

DATE: January 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12586

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated October 7, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), Guideline H (Drug Involvement), and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable decision, dated September 29, 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 issue is raised on appeal: whether the Administrative Judge erred in concluding that Applicant's failure to disclose a 1994 arrest was deliberate. For the reasons that follow, the Board remands the case to the Judge for processing consistent the Board's rulings and instructions.

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 ⁽¹⁾

Whether the Administrative Judge erred in concluding that Applicant's failure to disclose a 1994 arrest was deliberate. The Administrative Judge concluded that Applicant's failure to disclose a 1994 arrest on his security clearance application was deliberate because the Judge understood an earlier Appeal Board decision (ISCR Case No. 02-23133, June 9, 2004) as holding that the mere showing of a failure to disclose "shifted the burden to Applicant to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification." The Judge went on to say that Applicant denied that failure to disclose was deliberate but ". . . has provided nothing to rebut or explain this omission." ⁽²⁾

On appeal, Applicant notes that he had previously given a statement (Government Exhibit 9) in which he had discussed that omission and another omission (regarding employment) and said that the omissions were oversights, and that "There was no intent to lie or falsify my security forms."

The Appeal Board has previously ruled that the Administrative Judge's reading of the ISCR Case No. 02-23133 is erroneous. We have explained that: (a) when a falsification allegation is controverted Department Counsel has the burden of proving falsification; (b) proof of omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning applicant's state of mind at the time the omission occurred. In the decision cited by the Judge, the Board went on to state that given the record evidence in that case it was legally permissible for the Judge to conclude Department Counsel had established a *prima facie* case under Guideline E and the burden of persuasion had shifted to applicant to present evidence to explain the omission. *See* ISCR Case No. 03-09483, November 17, 2004, at p. 4.

In this case, the Administrative Judge's error was harmful. Rather than considering the record evidence as a whole

(including Applicant's statement in Government Exhibit 9) to determine if the Department Counsel had met its burden of demonstrating falsification, the Judge used the mere presence of an omission to shift the burden to Applicant. Furthermore, the Judge apparently did not consider Applicant's statement at all when he wrote that Applicant had provided nothing to explain or rebut the allegation.

Conclusion

Applicant has demonstrated error which warrants remand. On remand the Judge must issue a new decision--consistent with the requirements of the Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25--that includes an analysis of whether the Department Counsel met its burden of proving allegation 4.a. in light of the Board rulings in this 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge issued formal findings in Applicant's favor under all SOR allegations except one (subparagraph 4.a.). The favorable findings are not at issue on appeal.

2. Decision at p. 7.