

DATE: January 7, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17219

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Dennis J. Sysko, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 22, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline K (Security Violations), Guideline M (Misuse of Information Technology Systems), and Guideline E (Personal Conduct). Administrative Judge atthew E. Malone issued an unfavorable security clearance decision, dated June 28, 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 SOR lacked sufficient specificity to place Applicant on adequate notice of the allegations against him; (2) whether the Administrative Judge erred by not properly considering the record evidence presented by Applicant; and (3) whether the Administrative Judge erred by finding that Applicant's conduct constituted security violations under the National Industrial Security Program Operating Manual. 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⁾

The case file does not contain two documents that the Administrative Judge admitted into evidence: Government Exhibits 15 and 16. When faced with such a situation, the Board must consider whether it is possible to meaningfully address the issues raised on appeal without the missing documents, or whether it would be more appropriate to remand the case for the record to be restored.⁽²⁾ Given the descriptions of Government Exhibits 15 and 16 that appear in the hearing transcript and the Judge's decision, the Board concludes the absence of those two exhibits from the case file does not preclude the Board from addressing the issues raised by Applicant's appeal.

1. Whether the SOR lacked sufficient specificity to place Applicant on adequate notice of the allegations against him. Applicant contends the SOR issued to him was "inadequate, misleading and insufficient to satisfy the requirements" of Section 3(1) of Executive Order 10865⁽³⁾ and Section 4.3.1 of the Directive.⁽⁴⁾ In support of this contention, Applicant argues that various words and phrases in the SOR⁽⁵⁾ were inadequate and misleading, and failed to describe conduct that constitutes disqualifying conduct under Guideline K (Security Violations) or Guideline M (Misuse of Information Technology). Applicant further argues that the defects in the SOR "should not be corrected or remedied by the Administrative Judge nor the Board." For the reasons that follow, the Board concludes this claim of error lacks merit.⁽⁶⁾

An SOR is an administrative pleading that is not measured against the strict standards of a criminal indictment.⁽⁷⁾ To be legally sufficient, an SOR must place an applicant on reasonable notice of the allegations against him or her so that the applicant has a meaningful opportunity to respond to the allegations and prepare a defense to them.⁽⁸⁾ A challenge to the legal sufficiency of an SOR is not evaluated by considering the language of the SOR allegations in isolation, but

rather by considering whether there has been a showing that: (a) the applicant was confused or misled by the wording of the SOR allegations; or (b) the wording of the SOR allegations prejudiced the applicant's ability to respond to the SOR allegations and prepare his or her defense to them.⁽⁹⁾

Apart from the legally significant fact that Applicant did *not* object to the wording of the SOR when he submitted his answer to it or when he appeared at the hearing, nothing in Applicant's answer to the SOR or the hearing transcript indicates that Applicant was: (a) confused or misled by the wording of the SOR; (b) unable to respond to the SOR; or (c) unable to prepare and present a defense to the SOR allegations. Furthermore, Applicant's complaint about certain words and phrases in the SOR is based on the untenable premise that those words and phrases are inadequate, misleading, and legally insufficient when viewed separately from the SOR allegations in which they appear. Apart from the fact that the words and phrases identified by Applicant are ordinary and understandable by themselves, the words and phrases appear in SOR allegations that placed Applicant on fair notice that DOHA was alleging that he had failed to properly handle classified information or had failed to follow proper security practices and procedures. Considering all the circumstances, this claim of error is groundless.

2. Whether the Administrative Judge erred by not properly considering the record evidence presented by Applicant.

Applicant contends the Administrative Judge failed to properly consider record evidence he presented concerning: (a) his attention deficit disorder (ADD); (b) the relevance of his ADD on his conduct at issue in this case; (c) the favorable opinions of his coworkers; (d) his overall record while holding a security clearance; and (e) circumstances in his life that mitigated his conduct. Applicant also contends the Judge acted in an arbitrary and capricious manner with respect to the evidence presented concerning the licensed psychologist's written evaluation of him. For the reasons that follow, the Board concludes Applicant's contentions fail to demonstrate the Judge erred.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.⁽¹⁰⁾ Applicant's dissatisfaction or disagreement with the Judge's weighing of the record evidence, standing alone, is not sufficient to rebut the presumption that the Judge considered all the record evidence in this case.⁽¹¹⁾

Moreover, nothing in the Directive or generally applicable principle of federal administrative law compels an Administrative Judge to give record evidence any particular weight. Rather, subject to review for action that is arbitrary, capricious, or contrary to law, a Judge has discretion to weigh the record evidence in light of the Judge's assessment of the credibility of witnesses and the Judge's assessment of pieces of record evidence in light of the record evidence as a whole.⁽¹²⁾ When challenging a Judge's weighing of the record evidence, an appealing party must do more than just disagree with the Judge or argue for an alternate interpretation of the record evidence; rather, the appealing party must set forth a cogent argument or reason for why the Judge's weighing of the record evidence was arbitrary, capricious, or contrary to law.⁽¹³⁾

The Board does not have to agree with the Administrative Judge's findings or conclusions to decide that: (i) Applicant has not demonstrated the Judge failed to consider the record evidence he presented; and (ii) Applicant has not shown the Judge's weighing of the record evidence is arbitrary, capricious, or contrary to law. Considering the record as a whole, the Board concludes the Judge's findings reflect a reasonable interpretation of the record evidence as a whole.

3. Whether the Administrative Judge erred by finding that Applicant's conduct constituted security violations under the National Industrial Security Program Operating Manual.

Applicant contends the Administrative Judge erred by finding that his conduct constituted security violations under DoD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM).⁽¹⁴⁾ In support of this contention, Applicant argues: (a) the Judge failed to adequately explain why he found that Applicant's conduct constituted violations of the NISPOM; and (b) Department Counsel failed to present evidence showing that Applicant's conduct satisfied the NISPOM definition of a security violation because there is no record evidence that his conduct "reasonably could result in the loss or compromise of classified information."⁽¹⁵⁾

(a) The Board need not decide whether an Administrative Judge must make findings of fact about security violations that include explicit references to specific provisions of the NISPOM. In this case, Applicant's answer to the SOR admitted that he had engaged in security violations. At the hearing, Applicant did not try to withdraw his answer to the

SOR. Moreover, the record evidence shows that Applicant conceded to his company, on more than one occasion, that his conduct involved security violations. Finally, Applicant's defense at the hearing was based, in part, on the premise that he engaged in security violations, but that they were extenuated or mitigated. Considering all the circumstances, the Board concludes Applicant waived the issue of whether his conduct constituted security violations under Guideline K.

(b) Even if the Board were to assume -- solely for the purposes of addressing Applicant's second argument -- that Applicant did not waive his right to claim the record evidence presented by Department Counsel did not show that his conduct "reasonably could result in the loss or compromise of classified information," such a claim is not persuasive.

Given the totality of the record evidence in this case, the Administrative Judge reasonably could find that Applicant's conduct resulted in situations where classified information was not properly handled or protected and there was the potential that persons without a security clearance or the need to know could have gained access to the classified information Applicant mishandled. Even if the Board were to accept -- solely for purposes of deciding this appeal -- Applicant's argument that the classified information he mishandled could only have been accessed by other people in his company with security clearances, the result would be the same. A person with a security clearance is not granted access to any and all classified information, but rather just the classified information for which the person has an authorized need to know.⁽¹⁶⁾ A security violation can occur if a person with a security clearance gains access to classified information for which the person does not have an authorized need to know.⁽¹⁷⁾ Accordingly, the potential loss or compromise referred to in the NISPOM definition of security violation is not limited to situations where the mishandling of classified information makes it vulnerable to exposure to persons without a security clearance, but also covers situations where the security violation makes classified information vulnerable to exposure to persons without the requisite need to know.⁽¹⁸⁾

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 Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Administrative Judge concluded Applicant's conduct under Guideline M (Misuse of Information Technology Systems) was mitigated and, therefore, warranted an overall favorable formal finding under Guideline M. That favorable conclusion is not at issue on appeal.

2. *See, e.g.*, ISCR Case No. 02-20365 (November 2, 2004).
3. "A written statement of reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits."
4. "Notice of specific reasons for the proposed action."
5. "You were counseled . . ."; "You were reprimanded . . ."; "You were reprimanded, retrained and given 4 hours leave without pay . . ."; "You were re-briefed counseled, and suspended for one week without pay . . ."; "You committed . . ."
6. Applicant's argument is moot to the extent it challenges the sufficiency of the SOR allegations under Guideline M (Misuse of Information Technology Systems) because the Administrative Judge concluded Applicant's conduct under Guideline M was mitigated sufficiently to warrant an overall favorable formal finding under Guideline M.
7. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2; ISCR Case No. 99-0557 (July 10, 2000) at p. 3 n.1.
8. *See, e.g.*, ISCR Case No. 02-23365 (March 22, 2004) at p. 5; ISCR Case No. 02-05665 (May 7, 2003) at p. 3.
9. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 3; ISCR Case No. 99-0554 (July 24, 2000) at pp. 4-5.
10. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
11. *See, e.g.*, ISCR Case No. 03-09485 (July 8, 2004) at p. 3; ISCR Case No. 02-09907 (March 17, 2004) at p. 5.
12. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5; ISCR Case No. 02-02892 (June 28, 2004) at pp. 3-4.
13. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5.
14. Copy available at <http://www.dtic.mil/whs/directives/corres/html/522022m.htm>
15. The language cited by Applicant appears in the definition of "Security Violation" in Appendix C of the NISPOM.
16. *See, e.g.*, the definitions of "Authorized Person," "Compromise," and "Need-to- Know" in Appendix C of the NISPOM. *See also* Executive Order 13292 ("Classified National Security Information"), dated March 25, 2003, Section 4.1(a) (to gain access to classified information, person must have need-to-know); Sections 4.1(f) and 4.1(g)(classified information must be controlled to prevent access by unauthorized persons).
17. In Appendix C of the NISPOM, a compromise is defined as: "The disclosure of classified information to an unauthorized person."
18. *See also* DISCR Case No. 87-2107 (October 30, 1991) at p. 4 (noting the potential for compromise of classified information was not eliminated merely because the security violations occurred within the confines of a defense contractor facility).