

DATE: March 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17881

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 March 18, 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 Joseph Testan issued an unfavorable security clearance decision dated November 26, 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 erred by finding Applicant falsified a security clearance application; (2) whether the Administrative Judge should have concluded Applicant's security clearance application omission was mitigated because Applicant is no longer vulnerable to coercion or blackmail; and (3) whether the Administrative Judge failed to consider or give due weight to the favorable evidence Applicant presented. 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⁾

1. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application by not disclosing a child he had as the result of an extramarital affair. On appeal, Applicant challenges that finding by arguing: (a) there is no evidence that the child in question is his child; and (b) the omission of the child from the security clearance application was not a falsification for various other reasons. Applicant's claim of error is not persuasive.

(a) SOR paragraph 1.c alleged that Applicant falsified a security clearance application by not disclosing a child that he had as the result of an extramarital affair. If Applicant did not have a child as the result of an extramarital affair, then there could not be a falsification of the security clearance application as alleged in SOR paragraph 1.c. Accordingly, whether Applicant had such a child is a threshold factual predicate to the falsification allegation in SOR paragraph 1.c.

The Administrative Judge's finding that Applicant is the father of a child that is the result of an extramarital affair is not erroneous just because Applicant correctly points out that the record below does not contain certain kinds of evidence proving the child in question is his. *See, e.g.*, ISCR Case No. 94-1055 (May 8, 1996) at p. 3 ("Nothing in the Directive requires Department Counsel to prove its case against an applicant through any specific form of evidence."). The Judge can make findings of fact that reflect a reasonable interpretation of relevant, credible record evidence. Given the record evidence in this case, the Judge's finding that Applicant had a child as the result of an extramarital affair is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

(b) During the proceedings below, apart from Applicant's claim that he did not have a child as the result of an extramarital affair, Applicant denied that he falsified the security clearance application. Applicant's denials were relevant and material evidence that the Administrative Judge had to consider. However, Applicant's denials were not

binding or conclusive on the Judge. The Judge had to assess the credibility of Applicant's testimony, consider Applicant's denials in light of the record evidence as a whole, and make a finding about Applicant's intent or state of mind when he completed the security clearance application. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. The Judge specifically noted Applicant gave different explanations for why he did not disclose the existence of the child when he completed the security clearance application and concluded Applicant's differing explanations were not credible. Giving due deference to the Judge's credibility determination, the Board concludes the Judge's finding that Applicant falsified the security clearance application is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

(2) Whether the Administrative Judge should have concluded Applicant's security clearance application omission was mitigated because Applicant is no longer vulnerable to coercion or blackmail. Applicant argues, in the alternative, that the Administrative Judge should have concluded his omission was mitigated because Applicant is no longer vulnerable to coercion or blackmail. This argument fails to demonstrate the Judge erred.

The Administrative Judge specifically concluded that Applicant was no longer vulnerable to coercion or blackmail because his extramarital affair and the child that was born as a result of that affair have been disclosed to his family members (Decision at p. 2). That favorable conclusion did not require the Judge to conclude Applicant's falsification of the security clearance application was mitigated. A falsification can be aggravated if an applicant is vulnerable to coercion or blackmail because of that falsification. However, even in the absence of any vulnerability to coercion or blackmail, a falsification demonstrates poor judgment, unreliability, and untrustworthiness. Accordingly, the Judge's conclusion that Applicant was no longer vulnerable to coercion or blackmail did not preclude the Judge from concluding Applicant's falsification still raised serious concerns about Applicant's security eligibility under Guideline E (Personal Conduct). *See, e.g.*, ISCR Case No. 02-08052 (June 23, 2003) at p. 3 (discussing how falsification raises serious security concerns even if there is no vulnerability to coercion or blackmail involved).

(3) Whether the Administrative Judge failed to consider or give due weight to the favorable evidence Applicant presented. Applicant also notes his past military service and past possession of a security clearance. The Board construes Applicant's reference to those matters as raising the issue of whether the Administrative Judge failed to consider or give due weight to the favorable evidence Applicant presented.

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 No. 99-9020 (June 4, 2001) at p. 2. Apart from that legal principle, the Judge specifically noted the favorable evidence concerning Applicant's background (including his past military service) and concluded that the evidence presented by Applicant was insufficient to overcome the negative security implications of Applicant's falsification of the security clearance application. Applicant's disagreement with the Judge's conclusion about the weight of that favorable evidence is not sufficient to demonstrate the Judge ignored that evidence or weighed it in a manner that is arbitrary, capricious, or contrary to law.

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: 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

1. The Administrative Judge's decision does not set forth specific formal findings about each of the SOR paragraphs. Reading the Judge's decision in its entirety, the Board concludes the Judge implicitly reached favorable conclusions under Guideline E (Personal Conduct) about the matters covered by SOR paragraphs 1.a and 1.b. Accordingly, for purposes of deciding this appeal, the Board construes the decision below as indicating the Judge relied solely on SOR paragraph 1.c to base his unfavorable security clearance decision.