

DATE: December 11, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01093

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Charles A. Meade, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated October 15, 2002, 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 Roger E. Willmeth issued an unfavorable security clearance decision dated August 7, 2003. [\(1\)](#)

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 considered all of the evidence and gave appropriate consideration to all of the facts in the case in reaching conclusions; (2) whether the Administrative Judge's finding that Applicant had deliberately omitted information from his personnel security clearance questionnaire is supported by sufficient evidence; (3) whether underlying misconduct of sexual harassment and telephone harassment was serious enough to establish doubt about Applicant's ability to safeguard classified material; (4) whether the Administrative Judge gave sufficient weight to the evidence of refutation, explanation, extenuation, and mitigation; and (5) whether the hearing failed to meet standards of fairness and due process because Applicant did not have the ability to defend himself and articulate his case. For the reasons that follow, the Board affirms the Administrative Judge's decision. [\(2\)](#)

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 considered all of the evidence and gave appropriate consideration to all of the facts in the case in reaching conclusions. There is a rebuttal presumption that a Judge considered all the record evidence unless the Judge specifically states otherwise. *See e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Nothing in the record suggests that the Judge ignored any testimony or other evidence provided by Applicant. Furthermore, Applicant does not identify what evidence the Judge supposedly ignored or failed to consider. Finally, the Judge distinguished between favorable and unfavorable components of the record evidence and made formal findings in Applicant's favor under Guideline G, while finding against Applicant under Guideline E. This claim of error is unpersuasive.

(2) Whether the Administrative Judge's finding that Applicant had deliberately omitted information from his personnel security clearance questionnaire is supported by sufficient evidence. Applicant's statements about his state of mind and intent when he completed the SF-86 in November 2000 are relevant and material evidence that the Administrative Judge had to consider. However, those statements were not binding on the Judge; rather, the Judge had to consider Applicant's statements in light of his assessment of Applicant's credibility and the record evidence as a whole. Considering the record as a whole outlined above, and giving due deference to the Administrative Judge's assessment of Applicant's credibility (Directive, Additional Procedural Guidance, Item E3.1.32.1), the Board concludes the Judge's finding of falsification of the SF-86 reflects a reasonable interpretation of the record evidence that is sustainable. *See* ISCR Case No. 01-08565 (March 7, 2003) at pp. 3-4. Applicant's ability to argue for an alternative interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification of the SF-86 is erroneous.

(3) Whether underlying misconduct of sexual harassment and telephone harassment was serious enough to establish doubt about Applicant's ability to safeguard classified material. Applicant argues that a one-day suspension at work is minor and has no security significance. Applicant also argues that the July 1997 arrest was for a misdemeanor that was never prosecuted.

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). The government need not wait until an applicant mishandles classified information before it can deny or revoke the applicant's access to such information. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate the applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p.3 ; and ISCR Case No. 97-0628 (April 17, 1998) at p. 3. The issue here is not whether each instance of misconduct, standing alone, was serious enough to cast doubt about Applicant's ability to safeguard classified material, but whether, given the record here of the whole person, is it clearly consistent with the national interest to grant or continue a security clearance. Under the whole person concept (Directive, Section 6.3; Enclosure 2, Items E2.2.1 and E2.2.3), the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 00-0628 (February 24, 2003) at pp. 5-6 (discussing the whole person concept).

Even if the Board were to conclude that the July 1995 one-day suspension and the July 1997 arrest were insufficient to support an adverse security clearance decision, it was not arbitrary or capricious for the Judge to draw adverse conclusions about Applicant's security eligibility based on those two incidents plus Applicant's falsification of the SF-86 in November 2000.

(4) Whether the Administrative Judge gave sufficient weight to the evidence of refutation, explanation, extenuation, and mitigation. This argument is a variation of Applicant's claim that the Administrative Judge did not consider all the record evidence. For the same reasons given in addressing that appeal issue, the Board concludes this claim of error lacks merit.

(5) Whether the hearing failed to meet standards of fairness and due process because Applicant did not have the ability to defend himself and articulate his case. Applicant represented himself in the proceedings below. On appeal, Applicant, through counsel, contends that he was totally incapable of defending himself. Applicant acknowledges notice of the hearing and knowledge of a right to secure representation, but he contends that it was clear that he did not realize the nature of the proceeding and was completely inadequate in articulating crucial information. When invited to cross-examine the Defense Security Service agent, Applicant replied that he did not have the skills to do so. Applicant argues that fundamental fairness required the Judge to continue the hearing so that Applicant could have secured legal representation.

The Board does not find Applicant's claim persuasive. Despite his statement that he did not have the skills, nothing in the record suggests that Applicant, a 48-year-old system administrator with a college degree, was legally incompetent or otherwise unable to understand the nature of the proceedings below. Having decided to represent himself despite what he perceived as a handicap, Applicant cannot now reasonably complain that he did not do an adequate job of representing himself and be relieved of the consequences of his decision to proceed *pro se*. Furthermore, having knowingly failed to avail himself of the opportunity to be represented by counsel, Applicant cannot claim on appeal that he was denied due process. *See, e.g.*, DISCR Case No. 94-1159 (December 4, 1995) at p. 3-4; ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3.

Conclusion

Applicant has failed to identify error on the part of the Administrative Judge. Accordingly, the Board affirms the Judge's August 7, 2003 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made formal findings in favor of Applicant under Guideline G and these findings are not in issue on this appeal.
2. Some supporting argument in Applicant's brief is speculative or appears to add facts that go beyond the record (*e.g.*, the motives of the vendor in reporting Applicant to the police and the possible sympathetic treatment of Applicant by the police). The Board cannot receive or consider new evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.29.