

DATE: December 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04005

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 November 26, 2002 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 Martin H. Mogul issued an unfavorable security clearance decision dated September 23, 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 Board should reverse the Administrative Judge's decision based on new evidence submitted by Applicant; and (2) whether the Administrative Judge failed to consider favorable evidence submitted by Applicant. 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⁾

1. Whether the Board should reverse the Administrative Judge's decision based on new evidence submitted by Applicant. On appeal, Applicant states that since the Administrative Judge's decision he has taken steps to deal with his financial difficulties and offers documents to support that claim. Applicant also asks the Board not to affirm the Judge's adverse decision. The Board construes Applicant's appeal statements as a request that the Board reverse the Judge's decision based on the new evidence he has submitted with his appeal brief.

The Board is precluded from considering new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. During the proceedings below, Applicant had the opportunity to present evidence on his own behalf, and he took advantage of that opportunity to present testimonial and documentary evidence for the Administrative Judge to consider in his case. Nothing in Executive Order 10865, the Directive, or general principles of federal administrative law give the parties a right to supplement the record evidence continuously. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (the right to present evidence in DOHA proceedings must be exercised within provisions of the Directive and the practical need for administrative finality in these proceedings)(citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)).

2. Whether the Administrative Judge failed to consider favorable evidence submitted by Applicant. Applicant also states "I feel that the Administrative Judge[']s decision should not be affirmed because I have over the previous year made reasonable strides to correct the mistakes of my past." The Board construes Applicant's statement as raising the issue of whether the Judge failed to consider favorable evidence submitted by Applicant.

There is a rebuttable presumption that the Administrative 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 (citing federal decision). Applicant's disagreement with the Judge's weighing of the record evidence in his case is not sufficient to rebut or

overcome the presumption that the Judge considered all the record evidence. Moreover, a reading of the decision below persuades the Board (apart from the rebuttable presumption) that the Judge considered the evidence presented by Applicant. In the decision below, the Judge specifically noted evidence presented by Applicant to show his efforts to deal with his financial difficulties, and the Judge made favorable findings as to some of the debts alleged in the SOR. Such findings show the Judge considered the evidence presented by Applicant.

Conclusion

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

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 found Applicant falsified a security clearance application he completed in November 1999. The Judge entered formal findings against Applicant under Guideline E (Personal Conduct) based on the finding of falsification. Applicant's appeal brief does not raise any challenge to the Judge's findings and conclusions under Guideline E. Accordingly, those findings and conclusions need not be reviewed by the Board on appeal.