

DATE: April 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13426

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 July 17, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct). Administrative Judge Paul J. Mason issued an unfavorable security clearance decision dated February 26, 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 has been raised on appeal: whether the Administrative Judge erred by concluding Applicant had presented insufficient evidence of rehabilitation to warrant a favorable security clearance decision. 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 Issue

The Administrative Judge found that: (1) Applicant ran an illegal betting operation during the period 1996-2001; (2) in January 2001, Applicant was charged with two felony counts of possession of gambling records and one misdemeanor count of promoting gambling; and (3) as a result of a plea bargain, Applicant pleaded guilty to two misdemeanor counts of promoting gambling and was fined an unknown amount. The Judge concluded Applicant had presented insufficient evidence of rehabilitation to warrant a favorable security clearance decision.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his criminal conduct. However, Applicant does assert: (a) he has been employed with the same company for nearly 24 years without incident; (b) he does not associate with anyone that has ever been arrested for bookmaking; (c) he plays golf with a group of men "whose names could at any time be submitted to prove [his] honesty"; and (d) a security clearance is important to allow him to fully perform his job and for any future job opportunities that might require a security clearance. The Board construes Applicant's statements as raising the issue of whether the Judge erred by not concluding Applicant had presented sufficient evidence of rehabilitation to warrant a favorable security clearance decision.

Applicant's offer to present the names of men who could vouch for his honesty is untimely and precluded by the Directive. During the proceedings below, Applicant had ample opportunity to present evidence for the Administrative Judge to consider in his case. Applicant cannot fairly seek to challenge the Judge's decision based on a proffer of evidence on appeal that he could have presented for the Judge's consideration during the proceedings below. Furthermore, the Directive prohibits the Board from considering new evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Given the record evidence of Applicant's criminal conduct, Applicant had the burden of presenting evidence of extenuation, mitigation, or changed circumstances sufficient to show that it is clearly consistent with the national interest to grant or continue a security clearance for him. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-

6. The Administrative Judge had to consider the record evidence as a whole and decide whether Applicant had presented sufficient credible evidence to satisfy his heavy burden of persuasion. Because there is no presumption of error below, Applicant has the burden of demonstrating the Judge acted in a manner that is arbitrary, capricious, or contrary to law in assessing the evidence as a whole and deciding whether Applicant had satisfied his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15.

There is little record evidence concerning Applicant's employment history and job performance. Given what record evidence there is about Applicant's employment history and job performance, the Administrative Judge was not compelled to conclude that evidence mitigated Applicant's criminal conduct. Indeed, Applicant offers no reason or argument on appeal as to how or why his employment history and job performance mitigate his criminal conduct.

The importance of a security clearance to Applicant's current and future job situation is irrelevant to the adjudication of his security eligibility. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See, e.g.,* ISCR Case No. 02-23073 (March 30, 2004) at p. 3. The importance of a security clearance to an applicant's job situation has no probative value as to whether that applicant demonstrates the high degree of judgment, reliability, and trustworthiness required of persons being granted access to classified information.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board