

DATE: March 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02732

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 October 15, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge Robert J. Tuider issued an unfavorable security clearance decision, dated December 22, 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 issue has been raised on appeal: whether the Administrative Judge erred by finding that Applicant falsified a security clearance application by not disclosing an arrest for felony aggravated assault, his use of MDMA while holding a security clearance in the Marine Corps, and his counseling for alcohol and drug use in 1995. 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

The Administrative Judge entered formal findings in favor of Applicant with respect to the matters covered by Guideline G (Alcohol Consumption) and Guideline H (Drug Involvement). Because the Judge's findings and conclusions under those two Guidelines are not at issue on appeal, the Board need not address them.

Applicant challenges the Administrative Judge's findings that he falsified a security clearance application by not disclosing an arrest for felony aggravated assault, his use of an amphetamine while holding a security clearance in the Marine Corps, and his counseling for alcohol and drug use in 1995. In support of that challenge, Applicant argues: (a) he did not know that his arrest for aggravated assault involved a felony charge; (b) his understanding of what constituted counseling for alcohol and drug abuse was different from that of the investigator who interviewed him; (c) he was not told that his security clearance was revoked when he was in the Marine Corps; (d) he was not trying to falsify anything on the security clearance application, but just wanted to "move on in my life"; and (e) he did not knowingly falsify the security clearance application. For the reasons that follow, the Board concludes Applicant has not demonstrated the Judge's findings of falsification are erroneous.

The Administrative Judge had to consider the record evidence of Applicant's statements and explanations about his intent and state of mind when he completed the security clearance application, but the Judge was not bound to accept those statements and explanations at face value. Rather, the Judge had to consider Applicant's statements and explanations in light of the record evidence as a whole and his assessment of the credibility of Applicant's testimony, and make findings as to whether Applicant's omissions were deliberate or not. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record as a whole, and recognizing the deference owed to the Judge's credibility determinations, the Board concludes that the Judge's findings of falsification are sustainable because they reflect a legally permissible interpretation of the evidence as a whole. *See* Directive, Additional Procedural Guidance,

Item E3.1.32.1. Applicant's appeal arguments reflect his strong disagreement with the Judge's findings of falsification, but they do not -- individually or cumulatively -- demonstrate the Judge's findings of falsification are erroneous.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board