

DATE: April 6, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00578

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 8, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision dated January 21, 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 should have concluded Applicant's conduct was extenuated or mitigated sufficiently to warrant a favorable security clearance decision; and (2) whether Applicant can be granted a probationary or conditional security clearance. 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

1. Whether the Administrative Judge should have concluded Applicant's conduct was extenuated or mitigated sufficiently to warrant a favorable security clearance decision. The Administrative Judge found that: (1) Applicant had engaged in sexual encounters with various women who are not United States citizens, some of who were prostitutes and others who were women with whom he had extramarital affairs; (2) Applicant falsified material facts about those sexual encounters in two written statements he gave to a federal investigator in August 2001; and (3) Applicant was vulnerable to blackmail or compromise because he has not disclosed those sexual encounters to his employer or his spouse. The Judge concluded that Applicant's conduct and circumstances raised serious security concerns under Guidelines E, D, and J, and that Applicant had not presented evidence sufficient to extenuate or mitigate those security concerns.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact. However, Applicant: (a) acknowledges the seriousness of his past conduct; (b) apologizes for his past conduct and asks for forgiveness; (c) refers to various things he does for his daughter and for his parents; and (d) states that his daily conduct shows he is reliable and trustworthy. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge should have concluded Applicant's misconduct was extenuated or mitigated sufficiently to warrant a favorable security clearance decision.

Given the Administrative Judge's unchallenged findings of fact, the Judge had a rational basis for concluding serious security concerns were raised by Applicant's sexual encounters, Applicant's falsifications about those sexual encounters, and Applicant's vulnerability to blackmail or compromise due to his secretiveness about those sexual encounters. The burden of persuasion shifted to Applicant to present evidence of extenuation or mitigation sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Judge was responsible for weighing the record evidence as a whole, deciding whether the favorable evidence outweighed the

unfavorable evidence or *vice versa*, and then making a rational decision as to whether Applicant had satisfied his heavy burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance for him. Considering the record evidence as a whole, the Board concludes that Applicant's appeal arguments do not demonstrate that the Judge's adverse conclusions about Applicant's security eligibility are arbitrary, capricious, or contrary to law.

2. Whether Applicant can be granted a probationary or conditional security clearance. Applicant also asks the Board if there is anything he can do to gain the trust of the Department of Defense. The Board construes Applicant's request as raising the issue of whether he can be granted a probationary or conditional security clearance, so that he can have an opportunity to show that he can be trusted by the Department of Defense.

Under the Directive, there is no authority for granting a probationary or conditional security clearance. *See, e.g.*, ISCR Case No. 99-0109 (March 1, 2000) at p. 3. Accordingly, the Board cannot grant Applicant's request.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Williams S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board