

DATE: September 28, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09220

**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 September 29, 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), Guideline E (Personal Conduct), and Guideline G (Alcohol Consumption). Administrative Judge James A. Young issued an unfavorable security clearance decision dated May 27, 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 Applicant was denied a fair hearing because he had to represent himself; (2) whether Applicant was denied a fair hearing because the Administrative Judge and Department Counsel arrived at the hearing location together and left that location together; (3) whether the Administrative Judge erred by holding Applicant's past conduct against him instead of focusing on Applicant's present circumstances; and (4) whether the Administrative Judge's overall security clearance 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 Issues <sup>(1)</sup>

Applicant's brief contains some factual assertions that go beyond the record evidence. Such assertions constitute new evidence which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. The Board will address only those claims of error that do not rely on new evidence.

1. Whether Applicant was denied a fair hearing because he had to represent himself. Applicant argues that he did not prevail with respect to the Guideline E (Personal Conduct), which involved the falsification of his January 2001 security clearance application, because he had no legal training, and he could not afford to retain an attorney to represent him. He states that he did not understand most of the "legal jargon" during the hearing below and suggests that he was outmaneuvered by Department Counsel who "brought up details that happened up to five years ago to confuse and infuse doubt." We construe Applicant's position to be that he was denied a fair hearing because he had to represent himself.

A review of the record shows that Applicant was aware of his right to retain an attorney. Applicant appeared at the hearing below without an attorney and told the Judge that he chose to represent himself (Hearing Transcript at p.6). At no time during the hearing did the Applicant indicate that he could not represent himself or needed a continuance to retain counsel. There is no indication that Applicant was illiterate, mentally incompetent or mentally disabled, or otherwise unable to understand or appreciate the SOR allegations against him, the documentary evidence presented by the Department Counsel or the hearing procedures. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3. Moreover, the record shows that Applicant arranged for the appearance of four witnesses other than himself and obtained testimony from each that was favorable to him. Applicant's *pro se* status did not relieve him of the obligation to take timely, reasonable steps to protect his rights under Executive Order 10865 and the Directive. Having decided to

represent himself during the proceedings below, Applicant cannot fairly complain about the quality of his self-representation or seek to be relieved of the consequences of his decision to represent himself. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. This claim of error lacks merit.

2. Whether Applicant was denied a fair hearing because the Administrative Judge and Department Counsel arrived at the hearing location together and left that location together. Applicant states that the Department Counsel and the Judge arrived and departed together. He states that he was under the impression that a "local judge" would preside at his hearing. He questions "[h]ow can the appeal board and I be sure this case was not being discussed to and from Washington DC?" He further suggests that there is a "possibility" that the Department Counsel and Judge could have discussed his case "[e]specially seating [sic] next to one another for three plus hours in close quarters on a plan [sic]."

During the hearing, Applicant did not raise any concern about how the Judge and Department Counsel arrived. Nor does Applicant indicate on appeal what basis he had for thinking he would have a "local judge" preside over his hearing. There is no record evidence about the facts and circumstances of how the Administrative Judge and Department Counsel arrived at, and left, the hearing location. However, even if the Board accepts as true, solely for purposes of deciding the appeal, Applicant's appeal statement that the Administrative Judge and Department Counsel arrived and departed at the same time, it is insufficient to raise a colorable claim of bias or improper conduct. Even if the Judge and Department Counsel arrived and departed together, one cannot reasonably infer that they discussed Applicant's case.

There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at p. 3. Furthermore, there is a rebuttable presumption that agency officials carry out their duties in good faith, and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See* ISCR Case No. 02-17609 (May 19, 2004) at p. 3 (*citing National Archives and Records Administration v. Favish*, 541 U.S. --, slip op. at 16 (March 30, 2004)). Applicant's speculation about the Administrative Judge and the Department Counsel is so lacking in substance that it does not even begin to raise a colorable question about the good faith of the Administrative Judge and Department Counsel.

3. Whether the Administrative Judge erred by holding Applicant's past conduct against him instead of focusing on Applicant's present circumstances. Applicant contends that the decision to deny his security clearance "was based mostly on infractions that happened over five years ago and have little or no impact on what is happening [today]." Applicant states that he was punished for his past infractions and that "[d]enying my clearance based on these past infractions would be further punishment."

The record shows that the Administrative Judge concluded that Applicant's past criminal record (much of it involving alcohol-related offenses) had been mitigated and warranted favorable formal findings under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct). Therefore, the Judge did not rely on those aspects of Applicant's past conduct to make his unfavorable security clearance decision. The Judge was concerned about Applicant's more recent past conduct, the falsifications of his January 2001 security clearance application, to deny the clearance.<sup>(2)</sup> While the Judge did consider some of Applicant's pre-2001 conduct, the Judge's decision indicates that it was focused on Applicant's propensity not to be frank in disclosing prior misconduct to appropriate authorities at times when Applicant was under a duty to do so.

Applicant's focus only on current conduct and circumstances is misplaced. The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. This process is a careful weighing of a number of variables known as the "whole person" concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered. *See* Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.

4. Whether the Administrative Judge's overall security clearance decision was arbitrary, capricious or contrary to law. Applicant argues that: (a) the Administrative Judge did not have a sufficient basis to make an unfavorable security clearance decision; (b) his off-duty conduct has not affected his job performance; and (c) a favorable security decision would help his career and family. Applicant's arguments do not demonstrate the Judge erred.

First, falsification of a security clearance application raises serious security concerns. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See, e.g., Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960) (security requirements include consideration of a person's honesty, judgment, sobriety, and sense of obligations), *aff'd* 367 U.S. 886 (1961). Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964) (lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965).

Second, security clearance decisions are not limited to an applicant's conduct during duty hours, and off-duty conduct that raises security concerns can be considered in assessing an applicant's security eligibility. An applicant's ability to contribute to the defense effort is not a measure of whether that applicant demonstrates the high degree of judgment, reliability or trustworthiness that must be reposed in persons granted access to classified information. *See, e.g., ISCR Case No. 02-23073* (March 30, 2004) at p. 4. Even if Applicant's falsification did not adversely affect his job performance, the Administrative Judge could consider the negative security implications of that falsification.

Third, the consequences to an applicant's career and the financial well-being of himself or his family are not a relevant consideration in an adjudication of an applicant's security eligibility. *See, e.g., ISCR Case No. 98-0621* (November 23, 1999) at p. 2. The effect of an unfavorable security clearance decision on Applicant or his family has no bearing on the Administrative Judge's evaluation of Applicant's security eligibility in light of his falsification of a security clearance application.

### **Conclusion**

The Applicant has failed to demonstrate 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made formal findings in Applicant's favor with respect to all SOR allegations under Guideline J and Guideline G, and these findings are not in issue on appeal.
2. On appeal, Applicant does not challenge the Administrative Judge's finding of falsification.