

DATE: April 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17863

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 December 4, 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 Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated January 25, 2005.

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 not concluding Applicant had mitigated his history of deliberate falsifications. 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 Applicant falsified material facts about his drug abuse when he executed security clearance applications in 1989, 1994 and 2001, and during security clearance investigations conducted in 1983, 1990, and 1995. On appeal, Applicant does not challenge the Judge's findings of fact concerning his falsifications. However, Applicant contends the Judge should have concluded that he mitigated those falsifications. In support of this contention, Applicant: (a) cites record evidence concerning his drug rehabilitation and reform; (b) asserts that

the Judge misinterpreted some of his testimony; (c) refers to the favorable character evidence presented for the Judge's consideration; (d) argues the Judge erred by characterizing his conduct as a pattern of dishonesty; and (e) claims he has shown that he has changed his life completely and can be trusted to be truthful to the government in any future inquiries.

The record evidence of Applicant's drug rehabilitation and reform is not material to the security concerns raised by his long history of multiple acts of falsification. The Administrative Judge did not base her unfavorable decision on Applicant's past history of drug abuse, but rather Applicant's long history of multiple acts of falsification. Furthermore, Applicant's multiple acts of falsification over a period of many years have negative security implications that are independent of his history of drug abuse.

Applicant's disagreement with the Administrative Judge's interpretation of some of his hearing testimony does not demonstrate the Judge erred. The Board does not re-try a case on appeal, but rather reviews the Judge's decision to determine whether either party has identified error below. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Considering the record evidence as a whole, the Board concludes that Applicant has not shown the Judge's interpretation of his testimony is arbitrary, capricious, or otherwise unreasonable.

Given the Administrative Judge's unchallenged findings of fact about Applicant's multiple acts of falsification over a period of many years, it is untenable for Applicant to claim that the Judge erred by characterizing his conduct as

demonstrating a pattern of dishonesty.

The rest of Applicant's arguments raise the question of whether the Administrative Judge erred in her weighing of the record evidence favorable to Applicant. Those arguments fail to demonstrate the Judge erred. Although Applicant's arguments demonstrate he strongly disagrees with the Judge's weighing of the record evidence, his arguments do not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law when she weighed the record evidence as a whole. Standing alone, such a disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5 ("There is no simple formula or rule of law on how a Judge must weigh record evidence. Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge has discretion to weigh the record evidence. A Judge is not always faced with a case where the record evidence points all in one direction. To the contrary, it is not unusual for a Judge to be faced with conflicting record evidence, or with a record that contains some evidence that favors one side and different evidence that favors the other side. In such situations, the Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a conclusion as to whether the applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. If an appealing party challenges the Judge's weighing of the record evidence, that party must not simply disagree with the Judge's weighing of the record evidence, but rather must articulate a cogent reason or argument for how the Judge erred in weighing the record evidence.") (footnote omitted).

Conclusion

The Board affirms the Administrative Judge's security clearance 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board