicant's testimony to be credible; and (3) whether the Administrative Judge's decision is based on a piecemeal analysis of the record evidence and is not supported by the record evidence as a whole. 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 failed to consider or address all the record evidence. Department Counsel contends the Administrative Judge erred by failing to consider or address all the record evidence. This contention is not persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Moreover, a Judge is not required to specifically discuss or mention every piece of record evidence in the Judge's decision. *See, e.g.*, ISCR Case No. 02-30929 (January 7, 2004) at p. 3. Department Counsel's appeal arguments: (a) fail to rebut or overcome the presumption that the Judge considered all the record evidence; and (b) do not articulate any persuasive reason why the Judge's decision is legally defective for not specifically discussing or mentioning various pieces of record evidence. Department Counsel's strong disagreement with the Judge's findings and conclusions is not enough to show the Judge simply ignored or failed to consider the record evidence. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 6.

2. Whether the Administrative Judge erred by finding Applicant's testimony to be credible. Department Counsel contends the Administrative Judge erred by accepting Applicant's testimony as credible. This claim of error is not persuasive. As noted earlier in this decision, 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. Given the record evidence in this case (including the evidence cited by Department Counsel on appeal), the Judge could have found Applicant's testimony to be credible or not credible. Department Counsel's strong disagreement with the Judge's credibility determination is not sufficient to demonstrate it is arbitrary, capricious, or otherwise unsustainable in light of the record evidence in this case.

3. Whether the Administrative Judge's decision is based on a piecemeal analysis of the record evidence and is not supported by the record evidence as a whole. Department Counsel contends the Administrative Judge's decision is unsustainable because it: (a) reflects a piecemeal analysis of the record evidence; and (b) it is not supported by the record evidence as a whole. This contention is not persuasive.

There is no presumption of error below and the appealing party has the burden of demonstrating factual or legal error below. The Board does not review the record evidence *de novo* and make its own findings of fact and reach its own conclusions about a case. The Board does not have to decide whether it would make the same findings of fact and reach the same conclusions as the Administrative Judge did in this case. All the Board has to do is decide whether Department Counsel, as the appealing party, has shown the Judge's findings of fact are not sustainable in light of the record evidence as a whole (Directive, Additional Procedural Guidance, Item E3.1.32.1) or the Judge's conclusions are arbitrary, capricious, or contrary to law (Directive, Additional Procedural Guidance, Item E3.1.32.3).

Department Counsel has not shown the Administrative Judge's findings are not sustainable in light of the record evidence as a whole, or that the Judge's conclusions are arbitrary, capricious, or contrary to law. At most, Department Counsel argues for an alternate interpretation of the record evidence in this case. However, the Judge's findings reflect a plausible interpretation of the record evidence as a whole, and the Judge's conclusions do not reflect any reasoning that is arbitrary, capricious, or contrary to law.

Conclusion

The Administrative Judge's decision is affirmed because Department Counsel has failed to demonstrate the Judge committed factual or legal error.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board