

DATE: June 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11286

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated June 26, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision dated January 15, 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 one of his answers to written interrogatories; and (2) whether the Administrative Judge erred by not granting Applicant a security clearance with a warning. 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 and one of his answers to written interrogatories. The Administrative Judge found that Applicant falsified a security clearance application he completed in August 2001 by not disclosing three alcohol-related incidents, and falsified one of his answers to written interrogatories in February 2003 by not disclosing those three alcohol-related incidents. The Judge concluded that Applicant's falsifications warranted an unfavorable security clearance decision. On appeal, Applicant challenges the Judge's findings of falsification.

There is no dispute that Applicant was involved in three alcohol-related incidents that he did not list on the security clearance application he completed in August 2001 or in one of his answers to written interrogatories in February 2003. The Administrative Judge had to consider the record evidence before him and make a finding of fact as to whether Applicant's failure to list those three alcohol-related incidents were acts of deliberate falsification (one in August 2001, the other in February 2003). Applicant's denials of any intent to falsify were part of the record before the Judge. The Judge had to consider Applicant's denials and explanations for why he did not list the three alcohol-related incidents, but the Judge was not bound to accept those denials and explanations. Rather, the Judge can consider and weigh them in light of the record as a whole. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3.⁽²⁾ Considering the record evidence as a whole, the Judge's findings of falsification in August 2001 and February 2003 are sustainable. *See* Directive, Additional Procedural Guidance, Item E3.32.1. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's findings of falsification are erroneous.

Applicant also argues that there is no record evidence that shows he falsified information or misled an investigator who interviewed him and took his written statement.⁽³⁾ In support of this argument, Applicant: (a) asserts there is no record evidence that the investigator questioned Applicant about his record of alcohol-related incidents apart from one that

occurred in May 2000, and (b) refers to the investigator's Report of Investigation. Department Counsel's reply brief correctly notes that the Report of Investigation was not part of the record evidence and, accordingly, Applicant's appeal statements about the contents of the Report of Investigation constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. However, that conclusion does not resolve this claim of error.

In the File of Relevant Material, Department Counsel argued that Applicant failed to disclose the three alcohol-related incidents when he was interviewed by an investigator and gave his written statement. (4) However, proof of silence or an omission, standing alone, is not proof of a deliberate falsification. Rather, there must be some evidence -- direct or circumstantial -- that the person who remains silent or who does not disclose particular information was asked a question that a reasonable person would know or should know calls for disclosure of the particular information. The record evidence in this case shows the security clearance questionnaire and the written interrogatories asked questions that a reasonable person would know or should know called for disclosure of the three alcohol-related incidents that Applicant did not disclose. In contrast, there is no record evidence -- direct or circumstantial -- as to whether the investigator asked Applicant questions that a reasonable person would know or should know called for disclosure of the three alcohol-related incidents. Even under the relaxed evidentiary standards applicable in these proceedings, speculations or assumptions about what an investigator did or did not ask an applicant during an interview or during the preparation of a written statement do not constitute "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Directive, Additional Procedural Guidance, Item E3.1.32.1.

Given the record evidence in this case, the Administrative Judge erred by concluding Applicant deliberately omitted the three alcohol-related incidents when he was interviewed by an investigator and gave a written statement. In light of the Administrative Judge's sustainable adverse findings, this error is on its own not sufficient to warrant remand or reversal.

2. Whether the Administrative Judge erred by not granting Applicant a security clearance with a warning. In addition to challenging the Administrative Judge's findings of falsification, Applicant refers to his favorable Navy record and favorable employment history, states he has a good reputation for honesty in his personal life and his professional life, notes he has held a security clearance without having any security violations, and asks that he be granted a security clearance with a warning. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge erred by not granting Applicant a security clearance with a warning.

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). The federal government is not required to wait until an applicant mishandles or fails to safeguard classified information before it denies or revokes access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Furthermore, the favorable evidence cited by Applicant did not preclude the Administrative Judge from concluding that Applicant's acts of deliberate falsification (in August 2001 and February 2003) reflected adversely on his judgment, reliability, and trustworthiness and warranted an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at pp. 3-4 (discussing security significance of falsification). Considering the record evidence as a whole, the Judge's unfavorable security clearance decision is not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The Administrative Judge concluded that Applicant had presented sufficient evidence of extenuation, and changed circumstances to warrant favorable formal findings under Guideline G (Alcohol Consumption). The Judge's findings and conclusions under Guideline G are not at issue.
2. Because this case was decided without a hearing, the Administrative Judge did not have an opportunity to make a credibility determination based on a personal observation of Applicant's demeanor during testimony.
3. Although the SOR did not allege that Applicant engaged in any falsification when he was interviewed by the investigator and gave a written statement, the Administrative Judge concluded that Applicant deliberately omitted information about three alcohol-related incidents from his January 2002 written statement (Decision at p. 5).
4. Although it is legally permissible for Department Counsel to make arguments in a File of Relevant Material, such arguments do not constitute record evidence. *See* ISCR Case No. 02-07191 (March 25, 2004) at p. 3.