

DATE: November 20, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03414

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 August 16, 2002 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) and Guideline J (Criminal Conduct). Administrative Judge Joan Caton Anthony issued an unfavorable security clearance decision dated June 30, 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 that Applicant was fired from a job in 1993; (2) whether the Administrative Judge's findings and conclusions concerning SOR paragraph 1.b are erroneous; (3) whether the Administrative Judge erred by finding Applicant falsified a security clearance application in July 2000; (4) whether the Administrative Judge's adverse formal finding under Guideline J (Criminal Conduct) is arbitrary, capricious, or contrary to law; and (5) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law because there has been no showing that Applicant has mishandled classified information. 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

Applicant's appeal brief contains many factual assertions that seek to supplement the record evidence below. Such statements constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will consider only those arguments made by Applicant that do not rely on new evidence.

1. Whether the Administrative Judge erred by finding that Applicant was fired from a job in 1993. Applicant contends the Administrative Judge erred by finding that Applicant was fired from a job in 1993. This claim of error lacks merit. The Administrative Judge noted that SOR paragraph 1.a alleged Applicant had been fired from a job in 1993, but concluded that Department Counsel had failed to present evidence to support that allegation, and entered a formal finding in favor of Applicant with respect to SOR paragraph 1.a.

2. Whether the Administrative Judge's findings and conclusions concerning SOR paragraph 1.b are erroneous. The Administrative Judge found that Applicant had been terminated from a position as a security guard in January 1999 after a series of security infractions by him. The Judge concluded that the facts and circumstances of Applicant's termination were pertinent to a determination about his judgment, trustworthiness or reliability to hold a security clearance. On appeal, Applicant strongly objects to the Judge's findings and conclusions.

Applicant's written statements and explanations about the events leading up to his termination in 1999 (contained in the record below) are relevant and material evidence that the Administrative Judge had to consider. However, those statements and explanations were not binding on the Judge. When faced with conflicting record evidence, a Judge must

weigh the record evidence as a whole and make findings of fact and draw reasonable conclusions. The Judge's findings about this aspect of the case reflect a reasonable, legally permissible interpretation of the record evidence as a whole. Applicant's strong disagreement with the Judge's findings is not sufficient to show the Judge erred. *See, e.g.*, ISCR Case 01-14740 (January 15, 2003) at p. 10.

Given the Administrative Judge's findings about the facts and circumstances of Applicant's termination in 1999, it was not arbitrary, capricious, or contrary to law for the Judge to draw adverse conclusions about Applicant's security eligibility under Guideline E (Personal Conduct). Having found that Applicant was terminated as a security guard for failing to perform his duties properly, it was reasonable for the Judge to draw adverse conclusions about Applicant's judgment, trustworthiness, and reliability for purposes of adjudicating his security eligibility. The favorable record evidence cited by Applicant on appeal does not demonstrate the Judge's adverse conclusions under Guideline E are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 4 (Administrative Judge must weigh the record evidence and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*); ISCR Case No. 01-00274 (January 27, 2003) at p. 3 ("A party's ability to point to evidence in their favor does not prove that the Administrative Judge erred in weighing the evidence as a whole.").

3. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application in July 2000. The Administrative Judge found that Applicant falsified a security clearance application in July 2000 by failing to disclose that he had been terminated from a position as a security guard in January 1999. Applicant challenges that finding of falsification.

During the proceedings below, Applicant denied any intent to falsify the security clearance application and claimed that he never was formally notified that he had been terminated in January 1999. The Administrative Judge had to consider Applicant's denial of any intent to falsify and his explanation for not disclosing his 1999 termination from employment. However, the Judge was not bound to accept Applicant's denial and explanation. Rather, the Judge had to consider them in light of the record evidence as a whole and make a finding of fact as to whether Applicant's failure to disclose the 1999 termination was a falsification. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record evidence as a whole, the Judge's finding of falsification is sustainable. Applicant's appeal argument on this aspect of the case is not persuasive and fails to demonstrate the Judge's finding of falsification is erroneous.

4. Whether the Administrative Judge's adverse formal finding under Guideline J (Criminal Conduct) is arbitrary, capricious, or contrary to law. The Administrative Judge entered a formal finding against Applicant under Guideline J (Criminal Conduct) based on her conclusion that Applicant's falsification of a security clearance application in July 2000 constituted a violation of 18 U.S.C. 1000, a federal felony. On appeal, Applicant challenges the Judge's adverse formal finding under Guideline J, arguing that: (a) he did not falsify the security clearance application; and (b) he does not have a history or pattern of criminal conduct.

As discussed earlier in this decision, the Administrative Judge's finding of falsification is sustainable. Furthermore, the Judge's conclusion that falsification of a security clearance application constitutes a violation of 18 U.S.C. 1001 is legally correct. *See United States v. Yermian*, 468 U.S. 63 (1984)(case involving conviction under 18 U.S.C. 1001 based on falsification of security clearance application). Given the Judge's finding that Applicant falsified a security clearance application in July 2000, the Judge properly concluded that Applicant's falsification was a violation of 18 U.S.C. 1001. That legal conclusion provides a rational basis for the Judge's adverse formal finding under Guideline J.

5. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law because there has been no showing that Applicant has mishandled classified information. Applicant also asserts that he has never mishandled classified information and that his track record on this point shows he is trustworthy and reliable. The Board construes this argument as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law because there has been no showing that Applicant has mishandled classified information.

The federal government is not required to wait until an applicant has mishandled or failed to properly safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Furthermore, nothing in Executive Order 10865 or the Directive requires a showing that there has been a security violation before an adverse security clearance decision can be made.

Even if there has been no showing that an applicant has committed a security violation, an Administrative Judge must consider the record evidence as a whole to determine whether the applicant possesses or lacks the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 02-01494 (May 28, 2003) at p. 3. Given the record evidence in this case, the Judge's findings and conclusions provide a rational basis for the Judge's adverse conclusions under Guidelines E and Guideline J, and provide a sufficient basis for her adverse security clearance decision.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board