

DATE: May 18, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11869

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 December 27, 2002 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), Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline F (Financial Considerations). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision dated January 30, 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 in issuing factual findings against applicant for five items under Guideline J, and (2) whether the Administrative Judge's decision is 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

1. Whether the Administrative Judge erred in issuing factual findings against Applicant for five items under Guideline J. The five items are arrests listed in the SOR as items 3.a(2), 3.a(3), 3.a(4), 3.a(7), and 3.a(9). In his appeal brief, Applicant states that none of these items resulted in an arrest. Arrest is not necessary for conduct to be a security concern. *See* Directive, Item E2.A10.1.2.1. Applicant contends that the Judge mis-characterized the offenses listed as 3.a(3), (4), (7), and (9) and that in 3.a(9) he was the complainant rather than the perpetrator. In light of Applicant's admissions in his answer to the SOR, Applicant's claims of error are not sustainable beyond the Administrative Judge's erroneous insertion of the term "military installation." Even that error is harmless, in light of the record as a whole. ⁽¹⁾

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The Administrative Judge issued Formal Findings adverse to Applicant on all items in the SOR except one. ⁽²⁾ Applicant appeals many of the Administrative Judge's adverse findings.

With regard to Guideline E (Personal Conduct), the Administrative Judge found against Applicant for failing to list on his Standard Form (SF) 86 a 1993 Driving Under the Influence (DUI) arrest and three arrests involving disputes with his domestic partner. ⁽³⁾ Considering the record evidence as a whole, the Judge's finding that Applicant deliberately failed to list these arrests is supportable.

Under Guideline G (Alcohol Consumption), Applicant sought to minimize his two alcohol-related offenses because the first occurrence was over seven years ago and there was no evidence of a pattern. The Administrative Judge found against Applicant in large part because the second offense occurred less than a year before Applicant completed his SF 86 and because Applicant had failed at rehabilitation after the first offense and not shown further rehabilitation efforts. The Judge's findings under Guideline G are sustainable.

With regard to Guideline J (Criminal Conduct), Applicant sought to mitigate or extenuate each offense, often by stating that the criminal conduct was an isolated incident, in some instances not recent, and that his personal situation later changed, so that his repetition of that conduct was unlikely. Viewing Applicant's criminal record as a whole, the Administrative Judge found a pattern of criminal offenses, which in his view created doubt as to Applicant's judgement, reliability, and trustworthiness. Except as indicated earlier, the Judge had an adequate basis for his findings under Guideline J, for the security concerns raised by those findings. (Directive, Enclosure 2, Item E2.A10.1.1).

Applicant attempted to minimize the significance of the debts listed in the SOR under Guideline F (Financial Considerations). The Board cannot consider Applicant's supplemental remarks on appeal about his efforts to attempt to settle outstanding debts. Comments on such matters constitute new evidence, which the Board cannot consider. (Directive, Additional Procedural Guidance, Item E3.1.29). The Administrative Judge concluded that Applicant's conduct established Financial Considerations Disqualifying Conditions 1 [\(4\)](#) and 3 [\(5\)](#), and that Applicant failed to mitigate any of these debts. Based on the record as a whole, the Judge's conclusions are sustainable.

Applicant chose not to have a hearing. While the File of Relevant Material (FORM) before the Administrative Judge contained Applicant's answer to the SOR and his responses during an interview with a DSS agent, he did not submit a response to the File of Relevant Material as a whole. Applicant did not submit any evidence to support his interpretation of the facts involved. There is a presumption that the Judge has considered the entire record before him, and there is no indication that the Judge did not consider Applicant's statements in the FORM. The Judge was not bound to accept Applicant's explanations. As explained in the preceding paragraphs, there is adequate evidence to support the Judge's decision and little if any opposing evidence. Moreover, 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). Security requirements include considerations of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D. C. Cir. 1960). The Administrative Judge's decision is therefore not arbitrary, capricious, or contrary to law.

Conclusion

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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. Applicant also points out that the Judge mis-stated Applicant's age. That error is also harmless, since it has no bearing on the outcome of the decision.
2. The Judge found that Applicant's omission of his children from his security application was inadvertent. That finding is not at issue here.
3. "The deliberate omission, concealment, or falsification of relevant material facts from any personnel security questionnaire..." (Directive, Enclosure 2, Item E2.A5.1.2.2).
4. "A history of not meeting financial obligations." (Directive, Enclosure 2, Item E2.A6.1.2.1)
5. "Inability or unwillingness to satisfy debts." (Directive, Enclosure 2, Item E2.A6.1.2.3)