

DATE: January 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18678

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 January 16, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated October 13, 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 issue has been raised on appeal: whether the Administrative Judge should have concluded that Applicant's falsification of a security clearance application was extenuated or mitigated. 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

On appeal, Applicant does not challenge the Administrative Judge's finding that he falsified a security clearance application. Rather, Applicant asks the Board to reverse the Judge's unfavorable decision because: (a) he has taken significant steps toward becoming financially stable; (b) he did not want his employer to find out about his financial problems; (c) his military service and personal life show positive things that should weigh in his favor; and (d) an unfavorable security clearance decision will have significant adverse effects on his employment situation and his personal life.

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline F (Financial Considerations). Because the Judge did not base his unfavorable decision on Applicant's history of financial difficulties, Applicant's comments about his financial situation are moot.

The record evidence does not support the statement in Applicant's appeal brief about not wanting his employer to find out about his financial problems. As such, it constitutes new evidence that the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had a reasonable opportunity during the proceedings below to offer documentary evidence or testimony for the Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of evidence that he did not present for the Judge's consideration during the proceedings below.

There is little record evidence concerning Applicant's military service and personal life. Given the sparse record evidence about those matters, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant has not presented evidence that extenuated or mitigated his falsification of the security clearance application.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to

classified information. The adverse consequences an unfavorable security clearance decision may have on an applicant are irrelevant to an Administrative Judge's determination as to whether the applicant poses the high level of judgment, reliability, and trustworthiness necessary to be granted a security clearance. The security significance of Applicant's falsification of a security clearance application is not diminished by the adverse effects that an unfavorable security clearance decision could have on him personally. *See, e.g.*, ISCR Case No. 02-09209 (June 9, 2004) at p. 5; ISCR Case No. 02-11570 (May 19, 2004) at p. 8.

Conclusion

Applicant has not demonstrated error below. Therefore, the Board affirms the Administrative Judge's security clearance decision.

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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board