

DATE: April 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05854

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 February 19, 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) and Guideline G (Alcohol Consumption). Administrative Judge Martin H. Mogul issued an unfavorable security clearance decision dated January 14, 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 Judge's unfavorable security clearance decision is arbitrary, capricious or contrary to law. 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

Whether the Judge's unfavorable security clearance decision is arbitrary, capricious or contrary to law. The Applicant claims that during her interview with a Special Agent of the Defense Security Service (DSS Agent) she was "harassed, coached on how to answer questions, my words twisted and mislead by [the DSS Agent who] . . . instructed me to sign a form at the end of the interview while I was under great duress." Moreover, the Applicant claims that one of her friends who was also interviewed by the DSS Agent was harassed and embarrassed by the sexual nature of the DSS Agent's questions. The Board construes Applicant's appeal argument as raising two sub-issues: (a) whether the Administrative Judge's decision should be reversed because the government failed to conduct a proper investigation; and (b) whether the Judge erred in not excluding Applicant's written statement from which the Judge made findings and drew conclusions that Applicant had engaged in disqualifying conduct under Guideline G (Alcohol Consumption) and Guideline H (Drug Involvement).

(a) Applicant's argument concerning the conduct of the DSS Agent can be construed in two ways: (i) as an argument that the Administrative Judge's decision should be reversed because the DSS agent's conduct was improper and denied her a fair background investigation; or (ii) as an argument that the DSS Agent's conduct made Applicant's written statement coerced and unreliable and not worthy of being considered or relied on by the Judge in making a decision in Applicant's case. The Board will address each argument in turn.

(a)(i) In general, the scope and methods of personnel security investigations are outside the scope of review of the Hearing Office Administrative Judge and the Board. Moreover, even if an applicant believes that a personnel security investigation was incomplete or flawed, the applicant is not without recourse in DOHA proceedings. The applicant can present evidence, either at a hearing or in response to a File of Relevant Material (FORM), that is relevant and material to the applicant's response to the SOR allegations, applicant's response to evidence presented by Department Counsel, or supportive of the applicant's burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. *See, e.g.*, ISCR Case No. 02-32606 (January 21, 2004) at p. 3.

More importantly, even if an applicant were able to present credible evidence of misconduct by a DSS Agent during an interview or the preparation of a written statement, such evidence would not entitle an applicant to a favorable security clearance decision. A favorable security clearance decision should not be made unless there is an affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant. *See* Executive Order 10865, Section 2; Directive, Sections 2.3, 3.2 and 4.2; Directive, Enclosure 2, Item E2.2.3; and Directive, Additional Procedural Guidance, Items E3.1.1 and E3.1.25. The actions or inactions of a DSS Agent are not probative of an applicant's judgment, reliability, or trustworthiness, or otherwise indicative of an applicant's security eligibility. Moreover, an applicant is not entitled to a favorable security clearance decision based on a claim of equitable estoppel. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3; ISCR Case No. 99-0481 (November 29, 2000) at p. 5.

Accordingly, even if the Administrative Judge were to conclude that Applicant had presented sufficient credible evidence to demonstrate her claim about the conduct of the DSS Agent, such a conclusion would not entitle her to a favorable security clearance decision.

(a)(ii) Although the exclusionary rule does not apply in DOHA proceedings, an applicant is not precluded from asking an Administrative Judge to give little or no weight to an applicant's prior written statement based on a claim that the written statement was the product of coercion or duress. *See* ISCR Case No. 97-0184 (June 16, 1998) at p. 2. However, an applicant seeking to attack a prior written statement must do more than just make a claim of impropriety by a DSS agent. An applicant must overcome some significant obstacles before such a claim can be accepted.

First, there is a well-established legal presumption that government officials carry out their duties properly and in good faith and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See, e.g. National Archives and Records Administration v. Favish*, 541 U.S. --, slip op. at 16 (March 30, 2004). Second, a claim of coercion or duress must be based on evidence showing that the applicant's written statement was obtained by means that were coercive, oppressive or reasonably calculated to overbear the will of the applicant. *See* ISCR Case No. 97-0184 (June 16, 1998) at p. 3. Accordingly, conclusory claims of improper conduct by DSS agents are not sufficient. Third, an applicant's claim of coercion or duress must be evaluated in terms of an objective, reasonable person standard. A purely subjective belief, standing alone, is not sufficient to support a finding of coercion or duress. *See* ISCR Case No. 97-0184 (December 8, 1998) at pp. 4-5. Therefore, an applicant's statements concerning alleged misconduct by a DSS Agent are relevant evidence with respect to assessing a claim that the applicant's written statement was not voluntary, but those statements must be evaluated in light of the record evidence as a whole to determine whether: (a) there is clear evidence that overcomes the presumption that DSS Agents carry out their duties properly and in good faith; (b) the applicant's written statement was obtained by means that were coercive, oppressive, or reasonably calculated to overbear the applicant's will; and (c) the evidence supporting a claim of coercion or duress satisfies an objective, reasonable person standard.

In this case, the Administrative Judge did not specifically address Applicant's claim of improper conduct by the DSS Agent (a claim set forth in Applicant's answer to the SOR). However, the Judge specifically referred to and relied on Applicant's December 2001 written statement in making findings and reaching conclusions about Applicant's case. By doing so, the Judge implicitly found that written statement to be voluntary and reliable. Considering the record as a whole, the Board concludes it was not arbitrary, capricious, or contrary to law for the Judge to consider Applicant's December 2001 written statement to be voluntary and reliable.

(b) Department Counsel has the initial burden for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted. Directive, Additional Procedural Guidance, Item E3.1.14. Applicant's December 2001 written statement was substantial evidence in support of the SOR allegations that the Administrative Judge could consider. Applicant then had the burden for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by Applicant or proven by Department Counsel, and had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. The Applicant elected to present her case through the FORM in lieu of a hearing before the Judge. In such circumstances, when an applicant's and witness's hearing testimony are not available for the Judge's consideration, an applicant must provide other evidence (*i.e.*, documentary evidence) to meet his or her burden of proof. Considering the record as a whole, the Administrative Judge's findings and conclusions about Applicant's history of alcohol and drug abuse are

sustainable.

Conclusion

Applicant has failed to meet her burden of demonstrating error below, therefore, the Administrative Judge's decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board