

DATE: August 12, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-18254

## **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 issued to Applicant a Statement of Reasons (SOR), dated October 10, 2003, which stated why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated April 15, 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 are raised on appeal: (1) Were the Administrative Judge's findings sustainable in light of the contrary record evidence and (2) Were the Administrative Judge's conclusions sustainable. For the reasons set forth below, 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<sup>(1)</sup>

(1) Were the Administrative Judge's findings sustainable in light of the contrary record evidence. The Administrative Judge found that Applicant deliberately falsified his answers to Questions 24, 28, 29 and 31 on the Standard Form 86 Applicant completed on March 13, 2000. The Judge found Applicant's various explanations for his specific false answers not credible. A review of the record evidence shows that, except for Question 29 (cited in SOR paragraph 2.d), the Judge's findings were sustainable. As to Question 29, Applicant stresses on appeal that the question clearly asks if purchases were "for your own intended profit or that of another?" Applicant admitted that he purchased marijuana from friends for his personal use (Government Exhibit 5). The Judge cited the first section of the question, omitting the language regarding profit. She then found that Applicant's answer was false because he had in fact purchased marijuana on many occasions. In view of the particular wording of Question 29, the Judge could not find Applicant's "NO" answer was a falsification, unless she connected it to record evidence that Applicant had been involved in a drug transaction for his profit or that of another person or entity. *See* ISCR Case No. 02-01181 (January 30, 2004) at p. 6; ISCR Case No. 97-0595 (February 19, 1999) at pp. 2-3. Here, the Judge did not do so and her finding of falsification as alleged in SOR paragraph 2.d is not sustainable. However, that error is harmless under the particular facts and circumstances of this case. The Judge's other findings of falsification are sufficient to support the Judge's adverse conclusions under Guideline E (Personal Conduct) and Applicant failed to demonstrate any error with respect to these findings.

(2) Were the Administrative Judge's conclusions sustainable. The Administrative Judge concluded that Applicant was not eligible for a security clearance because of his false answers on his security clearance application. Applicant challenges the Judge's conclusions on the theory that Applicant's explanations for his conduct should negate his responsibility for the consequences of that conduct. In essence, Applicant is asking the Board to accept as fact for purposes of analyzing the Judge's conclusions those very defenses which the Judge declined to accept in her decision. The Board finds no basis in the record or in the law to do as Applicant requests. Applicant has failed to demonstrate error in the Judge conclusions.

## Conclusions

With one exception that constitutes harmless error under the particular facts of this case, Applicant has failed in his burden on appeal of demonstrating error in the Administrative Judge's decision. Therefore the Judge's April 15, 2004 decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge issued favorable findings for Applicant under Guideline H (Drug Involvement). Those findings are not at issue on appeal.