

DATE: April 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03248

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Jeffrey B. Hammerlund, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 27, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline D (Sexual Behavior). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated December 9, 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's adverse security clearance decision is arbitrary, capricious, or contrary to law because it is based on factual errors; and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law because the Judge did not cite any complaints against Applicant for mishandling classified information and Applicant's conviction did not lead to his mishandling of 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

1. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law because it is based on factual errors. Applicant argues that the Administrative Judge's adverse security clearance decision was predicated on several factual findings that Applicant contends were erroneous. Some of the alleged erroneous findings were related to the disqualifying conduct under Guidelines J (Criminal Conduct) and D (Sexual Behavior), while others were more related to Guideline E (Personal Conduct).

The first two claimed factual errors (pertaining to the status and disposition of Applicant's motion to vacate his criminal conviction) are not material to whether Applicant engaged in sexual misconduct with his minor daughter in 2001. The Board need not address claims of error that are not material. *See* Directive, Additional Procedural Guidance, Item E3.1.32.

There is no merit to Applicant's third claimed factual error (that the Administrative Judge implicitly found Applicant pleaded guilty to the criminal charge for which he was convicted). The Judge did not find or imply that Applicant pleaded guilty to the criminal charge. The Judge specifically found that Applicant was convicted of one count of aggravated criminal sexual abuse of his minor daughter, on the basis of stipulated testimony (Decision at p. 2). Furthermore, the Judge specifically noted that Applicant denies that he engaged in the sexual misconduct with his minor daughter (Decision at p. 3).

The fourth and fifth claimed factual errors pertain to the Administrative Judge's finding that Applicant tested positive for marijuana when he reported for his court-ordered evaluation in October 2001 (Decision at p. 3). There is record

evidence that supports a finding that Applicant was ordered

to undergo drug and alcohol evaluation and that he tested positive for cannabis. *See* Exhibit 7. The record evidence also shows that Applicant has denied repeatedly that he ever used marijuana. However, there is no record evidence to support Applicant's appeal claim that a subsequent test proved the first test result was a false positive. Applicant stated he believed the first test result was positive. *See* Exhibit 17 at p. 6. But there is no record evidence that shows that the first sample was retested and determined to be a false positive. Indeed, Applicant testified that he asked for the sample to be re-tested and was told his request was denied. *See* Hearing Transcript at p. 22. The Board need not consider the significance of the positive marijuana test result in this case because a reading of the decision below in its entirety persuades us that the results of the marijuana test were not material to the Judge's adverse decision, which was based on his findings and conclusions concerning Applicant's sexual misconduct with his minor daughter.

The sixth claimed factual error (*i.e.*, the Administrative Judge erred by rejecting Applicant's denials of sexual misconduct with his minor daughter) fails to demonstrate error below. As a general proposition, an applicant is collaterally estopped from denying he or she engaged in conduct that underlies a felony criminal conviction, regardless of whether the conviction is based on a guilty plea or not. *See, e.g.*, ISCR Case No. 99-0116 (May 1, 2000) at p. 2. The doctrine of collateral estoppel also applies if an applicant's conviction is based on an *Alford* plea. *See, e.g.*, ISCR Case No. 96-0525 (June 17, 1997) at pp. 2-3. Although the Board has held that a conviction based on a *nolo contendere* plea does not collaterally estop an applicant from contending he or she is really innocent of the conduct for which he or she was convicted, the Board has noted there may be a need to change that position. *See* ISCR Case No. 96-0525 (June 17, 1997) at p. 3 n.3. Resolution of this appeal does not require the Board to decide whether Applicant's conviction was based on an *Alford* plea or a *nolo contendere* plea, or whether the Board should change its position as suggested in footnote 3 of ISCR Case No. 96-0525 (June 17, 1997). Even assuming--solely for the purposes of deciding this appeal--that Applicant was not collaterally estopped from contending he is innocent of the criminal conduct for which he was convicted, the Judge could reasonably find that Applicant committed the acts of sexual misconduct with his minor daughter. There is conflicting record evidence on whether Applicant engaged in acts of sexual misconduct with his daughter. The Judge had the opportunity to personally observe Applicant's demeanor during his hearing testimony, assess the credibility of Applicant's testimony on the matter, and weigh Applicant's denials of wrongdoing in light of Judge's credibility determination and the record evidence as a whole. Giving due deference to the Judge's credibility determination,⁽¹⁾ the conflicting record evidence plus the Judge's negative assessment of Applicant's credibility -- taken together -- provided a legally sufficient basis for the Judge to find that Applicant engaged in acts of sexual misconduct with his minor daughter.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law because the Judge did not cite any complaints against Applicant for mishandling classified information and Applicant's conviction did not lead to his mishandling of classified information. Applicant states that he has maintained a security clearance throughout the process without incident and that the Administrative Judge did not cite any instances in which Applicant mishandled classified information. Applicant also asserts there is no indication that his conviction lead to any security misconduct by Applicant. However, the Administrative Judge must consider the security significance of the conduct that Applicant did engage in. The United States 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 overall facts and circumstances surrounding Applicant's involvement in criminal sexual misconduct with his minor daughter provided a rational basis for the Administrative Judge's doubts about Applicant's judgment, reliability and security eligibility, whether or not he was still vulnerable to pressure or coercion involving the underlying conduct. *See, e.g.*, ISCR Case No. 96-0587 (March 24, 1997) at pp. 3-4. Given those doubts, the Judge reasonably resolved them in favor of the national security. *See* Department of the Navy v. Egan, 484 U.S. 518, 531 (1988). Furthermore, Applicant's false statements to security investigators provided a rational and sufficient basis for the Administrative Judge's unfavorable security clearance decision, even in the absence of any evidence that Applicant has ever committed a security violation. *Cf.* ISCR Case No. 03-05176 (August 11, 2004) at pp. 3-4.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Directive, Additional Procedural Guidance, Item E3.1.32.1.