

DATE: October 2, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23922

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 December 18, 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), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Wilford H. Ross issued an unfavorable security clearance decision dated July 9, 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 erred by finding that Applicant falsified a security clearance application in 1999; and (2) whether the Administrative Judge's adverse conclusions are 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 Issues ⁽¹⁾

1. Whether the Administrative Judge erred by finding that Applicant falsified a security clearance application in 1999. The Administrative Judge found that Applicant falsified a security clearance application in August 1999 by failing to fully disclose his criminal record. On appeal, Applicant argues that he answered all questions on the form to the best of his knowledge and ability.

During the proceedings below, Applicant denied any intent to falsify the security clearance application. Applicant's statements denying any intent to falsify were relevant and material evidence that the Administrative Judge had to consider. However, the Judge was not bound to accept Applicant's denials; rather, the Judge had to consider those denials in light of the record evidence as a whole and decide whether to accept them or reject them. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record evidence as a whole, the Judge's finding that Applicant falsified the security clearance application is sustainable. Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law. On appeal, Applicant generally does not challenge the Administrative Judge's findings of fact about his history of alcohol abuse or his past criminal conduct. ⁽²⁾ However, Applicant argues: (a) he has served in the U.S. military and with a defense contractor for many years and performed his duties faithfully and commendably; (b) his actions did not adversely affect his work; (c) if the Board were to ask his coworkers and end users that he supports, they would say good things about his dedication to duty and his professionalism; (d) he "went through a terrible time and made some bad mistakes" because of a "very difficult divorce" in 1998; (e) his life is back on track since he has gotten married and is expecting a child; and (f) an adverse security clearance decision would seriously damage his career. The Board construes these arguments as raising the issue of whether the Judge's adverse conclusions are arbitrary, capricious, or contrary to law.

For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge erred.

(a) The Administrative Judge had the opportunity to consider the record evidence concerning Applicant's military service and job history. Although the Judge did not give that record evidence as much weight as Applicant would have liked, Applicant's citation of that favorable evidence is not sufficient to show the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

(b) The absence of evidence that Applicant's conduct adversely affected his job performance does not make the Administrative Judge's adverse decision arbitrary, capricious, or contrary to law. Security clearance decisions are not limited to consideration of an applicant's conduct during duty hours. An applicant's off-duty conduct can raise security concerns that would warrant an adverse security clearance decision. *See, e.g.*, ISCR Case No. 01-13906 (January 3, 2003) at p. 3. In this case, Applicant's off-duty conduct raised security concerns that the Judge had to consider in making his security clearance decision.

(c) It would not be proper for the Board to contact Applicant's coworkers and end users to solicit their comments and statements about Applicant for consideration in this case. The appeal process is not a second chance for a party to develop the record evidence. During the proceedings below, Applicant had the opportunity to submit written statements from his coworkers and end users for consideration by the Administrative Judge in his case. Applicant cannot fairly challenge the Administrative Judge's decision based on a belated proffer of information that he failed to offer for the Judge's consideration. Furthermore, the Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29.

(d) The Administrative Judge had the opportunity to consider the record evidence concerning Applicant's divorce. Applicant's argument on this point fails to persuade the Board that the Judge failed to consider or give due consideration to that record evidence.

(e) There is no record evidence to support Applicant's statements about his engagement in 2002, his marriage in May 2003, and his expecting a child next arch. As noted earlier in this decision, the Board cannot consider new evidence on appeal. Furthermore, any changes in Applicant's life after the record evidence closed cannot form the basis for challenging the Administrative Judge's security clearance decision. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 3.

(f) The Administrative Judge's security clearance decision is not made arbitrary, capricious, or contrary to law because of the adverse consequences it could have on Applicant's career. The security significance of an applicant's conduct and circumstances is not increased or decreased by the effect that a security clearance decision will have on the applicant's career. *See, e.g.*, ISCR Case No. 01-24504 (February 11, 2003) at p. 4. The security significance of Applicant's history of alcohol abuse, his past criminal conduct, and his falsification of a security clearance application does not turn on what effect a security clearance decision will have on his career.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 2.c, 2.d, and 3.b. Those favorable formal findings are not at issue on appeal.
2. On appeal, Applicant asserts that his most recent driving under the influence incident occurred in November 2000, not in November 1999 or 2000 (as stated in the Administrative Judge's decision). The Judge's equivocation about when that incident occurred is not critical to the Judge's overall security clearance decision.