

DATE: July 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07555

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Steven Granberg, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated July 8, 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) and Guideline J (Criminal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision dated March 31, 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 the Administrative Judge erred by finding that Applicant falsified a security clearance application; and (2) whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Applicant's falsifications were mitigated under Guideline J, but not mitigated under Guideline E. 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 Administrative Judge erred by finding that Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in December 2000 by deliberately omitting a March 1998 arrest for domestic violence and an April 1992 arrest for possession of marijuana and drug paraphernalia. Applicant challenges the finding of falsification, contending the Judge erred by not accepting Applicant's explanations about the omissions.

Although Applicant's explanations about the omissions were relevant and material evidence that the Administrative Judge had to consider, the Judge was not legally required to accept Applicant's explanations. Indeed, the Judge could consider and weigh Applicant's explanations in light of his assessment of the record evidence as a whole and his assessment of the credibility of Applicant's hearing testimony. Furthermore, it is legally permissible for the Judge to consider whether the record evidence as a whole warrants a finding of deliberate falsification despite the Applicant's denial of any intent to deceive or mislead the government. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record as a whole and giving due deference to the Judge's credibility determination, the Board concludes the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification is erroneous.

2. Whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Applicant's falsifications were mitigated under Guideline J, but not mitigated under Guideline E. The Administrative Judge concluded Applicant's falsification of the security clearance application was not extenuated or mitigated under Guideline E, but extenuated or mitigated under Guideline J. Applicant contends the Judge erred by not concluding his falsification was extenuated or mitigated under Guideline E because: (a) since a violation of 18 U.S.C. 1001, a criminal statute, must be proven beyond a reasonable doubt, the Judge's conclusion that Applicant demonstrated rehabilitation

under Guideline J should have resulted in the Judge concluding Applicant demonstrated rehabilitation under Guideline E, which has a lesser standard of proof; and (b) it is arbitrary and capricious for the Judge to conclude that the same conduct (*i.e.*, falsification of a security clearance application) is extenuated or mitigated under Guideline J, but not extenuated or mitigated under Guideline E. [\(2\)](#)

(a) Applicant's first argument is based on an erroneous assumption. This case involves the adjudication of Applicant's security eligibility under the provisions of the Directive, not an adjudication of his guilt or innocence under criminal law. In these proceedings, an Administrative Judge can find an applicant has engaged in criminal conduct (under Guideline J) based on substantial evidence, which is less than the "beyond a reasonable doubt" standard. *See, e.g.*, ISCR Case No. 00-0233 (February 14, 2001) at p. 4. *See also Chesna v. U.S. Department of Defense*, 850 F.Supp. 110, 119 (D. Conn. 1994)(in a security clearance adjudication, an applicant is not entitled to the protections afforded a criminal defendant merely because the government seeks to deny or revoke access to classified information based on a determination that the applicant engaged in conduct that would constitute a felony). The Board will not review the Judge's conclusions under Guideline E and Guideline J predicated on Applicant's erroneous assumption that there is a distinction between the burden of proof under Guideline E and the burden of proof under Guideline J.

(b) It is not frivolous for Applicant to argue that it is inconsistent for the Administrative Judge to reach different conclusions under Guideline E and under Guideline J with respect to Applicant's falsification of the security clearance application. Indeed, the Board doubts it can reconcile the Judge's analysis (of Applicant's falsification) under Guideline J with his analysis under Guideline E. The federal government has a compelling interest in protecting classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). To further that compelling interest, the federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). An applicant who deliberately tries to deceive or mislead the federal government does not demonstrate the high degree of judgment, reliability, and trustworthiness that must be expected of persons granted access to classified information. The serious negative security implications of Applicant's deliberate falsification of the security clearance application do not turn on whether his falsification is analyzed under Guideline E or Guideline J.

When faced with a finding of deliberate falsification that is sustainable on the record evidence and a conclusion about that falsification that does not appear to follow rationally from the Administrative Judge's finding of falsification, the Board will sustain the articulated finding of falsification and decline to accept the inconsistent conclusion. To the extent the Judge erred in his analysis of Applicant's falsification under Guideline J, Applicant was not harmed by the Judge's error in any meaningful way. *See* ISCR Case No. 00-0377 (November 19, 2001) at pp. 4-5 (addressing claim of error similar to the one raised in this appeal).

Conclusion

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's unfavorable security clearance decision.

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's favorable findings and conclusions about SOR paragraphs 1.c and 2.a are not at issue on appeal. Applicant contends the Judge erred by finding that Applicant entered a six-month counseling program. That claim of error is moot in light of the Judge's favorable formal finding concerning SOR paragraph 2.a.
2. Applicant's conclusory invocation of his "rights to due process and equal protection under the Fifth Amendment" lacks specificity. Purported constitutional claims warrant more than a conclusory one-sentence assertion bereft of any cogent argument, analysis, or citation of legal authority. *See, e.g.*, ISCR Case No. 02-06478 (December 15, 2003) at p. 6 (the appealing party has the obligation to raise due process claims with specificity); ISCR Case No. 00-00050 (July 23, 2001) at p. 3 (explaining why appealing party must raise claims of error with specificity).