

DATE: January 12, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20349

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 May 5, 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) and Guideline J (Criminal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision dated September 30, 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 some of the Administrative Judge's factual findings are erroneous; (2) whether the Administrative Judge misunderstood Applicant's position concerning the applicability of Criminal Conduct Mitigating Conditions 1, 2, and 6; and (3) whether the Administrative Judge's adverse findings and conclusions under Guideline E are erroneous. 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 some of the Administrative Judge's factual findings are erroneous. On appeal, Applicant challenges a factual finding by the Administrative Judge concerning his current level of alcohol consumption, and a factual finding by the Judge that, as of the time of the hearing, Applicant had not informed his employer of a May 1998 driving while intoxicated (DWI) incident.

The SOR issued to Applicant did not allege that any of his conduct warranted an adverse decision under Guideline G (Alcohol Consumption). The May 1998 DWI incident was cited in the SOR only for the purpose of alleging that Applicant falsified a security clearance application in October 2000 by failing to disclose the May 1998 DWI incident. Furthermore, the Administrative Judge specifically concluded that "Applicant demonstrated that alcohol is not a problem for him." Finally, the Judge's finding about Applicant's current level of alcohol consumption was irrelevant to the Judge's adverse findings and conclusions under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Therefore, it does not matter whether the Judge's finding about Applicant's current level of alcohol consumption is correct or erroneous.

The Administrative Judge's finding that, as of the time of the hearing, Applicant had not informed his employer of a May 1998 DWI incident reflects a reasonable interpretation of the record evidence. Furthermore, Applicant's challenge to that finding is based on factual assertions that go beyond the record evidence and seek to supplement and amend his hearing testimony. As such, Applicant's assertions constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

2. Whether the Administrative Judge misunderstood Applicant's position concerning the applicability of Criminal Conduct Mitigating Conditions 1, 2, and 6. Applicant argues the Administrative Judge misunderstood the position he

took because he was referring to the 1998 DWI incident, not the falsification of the security clearance application, when he urged the Judge to apply Criminal Conduct Mitigating Conditions 1, 2, and 6 to his case. ⁽¹⁾ Applicant's argument identifies an ambiguity in the Judge's decision that is either not an error at all, or at most a harmless error that does not warrant remand or reversal.

Applicant's answer to the SOR asks for application of Criminal Conduct Mitigating Conditions 1, 2, and 6 in connection with his May 1998 DWI incident, not his falsification of the security clearance application. Because the wording of the decision below is ambiguous, it is not clear whether: (a) the Administrative Judge misunderstood Applicant's contention about those three mitigating conditions, or (b) the Judge understood Applicant's contention about those three mitigating conditions, but simply did not make clear that given the specific SOR allegations in this case Applicant's argument about those three mitigating conditions was irrelevant to the central issue of the case (*i.e.*, falsification of the security clearance application). If the Judge misunderstood Applicant's contention, such an error would be harmless because misunderstanding an irrelevant argument would not prejudice Applicant's rights under the Directive in any meaningful way. If the Judge understood Applicant's contention but simply addressed it in an ambiguous manner, then there is no real error at all. In any event, no useful purpose would be served by remanding the case to the Judge for clarification of his discussion of this aspect of the case.

3. Whether the Administrative Judge's adverse findings and conclusions under Guideline E are erroneous. Applicant also argues: (a) he had no prior experience with applying for a security clearance; (b) he did not know who to contact to ask questions about the May 1998 DWI incident and how it would apply to the security clearance application; and (c) he cannot be blackmailed and would never jeopardize the United States or his employer. The Board construes Applicant's arguments as raising the issue of whether the Judge's findings and conclusions under Guideline E are erroneous.

In a written statement Applicant gave to an investigator in February 2002, there is no reference to his lack of prior experience as an explanation or justification for his omission of the May 1998 DWI incident from the security clearance application he completed in October 2000. Furthermore, during the proceedings below, Applicant did not raise his lack of prior experience with applying for a security clearance as an explanation or justification for his failure to disclose the May 1998 DWI incident when he completed the security clearance application. Accordingly, this argument is based on a factual assertion that goes beyond the record evidence and seeks to supplement and amend his prior written statement, his answer to the SOR, and his hearing testimony. As such, this argument is based on a proffer of new evidence, which the Board cannot consider.

Applicant's claim that he did not know whom to contact to ask questions about the May 1998 DWI incident does not demonstrate the Administrative Judge's finding of falsification is erroneous. Considering the record as a whole, the Judge had ample evidence to find that Applicant deliberately falsified the October 2000 security clearance application by failing to disclose the May 1998 DWI incident.

Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude that the facts and circumstances surrounding Applicant's falsification of the security clearance application in October 2000 made him vulnerable to potential blackmail. Even if the Board were to assume, solely for purposes of deciding this appeal, that Applicant's subsequent disclosures about the May 1998 DWI incident eliminated any potential for blackmail, such a conclusion would not warrant remand or reversal in this case. Serious security concerns are raised whenever an applicant's conduct or circumstances make the applicant vulnerable to coercion or blackmail. However, the absence of such a vulnerability is not dispositive because serious security concerns can be raised by conduct or circumstances unrelated to vulnerability to coercion or blackmail. *See, e.g.*, ISCR Case No. 02-08052 (June 23, 2003) at p. 3. Falsification of a security clearance application reflects adversely on an applicant's judgment, reliability, and trustworthiness, independent of whether the falsification makes the applicant vulnerable to blackmail or coercion. Accordingly, even if the Board were to decide (solely for purposes of deciding this appeal) that the Judge should have concluded Applicant's subsequent disclosures eliminated Applicant's vulnerability to potential blackmail, the Judge's finding that Applicant falsified the security clearance application would be sufficient to support his adverse security clearance decision.

Conclusion

Applicant has failed to demonstrate error below. Even if the Board were to conclude that some of Applicant's claims of error had merit, they only demonstrate harmless error that does not warrant remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The wording of these three mitigating conditions is not critical to the resolution of this appeal issue. Therefore, there is no need to quote them verbatim this decision.