DATE: October 15, 2003

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-15935

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Gretchen A. Benolken, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated July 10, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision dated arch 31, 2003.

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's decision is reviewable under the Administrative Procedures Act; (2) whether the Administrative Judge erred by not allowing Applicant to amend his answer to the Statement of Reasons; and (3) whether the Administrative Judge erred by finding that Applicant falsified two written statements he gave to a federal investigator in January 2001. 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

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct). Those favorable formal findings are not at issue on appeal.

1. Whether the Administrative Judge's decision is reviewable under the Administrative Procedures Act. Applicant cites the Administrative Procedures Act (5 U.S.C. §706) as setting the standard of review for this appeal. Applicant's reliance on the Administrative Procedures Act is misplaced.

On its face, the Administrative Procedures Act deals with review of federal agency action by federal courts, not administrative appellate review of lower-level agency decisions. Furthermore, nothing in Executive Order 10865 or the Directive indicates that the DoD must adopt or apply the Administrative Procedures Act in security clearance adjudications.

Executive Order 10865 is silent on the appeal process. The Directive sets forth the pertinent provisions concerning DOHA appeals, including the standard of review. *See* Directive, Additional Procedural Guidance, Items E3.1.29 through E3.1.36. The Board will apply those provisions of the Directive in adjudicating this appeal.

2. Whether the Administrative Judge erred by not allowing Applicant to amend his answer to the Statement of Reasons. After the hearing, Applicant and Department Counsel submitted written closing arguments. In a footnote of Applicant's written closing argument, Applicant asked to be allowed "to withdraw and/or amend his responses to the SOR to be consistent with his testimony. The merits of the issue are more important than the technicality of an admission based on a mistake or erroneous interpretation." The Administrative Judge denied Applicant's request to withdraw on the grounds

that it was untimely and did not set forth sufficient good cause (Decision at p.2).

On appeal, Applicant contends the Administrative Judge erred by denying the request to withdraw because: (a) denial of the request to withdraw was inconsistent with Rule 36 of the Federal Rules of Civil Procedure; (b) various federal cases show that Applicant's request to withdraw was permissible and could have been granted by the Judge; and (c) given the "somewhat unusual" procedural posture of the hearing, "it would not seem proper to present a procedural motion during the taking of evidence." For the reasons that follow, the Board concludes Applicant has failed to show the Judge's denial of the request to withdraw was arbitrary, capricious, or contrary to law.

Applicant's reliance on Rule 36 of the Federal Rules of Civil Procedure ("FRCP") is misplaced. First, Rule 1 of the FRCP states "These rules govern the procedure in the United States district courts . . . ." DOHA hearings are not conducted by federal district courts. Second, the FRCP do not apply to federal administrative proceedings. *Kelly v. U.S. Environmental Protection Agency*, 203 F.3d 519, 523 (7th Cir. 2000). Third, nothing in Executive Order 10865 or the Directive states or indicates that security clearance adjudications must be conducted in compliance with the FRCP. Because the FRCP do not apply to these proceedings, the Administrative Judge cannot be found to have acted in violation of the FRCP.

Even if the Board were to construe Applicant's arguments as relying on Rule 36 of the FRCP as persuasive authority in these proceedings, Applicant's arguments concerning Rule 36 are not persuasive. We reach this conclusion for several reasons.

First, requests for admission under Rule 36 pertain to requests for admission made in the context of discovery proceedings. *See, e.g., Perez v. Miami-Dade County*, 297 F.3d 1255, 1263 (11th Cir. 2002); *In re Carney*, 258 F.3d 415, 418-420 (5th Cir. 2001); *Marchard v. Mercy Medical Center*, 22 F.3d 933, 936-939 (9th Cir. 1994). In this case, Applicant was seeking to withdraw admissions made in response to the SOR allegations, not admissions made in response to a request for admissions raised during discovery. Applicant cites no legal authority for the proposition that Rule 36 covers a request to withdraw admissions made in an answer to a civil complaint (which would be analogous to admissions made in response to an SOR).

Second, a purpose of Rule 36 is to obtain admissions to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial. *See, e.g., Perez v. Miami-Dade County*, 297 F.3d 1255, 1264 (11th Cir. 2002). In this case, the admissions that Applicant sought to withdraw pertained to SOR allegations that Applicant controverted at the hearing, not matters that the parties did not intend to dispute at the hearing. Moreover, Applicant fails to articulate in any meaningful way how the hearing would have been expedited if the Administrative Judge had granted Applicant's *post-hearing* request to withdraw his admissions to SOR allegations.

Third, when ruling on a motion to withdraw admissions under Rule 36, a court must consider whether its grant or denial of the motion will subserve the presentation of the merits of the case. *See, e.g., Kerry Steel, Inc. v. Paragon Industries, Inc.*, 106 F.3d 147, 154 (6th Cir. 1997). Applicant fails to articulate in any meaningful way how presentation of the merits of this case would be subserved if the Administrative Judge granted Applicant's *post-hearing* request to withdraw his admissions to SOR allegations. If Applicant had believed that his admissions to SOR allegations had been made based on mistake about, or misunderstanding of, the SOR allegations, then Applicant could have raised the matter earlier in the proceedings instead of waiting until after the hearing had been held. Given the timing of Applicant's post-hearing request to withdraw, it was not arbitrary or capricious for the Judge to expect Applicant to make a strong showing why the request should be granted.[(1)] Moreover, the Judge's denial of Applicant's post-hearing request to withdraw did not prevent Applicant from presenting his case, at the hearing, in response to the evidence Department Counsel presented in support of its case against Applicant. Furthermore, to the extent that Applicant wanted to retract, recant, minimize, or explain away his admissions to the SOR allegations pertaining to falsification, he had ample opportunity to do so during the hearing.

Fourth, Applicant cites no persuasive authority for the proposition that a motion to withdraw can be granted after a hearing. Although Applicant relies on *Atakpa v. Perimeter Ob-Gyn Associates, Inc.*, 912 F.Supp. 1566 (N.D. Ga. 1994) and *Local Union No. 38 v. Tripodi*, 913 F.Supp. 290 (S.D.N.Y. 1006) that reliance is misplaced. First, in both *Atakpa* and *Local Union* 38, the admissions involved were not admissions made by the defendant in response to a civil

complaint, but rather admissions made in the context of requests for admissions made during discovery. As discussed earlier in our decision, that distinction is an important one. Second, in *Atakpa*, the district court granted a Rule 36(b) motion to withdraw admissions after a summary judgment hearing, not after a trial on the merits. By granting the motion to withdraw admissions, the district court in *Atakpa* allowed the parties to litigate the case on its merits at a trial. A DOHA hearing is not the equivalent of a summary judgment hearing; rather, it is the equivalent of a trial on the merits. Third, *Local Union No. 38* involved the district court excusing a party from its admissions so that the case could be litigated on its merits, instead of technical admissions deemed to have been made by the party because it failed to respond to a Rule 36 request for admissions. In this case, Applicant's affirmative admissions in response to the SOR allegations cannot fairly be equated to the *Local Union No. 38* party's "admissions" that were deemed to have been made simply because the party failed to response to the opposing party's Rule 36 request for admissions.

Fifth, although the federal cases cited by Applicant could provide support for the proposition that there is discretion to grant a motion to withdraw admissions (Appeal Brief at p. 3), those cases do not stand for the contrary proposition that denial of such a motion *ipso facto* constitutes an abuse of discretion.

For all the foregoing reasons, the Board concludes the Administrative Judge's denial of Applicant's request to withdraw his admissions to certain SOR allegations was not arbitrary, capricious, or contrary to law. First, Applicant cites no legal authority that shows the Judge's denial was contrary to law. The Judge was not required to apply Rule 36 of the FRCP. Furthermore, Applicant cites no other legal authority that the Judge's denial violated or contravened. Second, Applicant has not made a showing that the Judge's denial of his post-hearing request to withdraw admissions was arbitrary or capricious.

3. Whether the Administrative Judge erred by finding that Applicant falsified two written statements he gave to a federal investigator in January 2001. The Administrative Judge found that Applicant falsified material facts about his drinking in two written statements he gave to a federal investigator, one dated January 9, 2001 and the other dated January 25, 2001. Applicant challenges the Judge's findings of falsification, arguing: (a) the Judge's findings of falsification are based on "pure speculation and surmissal" (sic); (b) the Judge erred by inferring that Applicant revised his statements because he was confronted with a polygraph examination; (c) record evidence does not support the Judge's findings of falsification; (d) the Judge erred by finding that Applicant was motivated to revise his statements because of embarrassment; and (e) the Judge's findings of falsification ignore Applicant's testimony and other record evidence that runs contrary to his findings. For the reasons that follow, the Board concludes Applicant's claim of error is not persuasive.

Applicant's last argument can be disposed first. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case 99-9020 (June 4, 2001) at p. 2. An appealing party's ability to point out the existence of conflicting record evidence is not enough to rebut that presumption. It is not unusual for a Judge to be faced with conflicting record evidence that must be considered and weighed before the Judge makes factual findings. When faced with conflicting record evidence, the Judge must weigh the evidence and then make findings of fact that reflect a reasonable interpretation of the record evidence as a whole. Applicant's strong disagreement with the Judge's weighing of the conflicting record evidence is not sufficient to rebut the presumption that the Judge considered all the record evidence. *See, e.g.*, ISCR Case No. 02-02052 (April 8, 2003) at p.3 ("The fact that the Judge did not give that favorable evidence as much weight as Applicant would have liked does not demonstrate the Judge simply ignored it.").

The Board rejects Applicant's argument that the Administrative Judge's findings of falsification are based on mere speculation and surmise. A case involving alleged falsification requires a Judge to make a finding of fact as to an applicant's intent or state of mind when the alleged falsification occurred. As a practical matter, when an applicant denies that he or she engaged in a falsification, proof of the applicant's intent or state of mind is rarely based on direct evidence, but rather often must rely on circumstantial evidence. It is not mere speculation or surmise for a Judge to make a finding of fact about an applicant's intent or state of mind based on circumstantial evidence. To the contrary, it is legally permissible for a Judge to make a finding of falsification based on circumstantial evidence of an applicant's intent or state of mind. *See, e.g.*, ISCR Case No. 00-0601 (September 21, 2001) at pp. 2-3; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. *See also Black's Law Dictionary, 6th edition* (West Publishing, 1990) at p. 810 (noting that intent is "[a] mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by

circumstances from which it may be inferred").

Considering the record evidence as a whole, the Administrative Judge's inference that Applicant revised his statements after being confronted with a polygraph examination is not an unreasonable one. Applicant's argument about him not canceling the polygraph examination is irrelevant because nothing in the Judge's decision states or implies the Judge found Applicant canceled the polygraph examination. To the contrary, the Judge found that the government investigator cancelled the polygraph examination (Decision at p. 8).

Considering the record evidence as a whole, the Administrative Judge's finding about Applicant's motivation reflects a reasonable interpretation of the record evidence. And, in any event, the Judge's finding about Applicant's motivation is not necessary to his finding of falsification. "Motive" and "intent" are separate and distinct. *See, e.g., Black's Law Dictionary, 6th Edition* (West Publishing, 1990) at pp. 810 ("Intent") and 1014 ("Motive"). The intent to commit a particular kind of act may be based on different motives. Accordingly, although evidence that an applicant has a particular motive to falsify may be probative of an intent to falsify for purposes of Guideline E, there is no legal requirement that a particular motive to falsify be established in order to prove an applicant had the intent to falsify. Accordingly, even if the Judge had made no finding as to Applicant's particular motivation, the Judge could still find -- based on the particular record evidence in this case -- that Applicant intended to falsify material facts about his drinking history when he gave the two written statements in January 2001.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant's suggestion that "it would not seem proper to present a procedural motion during the taking of evidence" is unpersuasive. The request to withdraw admissions had the potential to affect (a) the burdens of proof of Department Counsel and Applicant, respectively, under Directive, Additional Procedural Guidance, Item E3.1.15, and (b) the Administrative Judge's assessment of Applicant's credibility. Given such potential effects, it is difficult to understand how it would be "more proper" for Applicant to wait until after the hearing was concluded to make a request to withdraw admissions.