

DATE: December 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07026

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated April 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 E (Personal Conduct). Administrative Judge Robert J. Tuider issued an unfavorable security clearance decision, dated August 23, 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 Administrative Judge erred by finding that Applicant engaged in deliberate falsification as alleged in the SOR. 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

The Administrative Judge found that: (1) Applicant falsified a security clearance application in December 2000 by failing to disclose that she had a charged off account with a mortgage company worth approximately \$100,000; and (2) Applicant falsified material facts during a December 2001 interview with a Special Agent of the Defense Security Service (DSS) by claiming that she wrote a letter to DSS to correct the December 2000 security clearance application. Applicant challenges those findings of falsification.

Attached to Applicant's appeal brief are copies of various documents that duplicate exhibits that were presented to the Administrative Judge at the hearing. Also attached to Applicant's appeal brief are: (a) a copy of a handwritten letter dated March 25, 1996; and (b) a photocopy of a computer screen shot that is offered to prove that Government Exhibit 4 was created in September 2001. Neither of those two documents was offered as evidence during the proceedings below. Indeed, the photocopy of the computer screen shot bears dates indicating it was produced in September 2004, after the Judge's decision was issued. Accordingly, those two documents constitute new evidence, which the Board cannot consider on appeal.⁽¹⁾ A review of the case file shows that Applicant had a reasonable opportunity to present evidence for the Judge to consider in her case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence. The Board will consider Applicant's appeal arguments only to the extent they are not based on a proffer of new evidence.

In considering Applicant's challenge to the Administrative Judge's findings of falsification, the Board notes the Judge's decision contains a legally erroneous statement about Applicant's burden of proof. Specifically, the Judge stated that the Board decision in ISCR Case No. 02-23133 (June 9, 2004) held that proof of an omission is sufficient to shift the burden of proof to an applicant to prove the omission was not a falsification. The Judge appears to rely on a portion of one sentence from the Board's decision in ISCR Case No. 02-23133 out of context. In ISCR Case No. 02-23133, the Board specifically held that: (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind

when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. In that decision, the Board went on to state that *given the record evidence in that case* it was legally permissible for the Judge to conclude Department Counsel had established a *prima facie* case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

In this case, apart from the evidence of the Applicant's omission in the December 2000 security clearance application, there is record evidence that would allow the Administrative Judge to draw inferences about Applicant's intent or state of mind when she completed the security clearance application.⁽²⁾ Moreover, the December 2001 interview did not involve an omission, but rather Applicant's statement to the Special Agent that she corrected the omission in the December 2000 security clearance application by sending a letter to DSS in December 2000. As to that aspect of the case, the Judge had conflicting record evidence -- including Applicant's written explanation and hearing testimony, as well as the testimony of the Special Agent who interviewed Applicant in December 2001 -- to consider and weigh.

Given the totality of the record evidence in this case, and giving deference to the Administrative Judge's credibility assessments,⁽³⁾ it would have been legally permissible for the Judge to conclude: (a) there was sufficient evidence to satisfy Department Counsel's obligation to present evidence to establish a *prima facie* case against Applicant under Guideline E; (b) as a result of Department Counsel's *prima facie* case, the burden of proof shifted to Applicant to present evidence to explain the omission and prove that she had sent a correction letter to DSS in December 2000; and (c) Applicant's explanation for the omission and her claim about sending a correction letter were not credible and not sufficient to rebut the *prima facie* case against her under Guideline E.

Applicant's appeal arguments set forth an alternate interpretation of the record evidence, but they do not demonstrate the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law by deciding that Applicant's explanations and testimony were not credible and that the record evidence as a whole -- including the testimony of the Special Agent who interviewed Applicant in December 2001 -- supported findings that Applicant engaged in acts of falsification in December 2000 and December 2001, as alleged in the SOR. Applicant has not shown that it was arbitrary, capricious, or contrary to law for the Judge to reject her explanation about the security clearance application omission, or her claim about sending a correction letter to DSS in December 2000.

In view of the foregoing, the Board concludes that the Administrative Judge's erroneous reading of the Board decision in ISCR Case No. 02-23133 is harmless error under the particular facts and circumstances of this case. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Conclusion

The Board affirms the Administrative Judge's unfavorable security clearance decision because Applicant has not demonstrated harmful error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

DISSENTING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I disagree with my colleagues' conclusion that the Administrative Judge's erroneous reading of the Board's decision in ISCR Case No. 02-23133 is harmless in this case. This case is entirely about two alleged falsifications. Once the Judge concluded that the government had proven its *prima facie* case and shifted the burden of proof to Applicant with regard to one falsification, such a conclusion is likely to have colored the Judge's analysis of the other alleged falsification. Essentially, the case became a matter of Applicant having to prove that she did not lie, rather than the government having to demonstrate that she has lied.

I believe, based on the record in this case, there is a significant chance that, had the Judge not applied an erroneous reading of a Board decision, the Judge might have reached a different conclusion. Therefore, I believe this case should be remanded to the Judge with instructions to analyze the case without reference to his mistaken reading of the Board's decision in ISCR Case No. 02-23133.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
2. Evidence concerning an individual's intent or state of mind can be direct or circumstantial in nature, and an individual's statements about his or her intent or state of mind are not conclusive or binding on an Administrative Judge. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3.
3. Such deference is required by Directive, Additional Procedural Guidance, Item E3.1.32.1. As noted earlier in this decision, although an Administrative Judge's credibility determinations are not immune from review, the party challenging a Judge's credibility determinations has a heavy burden on appeal.