

DATE: July 28, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16613

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Charles W. Mahan, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of reasons (SOR), dated May 23, 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 Paul J. Mason issued an unfavorable security clearance decision, dated March 10, 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 issues raised on appeal are: (1) whether the Administrative Judge's findings of fact with regard to SOR allegation 1.c. were sustainable and (2) whether the Administrative Judge's decision as a whole was arbitrary, capricious, or contrary to law.

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's findings of fact with regard to SOR allegation 1.c. were sustainable. The bulk of Applicant's brief challenges the Administrative Judge's findings of fact which underlie the Judge's formal finding against Applicant for SOR allegation 1.c. The Board concludes that the Judge's essential findings with regard to allegation 1.c. are sustainable. The Judge's conclusion that Applicant was fired in 1995 as a result of personality differences is supported by enough record evidence to be upheld. Furthermore, even if the finding were not sustainable, it would be of no consequence, as the Judge's decision clearly relies on Applicant's 1998 warning about access pornography at work and 1999 termination for accessing pornography with his employer's computers.

(2) Whether the Administrative Judge's decision as a whole was arbitrary, capricious, or contrary to law. The Administrative Judge concluded that Applicant's documented history of inappropriate personal conduct was sufficiently extensive that it could not yet be mitigated by the mere passage of time. That the Judge found Applicant's inconsistent explanations for his 1995 firing not credible, aggravated his adverse conclusion. Given the record evidence in the case, the Judge's ultimate conclusions are sustainable. Applicant has failed to demonstrate that the Judge's decision as a whole was arbitrary, capricious, or contrary to law. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). The government need not wait until an applicant mishandles classified information before it can deny or revoke the applicant's access to such information. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate the applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p.3 ; and ISCR Case No. 97-0628 (April 17, 1998) at p. 3.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Therefore, the Board affirms the Administrative Judge's decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic

Applicant raises the following claims of error: (1) the Administrative Judge erred by not requiring Department Counsel to present witnesses and other evidence in support of SOR paragraph 1.c; (2) the record evidence does not support the Administrative Judge's findings pertaining to the matter covered by SOR paragraph 1.c; (3) the Administrative Judge misinterpreted the legal meaning or significance of Applicant Exhibit B; (4) the Administrative Judge erred by failing to apply appropriate Personal Conduct mitigating conditions; and (5) the Administrative Judge erred by finding Applicant gave inconsistent versions for why he was fired in 1995.

Applicant's first claim of error lacks merit. Department Counsel is obligated to present evidence in support of controverted SOR allegations. *See* Directive, Additional Procedural Guidance, Item E3.1.14. Subject to reasonable control by an Administrative Judge to ensure a fair and orderly proceeding (Directive, Additional Procedural Guidance, Item E3.1.10), Department Counsel has broad latitude to decide how it wants to present its case. The Directive does not command a Judge to micromanage a party's presentation of its case. Indeed, the Board has held that a Judge should not require a party to present any particular form or kind of evidence in support of its case. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 7 n.11. Accordingly, the Judge was not under any legal duty to require Department Counsel to present any particular form of evidence in support of SOR paragraph 1.c. ⁽¹⁾

Applicant's second and third claims of error raise a plausible challenge to the Administrative Judge's findings and conclusions about the matter covered by SOR paragraph 1.c. However, I need not address those claims of error in detail. Even if I were to conclude Applicant has established factual or legal error by the Judge with respect to SOR paragraph 1.c, such error would be harmless under the particular facts and circumstances of this case. Even if I were to conclude the Judge should have made findings and reached conclusions favorable to Applicant with respect to SOR paragraph 1.c., the Judge's findings and conclusions with respect to SOR paragraph 1.a and SOR paragraph 1.b. provide a sufficient basis for the Judge's unfavorable security clearance decision.

Applicant's fourth claim of error has mixed merit, but does not demonstrate harmful error. First, I reject Applicant's suggestion of bad faith on the Administrative Judge's part when he stated there were no Personal Conduct Mitigating Conditions (Decision at p. 5). There is a rebuttable presumption of good faith and regularity by an Administrative Judge. Reading the decision below in its entirety, I conclude the Judge's statement was a terse, short-hand declaration indicating the Judge had concluded none of the Personal Conduct Mitigating Conditions were applicable under the particular facts and circumstances of Applicant's case. Applicant's strong disagreement with the Judge's conclusion is not sufficient to rebut or overcome the presumption that the Judge acted in good faith. Second, Applicant's argument concerning Personal Conduct Mitigating Condition 1 has some force to the extent it overlaps with his second and third claims of error. However, like those two other claims, Applicant's argument concerning Personal Conduct Mitigating Condition 1 does not undercut the significance of the Judge's findings and conclusions with respect to SOR paragraph

1.a and SOR paragraph 1.b. Accordingly, the Judge's decision to not apply Personal Conduct Mitigating Condition 1 to the matter covered by SOR paragraph 1.c demonstrates, at most, harmless error. Third, Applicant's argument concerning Personal Conduct Mitigating Conditions 2 and 3 lacks merit. The applicability of those mitigating conditions would be a pertinent matter for the Judge to consider if Applicant had been accused of engaging in falsification and such falsification had been admitted to by Applicant or proven by Department Counsel. But, the SOR in this case does not contain an allegation of falsification, and the Judge did not find that Applicant had engaged in falsification. Moreover, even in the absence of an allegation of falsification or an allegation specifically pertaining to an applicant's credibility, a Judge is entitled to make a credibility determination about an applicant's statements and testimony. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 4; ISCR Case No. 02-15358 (July 22, 2003) at p. 4. If a Judge reaches an adverse conclusion about an applicant's credibility, the Judge is not required to decide whether Personal Conduct Mitigating Condition 2 or Personal Conduct Mitigating Condition 3 applies. Rather, the Judge must take an adverse credibility determination into account when weighing the record evidence. Fourth, Applicant's argument about Personal Conduct Mitigating Condition 5 fails to demonstrate error because the Judge did not make any finding that Applicant was vulnerable to coercion, exploitation, or pressure. Absent such a finding, what rational basis would there be for the Judge to consider whether Personal Conduct Mitigating Condition 5 applies? *Cf.* ISCR Case No. 02-13568 (February 13, 2004 at p. 3 n.1 ("Implicit in the concepts of extenuation and mitigation is the predicate that some conduct occurred for which a claim of extenuation or mitigation may be raised. If an Administrative Judge finds that an applicant did not engage in misconduct, then the Judge should not engage in analysis of extenuation or mitigation unless the Judge articulates a rational basis for doing so.")).

Applicant's fifth claim of error is not persuasive. As noted in the preceding paragraph, the Administrative Judge is entitled to make a credibility determination about an applicant's statements and testimony. Even if I were to conclude the Judge erred with respect to his findings and conclusions about the matter covered by SOR paragraph 1.c, there is sufficient record evidence (coupled with the Judge's assessment of Applicant's credibility after having the opportunity to personally observe Applicant's demeanor during his hearing testimony) to permit the Judge to conclude that Applicant gave inconsistent versions for why he was fired in June 1995.

For all the foregoing reasons, I conclude that some of Applicant's claims of error lack merit, and the remaining claims of error demonstrate, at most, harmless error. Accordingly, I concur with my colleagues' decision to affirm the decision below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Of course, a party's latitude to make tactical decisions about how best to present its case is separate and distinct from the question of the probative value of that evidence. A party's tactical decisions do not bind or control the Administrative Judge in weighing the evidence that a party presents.