

DATE: June 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-25576

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 Applicant a Statement of Reasons (SOR), dated December 30, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline F (Financial Considerations), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Michael J. Breslin issued an unfavorable security clearance decision, dated February 3, 2005.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by finding the Applicant's falsification of his security clearance application was deliberate, and (2) whether the Administrative Judge erred in concluding Applicant's history of criminal conduct had not been mitigated. 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 the Applicant's falsification of his security clearance application was deliberate. The Administrative Judge found Applicant falsified a security clearance application by failing to disclose his criminal record and his delinquent debts.⁽²⁾ The Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose his criminal record and record of delinquent debts. Rather, he contends the omission of the information in question was the result of forgetfulness, misunderstanding and oversight. Applicant's argument does not persuade us that the Judge erred.

Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude the burden had shifted to Applicant to explain his failure to disclose his criminal record and delinquent debts when he completed the security clearance application. The Administrative Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question. The Judge was not bound--as a matter of law--to accept Applicant's explanation. Rather, the Judge had to consider Applicant's explanation in light of the record evidence as a whole. Considering the record as a whole, the Judge had a sufficient basis to find that Applicant's omissions were deliberate and intentional. Accordingly, the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge erred in concluding Applicant's history of criminal conduct had not been mitigated. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of criminal conduct. However, Applicant does argue that his past criminal conduct was extenuated by the unfortunate circumstances of his former marriage, and mitigated by the passage of time without similar incidents happening since then. Applicant's arguments raise the issue of whether the Judge erred in concluding Applicant's history of criminal conduct had not been

mitigated.

The Administrative Judge's analysis of Applicant's criminal conduct under Guideline J is somewhat inconsistent and confusing. On the one hand, the Judge concluded Applicant's history criminal conduct was not an isolated incident and "reflects a serious lack of judgment, reliability and trustworthiness." On the other hand, the Judge concluded Applicant's conduct was mitigated by Criminal Conduct Mitigating Condition 1⁽³⁾ and Criminal Conduct Mitigating Condition 6.⁽⁴⁾ Moreover, the Judge refers to Applicant's lack of candor in a manner that makes it difficult to ascertain whether the Judge is (a) impermissibly using a negative credibility determination in lieu of record evidence, or (b) using a negative credibility determination properly to evaluate Applicant's testimony that he had matured and become more responsible. The uncertainty about how the Judge was using his negative assessment of Applicant's credibility is compounded by the inconsistency between (i) the Judge's application of Criminal Conduct Mitigating Conditions 1 and 6, and (ii) the Judge's rejection of Applicant's claim that he had matured and become more responsible. The manner in which the Judge rejected Applicant's claim suggests the Judge was using his negative assessment of Applicant's credibility to trump the record evidence.

To resolve this appeal, the Board need not decide whether it is possible to reconcile the inconsistencies in the Administrative Judge's analysis under Guideline J. If the Board were to conclude those inconsistencies could be reconciled and the Judge's adverse conclusions under Guideline J upheld, then the decision below would be affirmed. If the Board were to conclude those inconsistencies could not be reconciled, then reversal or remand would not be warranted because the Judge's findings and conclusions about Applicant's falsification would be sufficient to affirm the Judge's unfavorable security clearance decision.

Conclusion

Applicant has failed to demonstrate harmful 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge concluded Applicant had mitigated the security concerns raised under Guideline F (Financial Considerations) sufficiently to warrant favorable formal findings under that Guideline. Because the Judge ruled in Applicant's favor under Guideline F, Applicant's appeal argument about his past financial problems is moot and need not be addressed.

2. The Administrative Judge also found Applicant did not falsify the security clearance application by failing to disclose he had been ordered by a court to attend a counseling program for domestic violence offenders. That favorable finding is not at issue on appeal.
3. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).
4. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6). In the decision below, the Administrative Judge quoted the language of Criminal Conduct Mitigating Condition 6, but then listed the citation for Criminal Conduct Mitigating Condition 3. Given the Judge's quotation of the language of Mitigating Condition 6, the Board construes the citation to Mitigating Condition 3 to be a typographical error.