

DATE: January 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11073

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 22, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision, dated August 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 Applicant falsified a security clearance application; and (2) whether the Administrative Judge's findings about the status of Applicant's financial difficulties are supported by the record evidence. 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 Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application by failing to disclose material facts about his family members, his criminal record, and his financial difficulties. Applicant challenges the Judge's findings of falsification. In support of that challenge, Applicant argues the following: (a) he did not deliberately conceal information from the Department of Defense; (b) he denies that he told an investigator that he falsified material facts due to embarrassment about what his coworkers might think; (c) he did not think a September 2001 incident was an actual arrest that had to be reported in the security clearance application; (d) his failure to disclose material facts about his family members was due to pressure to complete the security clearance application as soon as possible; (e) his failure to disclose a delinquent debt was due to an innocent misunderstanding about when that debt occurred; and (f) his disclosures to an investigator during a February 2002 interview show he was not hiding things from the Department of Defense.

Applicant's second, third, fourth, and fifth arguments are based on factual assertions that constitute new evidence, which the Board cannot consider. As noted in footnote 1 of this decision, Applicant had a reasonable opportunity to respond to the File of Relevant Material and submit written and documentary evidence for the Administrative Judge to consider in his case. Having failed to respond to the File of Relevant Material or submit additional evidence for the Judge to consider, Applicant cannot fairly challenge the Judge's findings of falsification based on proffered explanations made for the first time on appeal.

Applicant's disclosures to an investigator in a February 2002 interview did not preclude the Administrative Judge from finding that Applicant had falsified a security clearance application in December 2001. It is factually, legally, and logically possible for a person to engage in falsification and then later make truthful disclosures about the matters initially falsified. Considering the record as a whole, Applicant's arguments do not show the Judge's findings of

falsification are erroneous.

2. Whether the Administrative Judge's findings about the status of Applicant's financial difficulties are supported by the record evidence. The Administrative Judge found that Applicant was current with his child support obligations, but that Applicant had unresolved delinquent debts worth approximately \$4000. Applicant challenges the Judge's finding that he is unwilling to deal with his delinquent debts, and offers new evidence about his financial situation and efforts to deal with his financial obligations.

As discussed earlier in this decision, the Board cannot consider new evidence. Accordingly, the Board will not consider Applicant's assertions about his current financial situation. Applicant's argument about his willingness to deal with his delinquent debts fails to demonstrate the Administrative Judge erred. Given the record evidence below, the Judge had a rational basis for finding that Applicant had shown he was not willing to deal with his delinquent debts.

Conclusion

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

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Attached to Applicant's appeal brief are two letters written in support of Applicant's appeal. Those two letters constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. A review of the case file shows that Applicant had a reasonable opportunity to respond to the File of Relevant Material and submit written or documentary evidence for the Administrative Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of evidence that was not submitted for the Judge's consideration during the proceedings below.