

DATE: April 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12586

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 the Applicant a Statement of Reasons (SOR), dated October 7, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon 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 security clearance decision, dated September 29, 2004.

Applicant appealed the Administrative Judge's unfavorable decision and, on January 25, 2005, the Appeal Board issued a Decision and Remand Order in the case.

Administrative Judge Young issued an unfavorable remand decision, dated February 2, 2005. Applicant appealed the Administrative Judge's unfavorable remand decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issue: whether the Administrative Judge's adverse findings and conclusions under SOR paragraph 4.a are reasonable in light of the record evidence in this case. For the reasons that follow, the Board affirms the Administrative Judge's remand 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 [\(1\)](#)

Whether the Administrative Judge's adverse findings and conclusions under SOR paragraph 4.a are reasonable in light of the record evidence in this case. There is no dispute that Applicant failed to list charges against him for violating an October 1994 Protective Order on his January 18, 2000, Security Clearance Application (SCA). The Judge found that the incident was an important event in Applicant's life, and that he could not find Applicant's claim credible that he did not deliberately omit the information. The Judge concluded none of the mitigating conditions apply. On appeal, Applicant challenges the Judge's findings and his failure to apply any mitigating conditions.

Given the totality of the record evidence, the Judge could have found either that the omission was deliberate or that it was inadvertent. Indeed, the Board's January 25, Decision and Remand Order made it clear that the Judge was permitted to make either finding so long as he provided a reasonable analysis of the record evidence. On remand the Judge offered a reasonable analysis and explanation for his adverse finding. The Board need not agree with the Judge's finding to conclude that it is sustainable in light of the record evidence as a whole. Applicant has failed to demonstrate that the Judge's finding was erroneous.

Once the Administrative Judge found that Applicant had deliberately falsified his SCA, over four years prior to the close of the record, and had provided incredible explanations for that falsification through the close of the record, the Judge was not obliged to apply any of the mitigating conditions under Guideline E. Applicant has failed to demonstrate that the Judge's decision not to apply any mitigating conditions was erroneous.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's February 2, 2005 decision. Therefore, the Judge's remand decision is affirmed.

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 made favorable findings under all SOR paragraphs except for paragraph 4.a. The Judge's favorable findings are not at issue on appeal.