

DATE: January 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17525

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 October 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 E (Personal Conduct). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated September 22, 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 erred by concluding that Applicant's falsification of a security clearance application raised security concerns that are sufficient to warrant an unfavorable security clearance decision; and (2) whether Applicant is entitled to a hearing if the Board does not accept Applicant's contention that the Administrative Judge's decision should be reversed. 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 erred by concluding that Applicant's falsification of a security clearance application raised security concerns that are sufficient to warrant an unfavorable security clearance decision. Applicant does not challenge the Administrative Judge's finding that he falsified a security clearance decision by failing to disclose material facts about his financial difficulties. However, Applicant argues: (a) DOHA should have sought to deny or revoke his security clearance closer in time to his falsification, and the delay in bringing a case against him raises questions whether he is being "insulted, threatened, and punished" for reasons other than the national security; (b) he has held a security clearance for many years without a security violation; (c) he is not vulnerable to coercion or blackmail; and (d) an unfavorable security clearance decision would be detrimental to his employment situation. The Board construes Applicant's arguments as raising the issue of whether the Judge erred by concluding Applicant's falsification of a security clearance application raised security concerns that are sufficient to warrant an unfavorable security clearance decision.

There is a rebuttable presumption that government officials carry out their duties properly and in good faith, and a person seeking to rebut that resumption has a heavy burden of presenting clear evidence to the contrary. *See, e.g., National Archives and Records Administration v. Favish*, 541 U.S. --, slip op. at 16 (March 30, 2004). Applicant's conjectures about the motivation of DOHA personnel in issuing an SOR to him do not come close to satisfying that heavy burden of persuasion.

The passage of time between Applicant's falsification of the security clearance application and the issuance of an SOR to him by DOHA does not have the legal significance he places on it. First, nothing in the Directive indicates or suggests that the DoD has adopted any "statute of limitations" or analogous time period to limit or restrict the issuance of an SOR. Second, in the absence of an express statute to the contrary, the federal government is not bound by time

limitations in carrying out its governmental functions. Security clearance decisions involve the exercise of Executive Branch authority under the U.S. Constitution. Accordingly, security clearance cases are not bound by any time limitations unless such limitations are imposed by act of Congress or Presidential directive. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 3 (citing federal cases). Applicant does not cite, and the Board is not aware of, any act of Congress or Presidential directive (*e.g.*, Executive Order 10865 or any other Executive Order) that expressly sets any time limitation on when an SOR can be issued. Third, the federal government is not precluded from taking action based on a claim of laches (*i.e.*, a claim that a party failed to take timely steps to protect or enforce its rights). The Board has held that doctrine of laches is not applicable in security clearance cases. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at pp. 3-4 (citing federal cases on the inapplicability of laches to the federal government, and prior Board decisions declining to recognize a laches defense). For all these reasons, Applicant's challenge to the timing of the SOR issued in his case fails to demonstrate error below.

The federal government must be able to repose a high degree of trust and confidence in persons granted a security clearance. The absence of any security violations does not preclude the federal government from deciding to deny or revoke a security clearance for other reasons raising security concerns. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 7. Similarly, the absence of any evidence that an applicant is vulnerable to coercion or blackmail does not preclude the federal government to make an unfavorable security clearance decision on grounds unrelated to any such vulnerability. *See, e.g.*, ISCR Case No. 02-20349 (January 12, 2004) at p. 5. Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness, and can provide a legally sufficient basis for an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification). Accordingly, the Administrative Judge's unchallenged finding of falsification provides a legally sufficient basis for his unfavorable security clearance decision.

The possible adverse effects that an unfavorable security clearance decision could have on an applicant are irrelevant to whether the Administrative Judge has a rational basis for concluding an applicant's conduct or circumstances raises security concerns. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8. The negative security implications of Applicant's falsification of a security clearance application do not depend or turn on whether an unfavorable security clearance decision will have an adverse effect on his employment situation. Therefore, the Judge's decision in this case is not rendered arbitrary, capricious, or contrary to law by any adverse effect that it might have on Applicant's employment situation.

2. Whether Applicant is entitled to a hearing if the Board does not accept Applicant's contention that the Administrative Judge's decision should be reversed. Applicant also asks the Board to allow him to have a hearing if it decides not to reverse the Administrative Judge's decision. Applicant's request is not well founded. A review of the case file shows that Applicant was notified of his right to ask for a hearing in his case, and that he decided to have a decision made in his case without a hearing. Having waived the right to a hearing during the proceedings below, Applicant is not entitled to have a hearing now. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4.

Conclusion

The Board affirms the Administrative Judge's 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board