

DATE: July 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06194

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Harold J. Tulley, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR) dated September 8, 2003 which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline E (Personal Conduct). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision dated March 12, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issue: whether the Administrative Judge's decision was 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 Administrative Judge's decision was arbitrary, capricious, or contrary to law.

The Administrative Judge found that Applicant deliberately falsified his answer to a question about prior drug use on a February 26, 2001 security clearance application by failing to disclose his prior cocaine use. The Administrative Judge concluded that this falsification was not mitigated. On appeal, Applicant asserts the following:

(a) his failure to disclose prior drug use on his security clearance application was based on his honest belief that revelations made during his treatment for substance abuse were confidential and did not have to be repeated; (b) Applicant's admission to a company security officer that he withheld information on the security clearance application because he was afraid he would lose his job was the product of a leading question posed to him by the security officer, who was his superior; (c) the company security officer did not provide Applicant with an adequate opportunity to set the record straight concerning the omissions on the security clearance application during a conversation that took place prior to Applicant's meetings with government investigators; (d) under the "whole person" analysis, Applicant has provided sufficient mitigation to overcome any common sense concern that the government might have regarding his holding of a security clearance; and (e) the Administrative Judge was too strict, too severe, and should not have read as much into things as he did.

The Board construes these arguments as raising the issue of whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Applicant's first two assertions (a and b) may be discussed together as they are both offered as explanations for why he filled out the security clearance applications the way he did, and they are both offered as evidence that negates an intent to falsify. There is no dispute that Applicant used cocaine and that the use should have been disclosed when Applicant completed the security clearance application in 2001. The sole issue before the Administrative Judge was whether Applicant's omission of his drug use from the security clearance application was a deliberate falsification or a good

faith, inadvertent, or careless omission. Applicant's statements concerning his intent or state of mind at the time he completed the security clearance application are relevant and material evidence that the Judge had to consider. However, the Judge was not bound to accept Applicant's statements at face value. Rather, the Judge had to consider Applicant's statements in light of his assessment of Applicant's credibility and the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0430 (July 3, 2001) at pp. 4-5; ISCR case No. 99-0473 (May 12, 2000) at pp. 2-3. Given the record evidence in this case, the Judge could have accepted Applicant's explanations for the omission, or the Judge could have rejected Applicant's explanations. The Judge chose to reject Applicant's explanations as not credible. Considering the record as a whole, and giving deference to the Judge's credibility determination (Directive, Additional Procedural Guidance, Item E3.1.32.1), the Board concludes Applicant has failed to demonstrate the Judge's choice was erroneous.

Applicant's third and fourth assertions (c and d) involve both mitigation and the whole person concept and may be discussed together. Applicant correctly notes that when making a security clearance decision the Administrative Judge should evaluate an applicant's conduct and circumstances under the whole person concept. See Directive, Section 6.3; and Enclosure 2, Items E2.2.1 and E.2.2.3. However, Applicant's arguments do not demonstrate the Administrative Judge failed to apply the whole person concept. Applicant also argues the Administrative Judge should have concluded he had demonstrated extenuation and mitigation. In support of this argument, Applicant sets forth an alternate interpretation of the record evidence. However, Applicant's ability to do so is not sufficient to demonstrate the Judge failed to apply the whole person concept, or that the Judge erred when he determined that Applicant had not provided sufficient evidence in mitigation. Merely because a Judge makes adverse findings and draws adverse conclusions, it does not follow that the Judge is failing to apply the whole person concept or is weighing the evidence, both favorable and unfavorable, in a manner that is arbitrary, capricious or contrary to law. The question is not whether the Judge's findings and conclusions are favorable, unfavorable, or mixed; rather, the question is whether the Judge's findings and conclusions reflect a reasonable interpretation of the record evidence as a whole that adequately takes into account the totality of an applicant's conduct and circumstances. In this case, the Judge's findings and conclusions about Applicant's falsification of a security clearance application in February 2001 reflect an interpretation of the record evidence that is consistent with the whole person concept.

Finally, Applicant asserts that the Administrative Judge was "too strict, too severe, and should not have read as much into things as [he] did." Applicant's brief does not offer any clear explanation as to what specifically is meant by this assertion. A party is required to proffer arguments with sufficient specificity to enable the Board to determine with reasonable certainty what the claim of error is. With regard to the quoted language, Applicant has failed to do so.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board