

DATE: March 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15003

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 February 4, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Administrative Judge Kathryn Moen Braeman issued an unfavorable security clearance decision, dated December 20, 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 was biased and prejudiced against Applicant; (2) whether the Administrative Judge erred by not concluding Applicant's conduct was mitigated; and (3) whether the Administrative Judge's adverse conclusions under Guideline H and Guideline E are 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 was biased and prejudiced against Applicant. Applicant contends the Administrative Judge "was biased and prejudiced by [her] prior drug use, [which was] outside the scope of the [questions on her security clearance application]." Applicant's claim of bias and prejudice lacks merit.

There is a rebuttable presumption that an Administrative Judge acts in a fair and impartial manner, and a party seeking to rebut that presumption has a very heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. When reviewing claims of bias or prejudice, the standard is not whether the appealing party believes the Judge was biased or prejudiced, but rather whether there is any indication in the record of the proceedings below (including the Judge's decision) that would lead a disinterested person to reasonably question the Judge's fairness and impartiality. *See, e.g.*, ISCR Case No. 02-33169 (September 23, 2004) at p. 5. Nothing in the record of the proceedings below indicates or suggests anything that would lead a disinterested person to reasonably question the Judge's fairness and impartiality in this case.

2. Whether the Administrative Judge erred by not concluding Applicant's conduct was mitigated. Applicant does not challenge the Administrative Judge's findings of fact about her history of drug use or her falsification of a security clearance application. However, Applicant contends the Judge should have concluded: (a) her history of drug abuse was mitigated under unspecified Drug Involvement mitigating conditions and application of the whole person concept; (b) her falsification of a security clearance application was mitigated under Personal Conduct Mitigating Condition 2 and other unspecified Personal Conduct mitigating conditions and application of the whole person concept.

As noted earlier in this decision, there is no presumption of error below and the appealing party has the burden of raising claims of error with specificity. Applicant's assertions that the Administrative Judge erred by not applying

unspecified Drug Involvement mitigating conditions and unspecified Personal Conduct mitigating conditions lack specificity. Applicant's general claims of error are insufficient to satisfy her burden, as the appealing party, to raise identifiable claims of error and demonstrate the Judge committed factual or legal error.

Applicant's claim concerning Personal Conduct Mitigating Condition 2-[\(1\)](#) is not persuasive. Given the record evidence in this case, the Administrative Judge would not have been justified in applying Personal Conduct Mitigating Condition 2. *See, e.g.*, ISCR Case No. 01-19513 (January 22, 2004) at pp. 4-5 and ISCR Case No. 01-06166 (October 25, 2001) at p. 3 (discussing difference between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3). Accordingly, the Judge's decision to not apply Personal Conduct Mitigating Condition 2 in this case was not arbitrary, capricious, or contrary to law.

Finally, the Board does not find persuasive Applicant's assertion that the Administrative Judge should have concluded her drug abuse history and falsification of a security clearance application were mitigated under the whole person concept. A review of the Judge's decision persuades the Board that the Judge considered Applicant's security eligibility under the whole person concept. Furthermore, Applicant's appeal arguments do not demonstrate the Judge's adverse conclusions about her drug abuse history and falsification are arbitrary or capricious in light of the record evidence in this case.

3. Whether the Administrative Judge's adverse conclusions under Guideline H and Guideline E are arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's adverse conclusions about her history of drug use and her falsification of the security clearance application. In support of that challenge, Applicant: (a) cites two decisions by Hearing Office Administrative Judges in other cases; (b) refers to record evidence that she argues should have been given more weight by the Judge; and (c) offers an alternative characterization of her drug use history and falsification.

Applicant's reliance on decisions by Hearing Office Administrative Judges in two other cases is misplaced. A decision by a Hearing Office Judge is not legally binding precedent that must be followed by other Hearing Office Judges or the Board. At most, such decisions may be cited as persuasive authority, but the party doing so has the burden of persuading the Board that the cited Hearing Office decision should be accepted as persuasive authority. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5. One of the two Hearing Office decisions cited by Applicant is not persuasive because it was reversed by the Board on appeal. As to the other Hearing Office decision, Applicant presents no cogent argument or reason why the Board should consider it persuasive authority in this case.

Applicant's ability to cite to favorable record evidence and argue for an alternative characterization of her drug use history and falsification is not sufficient to demonstrate the Administrative Judge's adverse conclusions under Guideline H and Guideline E are arbitrary, capricious, or contrary to law. The Judge's findings of fact have not been challenged on appeal, and the Judge's adverse conclusions under Guideline H and Guideline E follow rationally from the Judge's findings of fact. Furthermore, Applicant offers no persuasive argument for how the Judge's conclusions are arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).