

DATE: August 13, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18434

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 August 4, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Joan Caton Anthony issued an unfavorable security clearance decision, dated April 23, 2004.

Applicant appealed the Administrative Judge's unfavorable remand decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Board can consider new evidence in mitigation of Applicant's Guideline F disqualifying conduct, (2) whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's deliberate falsification of his security clearance application had not been mitigated, and (3) whether Applicant can be granted an interim clearance to allow him the opportunity to resolve his financial situation. 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 Board can consider new evidence in mitigation of Applicant's Guideline F disqualifying conduct. On appeal, Applicant acknowledges that his multiple unpaid debts and his current financial posture do not bear favorably upon him. Applicant does not identify any factual or legal error with respect to the Judge's findings or conclusions as to his history of financial difficulties. However, he states that after the hearing, he requested copies of his credit reports, consulted several sources for guidance on how to resolve his financial problems, and he now intends to take appropriate actions to identify just debts and refute others.

As noted above, the Board reviews a Judge's decision with respect to factual or legal errors which have been specifically identified by the appealing party. The Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Therefore, we may not consider Applicant's statements about steps he has taken since the hearing to address his financial situation. Applicant had the opportunity to submit evidence for the Judge's consideration during the proceedings below. Applicant's offer of new evidence on appeal does not demonstrate error by the Judge, or render her decision arbitrary, capricious or contrary to law.

2. Whether the Administrative Judge erred in concluding that the security concerns raised by Applicant's deliberate falsification of his security clearance application had not been mitigated. On appeal, Applicant does not dispute that he failed to fully disclose material facts about his financial difficulties when he completed a security clearance application. However, Applicant argues that the Judge erred in concluding that the security concerns raised by the omissions had not been mitigated because: (a) it was not Applicant's intent to deceive or defraud the government, (b) the non-disclosure was a regrettable error for which he apologizes, (c) the information has now been disclosed, (d) Applicant could never be subject to blackmail or coercion, and (e) the Judge did not properly consider such "whole person" factors as his many years of outstanding military service and work performance. In support of his contentions, Applicant submits with his

appeal, a civilian and a military performance evaluation, and three character reference letters. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

The performance evaluations and character reference letters submitted by Applicant on appeal are new evidence. As noted earlier in this decision, the Board may not consider new evidence on appeal, and the submission of such new evidence does not demonstrate error by the Judge, or render her decision arbitrary, capricious or contrary to law.

Based upon the record before her, the Judge's findings and conclusions with respect to the Guideline E allegations are sustainable. An applicant's statements about his intent and state of mind when he completed his security clearance questionnaire are relevant evidence, but they are not binding on the Administrative Judge. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts Applicant's denial. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp. 6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. This case involved the omission of financial information which was of security significance in response to three different questions on the Applicant's security clearance application. Given the record evidence in this case, it was not unreasonable for the Judge to conclude that the Applicant's failure to disclose the relevant financial information had been intentional--despite his denials to the contrary. The Judge's finding of falsification reflects a reasonable interpretation of the record evidence as a whole.

The Administrative Judge was not required, as a matter of law, to conclude that the security concerns raised by Applicant's falsifications were mitigated by his subsequent disclosures. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (Judge had rational basis for concluding security concerns were not mitigated by the fact that Applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (it was not arbitrary or capricious for the Judge to conclude the security concerns raised by falsifications were not mitigated by the fact the applicant had "come clean" and "had nothing left to hide"). Likewise, the Judge was not required to conclude Applicant's falsifications were mitigated by Applicant's favorable professional and work record. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6 (security clearance decisions not limited to consideration of an applicant's conduct during duty hours; off-duty conduct that raises security concerns can be considered in assessing an applicant's security eligibility). After reviewing the Judge's decision in this case, it is our view that the Judge reasonably considered "whole person" factors (such as the Applicant's age, the circumstances surrounding the conduct, his motivation, and the likelihood of continuance or recurrence) and nevertheless concluded that the evidence presented in the case was insufficient to overcome the security concerns raised by Applicant's conduct. Considering the record as a whole, the Judge's application of the relevant Section 6.3 factors, and her weighing of the record evidence was not arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960) (security requirements include consideration of a person's honesty, judgment, sobriety, and sense of obligations), *aff'd*, 367 U.S. 886 (1961). Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964) (lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965). The Judge's findings and conclusions about Applicant's falsification of the security clearance application provide a rational basis for her adverse conclusions about Applicant's security eligibility.

3. Whether Applicant can be granted an interim clearance to allow him the opportunity to resolve his financial situation. Applicant asks the Board to grant him an interim clearance for six months so that he can address his financial situation and submit documentation to DOHA to show he is making progress with his financial situation. Applicant requests relief that cannot be granted. Under the Directive, there is no authority for a Hearing Office Administrative Judge or the Board to grant a conditional or probationary security clearance. *See, e.g.*, ISCR Case No. 01-24318 (May 23, 2003) at p. 3; ISCR Case No. 99-0109 (March 1, 2000) at p. 3.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board