

DATE: April 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09409

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 April 21, 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 G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision dated December 30, 2003.

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's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's unfavorable 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 made findings about Applicant's history of criminal conduct, which included three driving while intoxicated convictions, an assault and battery charge and a felony larceny charge. The Judge also made findings about Applicant's history of alcohol abuse and his falsification of a security clearance application. On appeal, Applicant does not challenge the Judge's findings of fact. Rather, Applicant cites his service with the Marines, his dedication to his country, his willingness to put his life on the line for his country, the fact that he has learned from his mistakes, and the adverse effect an unfavorable security clearance decision will have on his future employment. The Board construes Applicant's appeal statements as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

As noted earlier in this decision, there is no presumption of error. Because Applicant does not challenge any of the Administrative Judge's findings of fact, the Board need not review those findings in order to decide this appeal.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. Given the Administrative Judge's findings of fact about Applicant's history of criminal conduct, alcohol abuse, and falsification, the Judge had a rational basis for his adverse conclusions about Applicant's judgment, reliability and trustworthiness under Guidelines E, G, and J.

To the extent that Applicant's appeal statements can be construed as making claims that positive aspects of his record outweigh his negative conduct and that he has demonstrated reform and rehabilitation, the Board concludes Applicant has failed to demonstrate the Judge erred. The Judge had to consider the record evidence as a whole, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and whether Applicant had satisfied his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. The Judge considered the facts and circumstances of Applicant's criminal conduct, alcohol abuse, and falsification, and

weighed them against the evidence that Applicant presented to support his claim that he had reformed and rehabilitated himself. The Judge concluded that the favorable evidence presented was not enough to demonstrate reform, rehabilitation, or changed circumstances sufficient to warrant a favorable security clearance decision. Considering the record as a whole, the Board concludes the Judge's weighing of the record evidence was not arbitrary, capricious, or contrary to law.

Finally, the adverse effect that an unfavorable security clearance decision will have on Applicant's future employment is irrelevant to the adjudication of his security eligibility. Whether an unfavorable security clearance decision will adversely affect an applicant's job situation has no probative value as to whether that applicant demonstrates the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 01-21851 (April 18, 2003) at p. 4. Accordingly, Applicant's argument on this point does not demonstrate error by the Administrative Judge.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's adverse 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board