

DATE: November 20, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26367

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 September 25, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision dated July 29, 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 failed to take into account Applicant's value to his defense contractor employer; and (2) whether the Administrative Judge's adverse conclusions about Applicant's alcohol abuse 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. Whether the Administrative Judge failed to take into account Applicant's value to his defense contractor employer. On appeal, Applicant contends he is "an asset to the security department" at his defense contractor employer. The Board construes Applicant's contention as raising the issue of whether the Administrative Judge failed to take into account Applicant's value to his defense contractor employer.

Applicant's value to his defense contractor employer does not have the significance in these proceedings that Applicant places on it. An applicant's trustworthiness and reliability do not turn on whether the applicant possesses professional abilities that are valuable to his employer. It is entirely possible for: (a) an applicant to be trustworthy and reliable without possessing any professional ability or talent; (b) an applicant to be untrustworthy and unreliable despite possessing a professional ability or talent; or (c) *vice versa*. *See, e.g.*, ISCR Case No. 01-13894 (February 20, 2003) at p. 4. *See also* ISCR Case No. 01-20445 (April 29, 2003) at p. 4. Furthermore, the negative security implications of Applicant's history of alcohol abuse, criminal conduct, and falsification do not turn on whether Applicant is valuable to his employer. In view of the foregoing, Applicant's claim of error fails to demonstrate error by the Administrative Judge.

2. Whether the Administrative Judge's adverse conclusions about Applicant's alcohol abuse are arbitrary, capricious, or contrary to law. Applicant states "I also know that my past alcohol consumption played a major role in the Administrative Judge's decision. However, on June 20, 2003 I was diagnosed with a seizure disorder known as Epilepsy. My doctor told me to limit my alcohol intake to one or two drinks per sitting which I have done, because I know if I do drink I could have a seizure. I will also provide a statement from my doctor listing some of the other limitations of Epilepsy." The Board construes these statements as raising the issue of whether the Judge's adverse conclusions about Applicant's alcohol abuse are arbitrary, capricious, or contrary to law.

The statements in Applicant's appeal brief about his medical condition constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. A review of the case file shows that: (a) Applicant had ample notice of the adversarial nature of the hearing process and his obligation to present evidence on his behalf for consideration in his case, and (b) Applicant was given an adequate opportunity to prepare for the hearing and present evidence on his behalf for consideration by the Administrative Judge. Applicant cannot fairly challenge the Judge's findings and conclusions about his history of alcohol consumption based on a proffer of new evidence.

Apart from Applicant's proffer of new evidence, Applicant does not raise any specific challenge to the factual or legal sufficiency of the Administrative Judge's findings and conclusions. As noted earlier in this decision, 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. Accordingly, the Judge's findings and conclusions stand on appeal.

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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board