

DATE: March 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00602

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

James Katz, Esq.

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 F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision dated August 27, 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 erred by finding Applicant deliberately falsified the security clearance application by failing to disclose he had delinquent city wage taxes owing; (2) whether the Administrative Judge failed to evaluate Applicant's case under the whole person concept; (3) whether it was arbitrary and capricious for Administrative Judge to conclude Applicant's failure to repay city wage taxes was not mitigated; and (4) whether the Administrative Judge erred by not recommending that Applicant be granted a security clearance with a warning. 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 erred by finding Applicant deliberately falsified the security clearance application by failing to disclose he had delinquent city wage taxes owing. With one exception, the Administrative Judge made favorable findings and reached favorable conclusions with respect to the SOR allegations under Guideline E (Personal Conduct).⁽¹⁾ Specifically, the Judge found that Applicant falsified a personal security clearance application by not disclosing that he had delinquent local tax debts. Applicant challenges the Judge's finding of deliberate falsification.

There is no dispute that when Applicant completed his security clearance application he did not disclose that he had delinquent local tax debts. Applicant denied that the omission was a knowing and deliberate falsification. Faced with Applicant's denials, the Administrative Judge had to consider the record evidence as a whole, assess the credibility of Applicant's hearing testimony, and make a finding about Applicant's intent or state of mind when he completed the security clearance application. *See, e.g.*, ISCR Case No. 00-0430 (July 3, 2001) at pp. 4-5; ISCR Case No. 99-0473 (May 12, 2000) at pp. 2-3. Given the record evidence in this case, and giving due deference to the Judge's assessment of the credibility of Applicant's hearing testimony,⁽²⁾ the Board concludes the Judge's finding of falsification reflects a legally permissible interpretation of the record evidence and is sustainable. Applicant's ability to argue for a plausible, alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification is erroneous and unsustainable.

2. Whether the Administrative Judge failed to evaluate Applicant's case under the whole person concept. Applicant contends the Administrative Judge erred by not evaluating his case under the whole person concept, as required by Directive, Section 6.3 and Enclosure 2, Item E2.2.1. In support of this contention, Applicant sets forth a plausible

interpretation of the record evidence that offers an analysis of the case that is different from the one set forth in the Administrative Judge's decision.

The Administrative Judge's decision reflects consideration of the record evidence as a whole, as well as analysis of Applicant's case in a manner consistent with the whole person concept. The Board will not disturb a Judge's weighing of the record evidence unless there is a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-18860 (March 17, 2003) at pp. 3-4. Although Applicant vigorously disagrees with the Judge's conclusions, Applicant has not demonstrated the Judge failed to evaluate Applicant's case in a manner consistent with the whole person concept.

3. Whether it was arbitrary, capricious, and contrary to law for Administrative Judge to conclude Applicant's failure to repay city wage taxes was not mitigated. The Administrative Judge concluded that Applicant's failure to pay a local wage tax was not mitigated under the facts and circumstances of this case. Applicant contends it was arbitrary, capricious, and contrary to law for the Judge to conclude Applicant's conduct was mitigated under Financial Considerations Mitigating Conditions 3, ⁽³⁾ 4, ⁽⁴⁾ and 6. ⁽⁵⁾ For the reasons that follow, the Board concludes Applicant's contention is not persuasive.

Applicant cites no provision of Executive Order 10865, the Directive, or any other provision of federal law in support of his contention that the Administrative Judge erred, as a matter of law, by not concluding Applicant's conduct was mitigated. Moreover, a reading of the decision below persuades the Board that the Judge satisfied his legal obligation (under Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25) to consider pertinent provisions of the Adjudicative Guidelines when deciding Applicant's case. Accordingly, the Board does not find persuasive Applicant's assertion that the Judge acted contrary to law by not concluding Applicant's conduct was mitigated. However, Applicant's arguments on this aspect of the case do raise the issue of whether the Judge's conclusion was arbitrary or capricious.

The application of the Adjudicative Guidelines is not reducible to a simple formula, but rather requires an Administrative Judge to exercise sound judgment within the parameters set by the Directive when deciding which Adjudicative Guidelines for or against clearance are applicable in a given case. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Applicant's claims with respect to Financial Considerations Mitigating Conditions 3, 4, and 6 will be considered in light of that legal principle.

The Administrative Judge found that Applicant made a deliberate choice to not pay the local wage taxes so that he could use the money to pay for his older daughter's college education (Decision at p. 5). Given that finding, it was not arbitrary or capricious for the Judge to not conclude Applicant's conduct was mitigated under Financial Considerations Mitigating Condition 3.

The Administrative Judge found that Applicant had not completed repaying the delinquent local wage taxes and that Applicant admitted he would probably repeat his conduct if a family emergency arose in the future (Decision at p. 5). Given those findings, it was not arbitrary or capricious for the Judge to not conclude Applicant's conduct was mitigated under Financial Considerations Mitigating Conditions 4 and 6.

Applicant's appeal arguments set forth a plausible, alternate interpretation of the record evidence. However, those arguments do not demonstrate the Administrative Judge's analysis of the case under the Adjudicative Guidelines was arbitrary or capricious.

4. Whether the Administrative Judge erred by not recommending that Applicant be granted a security clearance with a warning. Applicant cites Directive, Enclosure 2, Item E2.2.6⁽⁶⁾ and argues, in the alternative, that his case presents a unique factual situation that warrants a favorable security clearance decision with a warning that any future occurrences could result in revocation of a security clearance. Department Counsel argues: (a) Applicant seeks relief "not provided for by the Department of Defense Directive 5220.6" (Reply Brief at p. 4 n. 4); and (b) Applicant seeks relief "that is not within the authority of the Administrative Judge and therefore not appropriate for a ruling by the Appeal Board" (Reply Brief at p. 15 n. 13).

Although Department Counsel's second argument is predicated on its first one, it challenges the Board's authority to address this appeal issue at all. Therefore, the Board will address Department Counsel's second argument initially. First, the Board has the authority to address the material issues raised by the parties on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.32.* Applicant's request for relief and Department Counsel's counter-arguments raise a material issue for the Board to address in this appeal. Second, the Board is authorized to address issues that involve questions of whether action is lawful under Executive Order 10865, the Directive, or other applicable federal law. *See Directive, Additional Procedural Guidance, Items E3.1.32.2 and E3.1.32.3.* Third, it is well established that a tribunal has the authority to rule on issues as to whether it has jurisdiction or authority to act in a particular matter. Fourth, acceptance of Department Counsel's second argument would lead to the untenable result that the Board would be unable to address any appeal issues based on claims that an Administrative Judge acted without lawful authority or in excess of the Judge's lawful authority, or that the Board itself lacks authority to act.⁽⁷⁾ For all these reasons, the Board concludes it has the authority to rule on this appeal issue.

Department Counsel's first argument lacks merit. Applicant expressly relies on a provision of Enclosure 2 of the Directive. Department Counsel cites no legal authority, and makes no argument, in support of its assertion that Applicant's reliance on Item E2.2.6 constitutes a request for relief outside the Directive. Indeed, Department Counsel's assertion is undercut by its own reliance on various provisions of Enclosure 2 of the Directive in its appeal brief. Whether or not Applicant is entitled to the relief he seeks, he is not citing or relying on anything outside the Directive.

The Board construes Applicant's appeal argument as raising the issue of whether the Administrative Judge erred by not recommending that Applicant be granted a security clearance with a warning. As discussed earlier in this decision, the Judge's adverse findings and conclusions under Guideline E and Guideline F are sustainable. Given those sustainable findings and conclusions, it was not arbitrary or capricious for the Judge to render an adverse security clearance decision.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Separate opinion of Administrative Judge Michael D. Hipple:

With one exception, I fully concur with the majority opinion's discussion and resolution of this appeal. Given the Administrative Judge's findings of fact and his conclusions with respect to other SOR allegations of falsification, there is no support for the conclusion that Applicant deliberately falsified his security clearance application by not listing the wage tax debt under question 38 ("In the last 7 years, have you been over 180 days delinquent on any debt(s)?"). The Judge was not convinced that Applicant did not falsify his response to question 38 regarding the wage tax because Applicant had made a conscious decision not to pay the underlying tax debt.

The Judge made various findings about Applicant's cognitive difficulties: difficulty in processing information, delay in understanding, difficulty in understanding written documents and retaining what he has read, and problems remembering things, especially dates. The Judge found that Applicant needed assistance in completing forms, and specifically, the Applicant did not understand that question 38 applied to his bankruptcy debts and wage tax debt, as well as to his main bills like the gas and electric bills (Decision at p. 3). For all of the falsification allegations except the wage tax, the Judge focused on the process surrounding Applicant's completion of the application and the impact that Applicant's cognitive difficulties had on that process relative to an intent to falsify. Based on these cognitive difficulties, the Judge concluded that Applicant did not falsify by failing to disclose the other debts, including the bankruptcy debts under the same question 38. For the falsification on the wage tax, the Judge suddenly departed from this approach and focused on the intent not to pay the underlying debt. However, Applicant completed question 38 at one point in time while he was under the same cognitive difficulties including the same misunderstanding as to the scope of question 38. Without further explanation, it is contradictory to reach two different conclusions about falsification in the same circumstance.

Nevertheless, this error is harmless because the Judge's adverse findings under Guideline F are sustainable and sufficient to support his overall adverse conclusion about Applicant's security eligibility. Therefore, I concur with my colleagues' conclusion that the Administrative Judge's unfavorable security clearance decision should be affirmed.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable findings and favorable conclusions under Guideline E are not at issue on appeal. Although the decision below lists a favorable formal finding for SOR paragraph 1.d (Decision at p. 6), the Judge's discussion on the merits of the case shows he found against Applicant with respect to SOR paragraph 1.d (Decision at p. 5). Considering the decision below in its entirety, the Board concludes the favorable formal finding listed for SOR paragraph 1.d is a typographical error.
2. Department Counsel's assertion that an Administrative Judge's credibility determination cannot be disturbed on appeal (Reply Brief at p. 14) is contrary to well-established Board precedent. *See, e.g.*, ISCR Case No. 01-06870 (September 13, 2002) at pp. 3-4; ISCR Case No. 00-0620 (October 19, 2001) at pp. 3-4; ISCR Case No. 99-0435 (September 22, 2000) at p. 3.
3. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive, Enclosure 2, Item E2.A6.1.3.3).
4. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive, Enclosure 2, Item E2.A6.1.3.4).
5. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Enclosure 2, Item E2.A6.1.3.6).
6. "If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access."
7. Indeed, to address Department Counsel's arguments on this appeal issue, the Board must of necessity make an express or implied ruling about the authority of the Administrative Judge and the authority of the Board itself.