

DATE: March 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12975

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of reasons (SOR) dated May 2, 2003, 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). Administrative Judge Michael Leonard issued an unfavorable clearance decision dated November 19, 2003.

Applicant appealed the Administrative Judge's adverse clearance decision. The Board has jurisdiction under Executive Order 10865 and DOD Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issue: whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. For the reasons set forth below, 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 Issue

Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. Applicant's appeal disputes several aspects of the Administrative Judge's decision. Taken together, the Board construes the Applicant's claims as arguing that the Judge's decision is arbitrary, capricious or contrary to law.

The Administrative Judge issued seven formal findings against Applicant under Guideline E (Personal Conduct). The Judge also issued one favorable finding which is not at issue on appeal. The seven adverse findings were: a. on a 1998 felony charge of Hinderment, b. on a 1998 charge and conviction for Reckless Driving, c. on a 1999 arrest and charge for Obstruction of Justice, d. on a 1999 arrest and charge of Intoxicated in Public which resulted in a finding of guilty and a \$100 fine and \$40 court costs, e. on a 1999 charge of Driving While Intoxicated which resulted in a 2000 conviction for Reckless Driving, f. on a 2000 charge of Urinating in Public for which Applicant paid a \$25 fine, and g. on a July 1999 falsification of Applicant's Security Clearance Application in which he deliberately failed to disclose item b.

Applicant contends that items a through e were not recent, not serious and not relevant to holding a security clearance. Applicant's relevance claim is not viable. Any conduct which fits a disqualifying condition under the Directive is relevant to the adjudication of an Applicant's security clearance. Applicant's remaining challenges go to the Administrative Judge's weighing of the evidence. The Judge concluded that taken together Applicant's misconduct was serious. The Judge is responsible for weighing the evidence in light of the record evidence as a whole. Applicant's disagreement with the Judge's assessment is not sufficient to persuade the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious or contrary to law. Accordingly, the Judge's conclusions are sustainable. Similarly, Applicant notes that he was a teenager at the time of these events, which the Board construes as a suggestion that his maturity should be considered. Such an argument is also a challenge to the Judge's weighing of the evidence. The Judge noted the maturity question but did not find it sufficient to overcome the misconduct as a whole. Absent a showing that the Judge's weighing of the evidence was arbitrary, capricious or contrary to law, the Board will not disturb that weighing.

Applicant points out that the Judge accepted his explanation for item f (that Applicant took the blame for two women) but then found against Applicant. Applicant's point is well-taken. Given the Judge's finding of fact, and absent any explanation reconciling the finding of fact with the formal finding, the Judge's formal finding against Applicant on this issue is error. However, given the totality of facts and circumstances in the case, the error is harmless.

Applicant challenges the Administrative Judge's adverse finding under item g, the falsification. Applicant denies that his omission was deliberate and stresses that he has acknowledged his error multiple times. Applicant's argument is not persuasive. The Judge had ample room to find that Applicant's omission was deliberate. As noted above, we will not disturb the Judge's weighing of the evidence, absent a showing that the Judge's weighing was arbitrary, capricious, or contrary to law. Applicant notes that the omission took place "five" [sic] years ago (the record in the case closed in October 2003). Given the totality of Applicant's misconduct, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's disqualifying behavior had not been mitigated by the passage of time.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating harmful error which would mandate remand or reversal.

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board