

DATE: July 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-25466

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 April 24, 2003, 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 Joseph Testan issued an unfavorable security clearance decision, dated April 19, 2004.

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; and (2) whether the Administrative Judge's unfavorable security clearance decision is 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. The Administrative Judge found that Applicant intentionally falsified a security clearance application by failing to disclose his involvement in alcohol-related incidents that occurred in 1975 and 1989. On appeal, Applicant challenges the Judge's finding of falsification.

There is no dispute that Applicant did not disclose the two alcohol-related incidents when he completed the security clearance application. As the trier of fact, the Administrative Judge had to consider the record evidence as a whole and make a finding of fact about Applicant's intent or state of mind when he completed the security clearance application. The record evidence concerning Applicant's explanations about the matter was before the Judge, who had to consider those explanations. However, the Judge was not legally required to accept Applicant's explanations; rather, the Judge could consider Applicant's explanations in light of the record evidence as a whole, and decide whether those explanations were credible. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. The Judge found Applicant's explanations to be not credible and that Applicant's omission of the two alcohol-related incidents was a deliberate falsification. Considering the record evidence as a whole, the Judge's finding of falsification is sustainable.

2. Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. Applicant refers to his job history, asserts he is not a security risk, and states that he is aware of the responsibilities connected with handling classified information. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

Security clearance decisions are not limited to considering an applicant's job performance or conduct during duty hours, but rather can be based on consideration of an applicant's conduct separate from the work place. An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case

No.99-0123 (January 11, 2000) at p. 3. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n. 6 (1980). In assessing an applicant's security eligibility, the federal government can take into account whether an applicant's conduct or circumstances raise questions about the applicant's judgment, reliability, or trustworthiness. Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification). In this case, the Administrative Judge's finding that Applicant falsified a security clearance application provides a rational basis for both his adverse conclusions about Applicant's judgment, reliability, and trustworthiness, and his unfavorable security clearance decision.

In view of the foregoing, the Board concludes Applicant's appeal arguments fail to demonstrate the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to the SOR paragraphs pertaining to Guideline G (Alcohol Consumption). Because the Judge found in favor of Applicant with respect to his history of alcohol consumption, Applicant's appeal arguments about his drinking history are moot and need not be addressed.