

DATE: March 24, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-25158

## 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 January 6, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Administrative Judge Wilford H. Ross issued an unfavorable security clearance decision dated December 10, 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 issue has been raised on appeal: whether the Administrative Judge erred by finding that Applicant falsified a security clearance application by not disclosing his past use of marijuana in 1999. 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 Issue <sup>(1)</sup>

On appeal, Applicant challenges the Administrative Judge's finding that Applicant falsified a security clearance application in 2000 by not disclosing his past use of marijuana. In support of that challenge, Applicant sets forth his interpretation of the record evidence and suggests the Judge misunderstood the facts.

There is no dispute that Applicant omitted his past marijuana use when he completed the security clearance application. The issue before the Administrative Judge was whether the omission was deliberate and intentional. In order to rule on this issue, the Judge had to consider the record evidence as a whole and make a finding as to Applicant's state of mind and intent when he completed the security clearance application. Applicant's denials of any intent to falsify the security clearance applications were relevant and material evidence that the Judge had to consider. However, Applicant's denials were not binding or conclusive on the Judge. Rather, the Judge had to consider Applicant's denials in light of his assessment of the credibility of Applicant's testimony, and weigh them in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3.

The Administrative Judge concluded Applicant's denials of any intent to falsify were not credible because Applicant gave different explanations for why he did not disclose his past marijuana use when he completed the security clearance application. Giving due deference to the Judge's credibility determination, the Board concludes that the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding is erroneous. Applicant's appeal arguments do not persuade the Board that the Judge acted in a manner that is arbitrary, capricious, or contrary to law when he assessed Applicant's credibility and weighed the record evidence.

### Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate

error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

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 under Guideline H (Drug Involvement) with respect to his past use of marijuana. Those favorable formal findings are not at issue on appeal.