

DATE: January 6, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06033

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

James England, Esq.

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 J (Criminal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated August 16, 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 Board decisions not available online constitute "secret law" that cannot be cited or relied in later Board decisions that are available online; and (2) whether the Administrative Judge erred by declining to consider evidence proffered to show Applicant can make affirmative contributions to the national defense. 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

The Administrative Judge made findings of fact about Applicant's history of criminal conduct, which spanned the period 1986-2003 and included acts of battery, domestic violence, assault, false imprisonment, and driving under the influence of alcohol. Those findings of fact have not been challenged on appeal.

1. Whether Board decisions not available online constitute "secret law" that cannot be cited or relied in later Board decisions that are available online. In the course of arguing Applicant's main appeal issue, he contends that because Board decisions issued before 1993 are not available online, any Board decision issued before 1993 -- and any Board decision issued after 1993 that relies on a pre-1993 Board decision -- constitutes "secret law" that cannot be followed or relied in this or any other case. Applicant's contention raises a novel issue that needs to be addressed before the Board addresses his main appeal issue. For the reasons that follow, the Board concludes Applicant's contention lacks merit.

Applicant's claim that Board decisions not posted online constitute "secret law" lacks merit.

Except for Board decisions issued after 1992 that are available through Westlaw, Board decisions were not available online prior to the Electronic Freedom of Information Act Amendments of 1996 ("EFOIA").⁽¹⁾ Prior to the enactment of EFOIA, redacted copies of Board decisions⁽²⁾ were available to anyone requesting copies of them, subject to copying fees permissible under the Freedom of Information Act. Under EFOIA, redacted copies of Board decisions issued from November 1, 1996 onwards are available through the Internet.⁽³⁾ After the enactment of EFOIA, redacted copies of Board decisions are still available to anyone requesting copies of them.

There is no indication in the appeal file that Applicant asked the Board for copies of any Board decisions issued prior to November 1, 1996. Furthermore, nothing in Applicant's appeal brief indicates or suggests that Applicant ever made such

a request. Having failed to ask the Board to provide redacted copies of Board decisions issued before November 1, 1996, Applicant cannot reasonably claim that such Board decisions are "unavailable" to him and, therefore, constitute "secret law" that cannot be cited or relied on by the Board.⁽⁴⁾

2. Whether the Administrative Judge erred by declining to consider evidence proffered to show Applicant can make affirmative contributions to the national defense. During the proceedings below, Applicant sought to prove that his technical expertise allows him to make contributions to the national defense. Applicant contends the Administrative Judge erred by not considering that evidence in making his decision, arguing: (a) the whole person concept requires a Judge to consider evidence that an applicant can make contributions to the national defense; (b) Applicant presented un rebutted evidence concerning his ability to contribute to the national defense; (c) prior Board decisions on the issue of the relevance of an applicant's ability to contribute to the national defense are distinguishable; and (d) acceptance of Applicant's contention will not open up a floodgate of litigation over the issue of whether an applicant has the ability to contribute to the national defense. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

The federal government has a compelling interest in protecting classified information and, pursuant to that interest, it has to decide whether persons to be entrusted with access to classified information are at risk of deliberately or inadvertently mishandling such information.⁽⁵⁾ In making such decisions, the government must determine whether a given person possesses and exhibits the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information.⁽⁶⁾ Security clearance decisions are not limited to consideration of an applicant's job performance or conduct during duty hours, and off-duty conduct can be relevant in assessing an applicant's security eligibility.⁽⁷⁾ An applicant's technical expertise (or lack thereof) is not a measure of whether the applicant is at risk of deliberately or inadvertently mishandling classified information, nor is it a measure of whether the applicant demonstrates the high degree of judgment, reliability, or trustworthiness required of persons granted access to classified information. An applicant with technical expertise may -- through conduct or circumstances -- demonstrate that he or she poses a security risk; an applicant without any technical expertise may -- through conduct and circumstances -- demonstrate that he or she is a good candidate for a security clearance.⁽⁸⁾ The security significance of Applicant's history of criminal conduct does not turn on whether Applicant possesses a technical ability that could be useful to a DoD contract or project. Moreover, Applicant's history of criminal conduct is not extenuated or mitigated by whether Applicant possesses a technical ability that could be useful to a DoD contract or project.

Applicant's effort to distinguish prior Board decisions is not persuasive. In addition, Applicant's reliance on two Board decisions that affirmed Hearing Office decisions that support his position is misplaced. Hearing Office decisions are not legally binding precedent that must be followed by the Board.⁽⁹⁾ Furthermore, Applicant goes too far in arguing that Board affirmance of the two Hearing Office decisions cited by him constitutes Board acceptance or endorsement of their reasoning. Because of the Board's limited scope of review under the Directive,⁽¹⁰⁾ affirmance of a Hearing Office decision does not constitute acceptance, endorsement, or ratification of that decision.⁽¹¹⁾ Moreover, no one can reasonably assert that a Board decision provides acceptance, endorsement, or ratification of any statement or ruling in a Hearing Office decision that was not expressly addressed on appeal.⁽¹²⁾ With respect to the two Hearing Office decisions relied on by Applicant, the Board was not required on appeal to address or consider any statements or rulings by the Hearing Office Administrative Judges concerning the applicants' ability to contribute to the national defense. Accordingly, it is untenable for Applicant to argue that the Board decisions in those two cases constitute Board precedent supportive of his position in this case.

Applicant's appeal arguments do not persuade the Board to reverse or modify its earlier rulings concerning an applicant's contribution to the national defense.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Public Law 104-231, 110 Stat. 3048 *et seq.* (amending 5 U.S.C. §552).
2. Board decisions are redacted to remove an applicant's name and Social Security number to protect the applicant's privacy.
3. DOHA web page is available at <http://ogc.osd.mil/doha/index.html>
4. Applicant's reliance on *Tax Analysts v. Internal Revenue Service*, 117 F.3d 607 (D.C. Cir. 1997) is misplaced because that case is easily distinguishable. *Tax Analysts* involved a situation where the Internal Revenue Service was refusing to disclose to FOIA requesters copies of Field Service Advice Memoranda that contained information not exempt under FOIA. Here, Applicant was not denied access to redacted Board decisions. The Board cannot be expected to know that an applicant is interested in obtaining a redacted copy of a Board decision issued before November 1, 1996 unless the applicant formally notifies the Board of such an interest.
5. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988).
6. *See, e.g.*, ISCR Case No. 02-22325 (July 30, 2004) at p. 3.
7. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at p. 4.
8. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8; ISCR Case No. 02-04237 (August 12, 2003) at p. 3; ISCR Case No. 01-13894 (February 20, 2003) at p. 4; ISCR Case No. 01-26893 (October 16, 2002) at p. 4.
9. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges, and the burden of persuasion that a party must meet when citing such decisions on appeal).
10. *See* Directive, Additional Procedural Guidance, Item E3.1.32.
11. *See* ISCR Case No. 01-22606 (June 30, 2003) at p. 4 (giving examples of situations where the Board will affirm a Hearing Office decision without agreeing with it, even if the Hearing Office decision contains factual or legal error).
12. Silence by the Board with respect to a Hearing Office Administrative Judge's ruling that has not been challenged on appeal does not permit anyone to draw meaningful inferences or conclusions about how the Board would have ruled if

the ruling had challenged on appeal. Moreover, if the Board has issued decisions that specifically address a particular matter, the Board's issued decisions cannot be assumed to be overruled or modified merely because the Board is silent about that particular matter in a later case where it was not raised on appeal.