

DATE: December 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19896

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Laura A. O'Reilly, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated March 25, 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 James A. Young issued an unfavorable security clearance decision dated September 17, 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's finding that Applicant falsified a security clearance application is not supported by substantial record evidence; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the Judge failed to comply with pertinent provisions of the Directive. 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 Administrative Judge's finding that Applicant falsified a security clearance application is not supported by substantial record evidence. The Administrative Judge found that Applicant falsified a security clearance application in March 2002 by failing to disclose a drug-related charge that was dismissed in 1994. Applicant contends Judge's finding of falsification is erroneous because: (a) Applicant did not intend to falsify the security clearance application; (b) the Judge erred by relying exclusively on his negative assessment of Applicant's credibility; and (c) the Judge failed to give sufficient weight to Applicant's explanation for why he did not disclose the 1993 charge in the security clearance application.

There is no dispute that Applicant was charged in a drug-related incident and that the incident should have been disclosed when Applicant completed the security clearance application in March 2002. The sole issue before the Administrative Judge was whether Applicant's omission of the incident from the security clearance application was a deliberate falsification or a good faith, inadvertent or careless omission. Applicant's statements concerning his intent or state of mind when he completed the security clearance application in March 2002 are relevant and material evidence that the Judge had to consider. However, the Judge was not bound to accept Applicant's statements at face value. Rather, the Judge had to consider Applicant's statements in light of his assessment of Applicant's credibility and the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0430 (July 3, 2001) at pp. 4-5; ISCR Case No. 99-0473 (May 12, 2000) at pp. 2-3. Given the record evidence in this case, the Judge could have accepted Applicant's explanation for the omission, or the Judge could have rejected Applicant's explanation. The Judge chose to reject Applicant's explanation as not credible. Considering the record as a whole, and giving deference to the Judge's credibility determination (Directive, Additional Procedural Guidance, Item E3.1.32.1), the Board concludes Applicant has failed to demonstrate the Judge's choice was erroneous. Applicant's argument that his explanations for his omission of the drug-related incident are "not necessarily inconsistent or mutually exclusive" does not demonstrate the Judge erred.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the Judge failed to comply with pertinent provisions of the Directive. Applicant also contends the Administrative Judge: (a) did not evaluate Applicant's case in terms of the whole person concept; (b) did not consider the applicability of Personal Conduct Mitigating Condition 2; and (c) failed to elicit relevant information from Applicant at the hearing. The Board construes these arguments as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law because the Judge failed to comply with pertinent provisions of the Directive.

(a) Applicant correctly notes that when making a security clearance decision the Administrative Judge should evaluate an applicant's conduct and circumstances under the whole person concept. *See* Directive, Section 6.3; and Enclosure 2, Items E2.2.1 and E2.2.3. However, Applicant's arguments do not demonstrate the Administrative Judge failed to apply the whole person concept.

To the extent Applicant's contention relies on evidence indicative of extenuation and mitigation with respect to the drug-related incident, it fails to demonstrate the Administrative Judge erred. The Judge's adverse decision is not based on the drug-related incident, but rather the March 2002 falsification concerning that incident. Accordingly, it is irrelevant whether Applicant presented evidence in mitigation of the drug-related incident.

To the extent Applicant's claim of error relies on his contention that the Administrative Judge erred by finding Applicant sought to conceal the drug-related incident, it is unpersuasive. As discussed earlier in this decision, the Judge's finding of falsification is sustainable. Since the Judge's finding of falsification is sustainable, the Board rejects Applicant's argument that intentional misrepresentation will not recur because Applicant never intended to falsify the security clearance application in the first instance.

To the extent Applicant's argument relies on his disagreement with the Administrative Judge's adverse credibility determination, it does not show the Judge failed to comply with the whole person concept. As discussed earlier in this decision, the Judge's credibility determination is entitled to deference and Applicant has failed to show it is unsustainable. Furthermore, Applicant fails to articulate a cogent argument for why the Judge's credibility determination is inconsistent or incompatible with application of the whole person concept.

Applicant also argues the Administrative Judge should have concluded he had demonstrated extenuation or mitigation. In support of this argument, Applicant sets forth an alternate interpretation of the record evidence. However, Applicant's ability to do so is not sufficient to demonstrate the Judge failed to apply the whole person concept. Merely because a Judge makes adverse findings and draws adverse conclusions, it does not follow that the Judge is failing to apply the whole person concept. The question is not whether the Judge's findings and conclusions are favorable, unfavorable, or mixed; rather, the question is whether the Judge's findings and conclusions reflect a reasonable interpretation of the record evidence as a whole that adequately takes into account the totality of an applicant's conduct and circumstances. In this case, the Judge's findings and conclusions about Applicant's falsification of the security clearance application in March 2002 reflect an interpretation of the record evidence that is consistent with the whole person concept.

Finally, Applicant's argument concerning the absence of potential for coercion in the future fails to demonstrate the Administrative Judge erred. If an applicant were vulnerable to coercion or blackmail, security concerns would be raised. However, the absence of such a vulnerability is not dispositive because 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. Even if Applicant is not vulnerable to coercion or blackmail, the Judge's finding that Applicant engaged in falsification in March 2002 is sufficient to support the Judge's adverse conclusions about Applicant's security eligibility.

(b) Applicant contends the Administrative Judge erred by not applying Personal Conduct Mitigating Condition 2 [\(1\)](#)

because: (i) the March 2002 falsification was an isolated incident; (ii) the March 2002 falsification was not recent; (iii) Applicant provided correct information voluntarily when he was interviewed by an investigator and when he answered the SOR in this case; and (iv) in another case, a Judge found even an intentional falsification mitigated under Personal Conduct Mitigating Condition 2 when it was "an isolated incident of poor judgment." Applicant argues, in the alternative, that the Judge should have at least discussed why he decided not to apply Personal Conduct Mitigating Condition 2 in Applicant's case.

The decision in another DOHA case cited by Applicant on appeal does not demonstrate error by the Administrative Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases, and it is not legally binding precedent on the Board in any case. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges). And, the Board does not find the decision cited by Applicant to be persuasive with respect to its analysis and application of Personal Conduct Mitigating Condition 2.

Given the particular facts in this case, Applicant's reliance on Personal Conduct Mitigating Condition 2 is misplaced. When a case involves a claim that an applicant made disclosures that correct an earlier falsification, then Personal Conduct Mitigating Condition 3⁽²⁾

is the proper guideline to consider, not Personal Conduct Mitigating Condition 2. *See, e.g.*, ISCR Case No. 99-0557 (July 10, 2000) at p.4 (discussing difference between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3 and citing other Board decisions on point). Accordingly, the Judge did not err, as a matter of law, by not applying Personal Conduct Mitigating Condition 2 in Applicant's case.

(c) Applicant correctly notes that "[i]t is not in any way the Judge's responsibility to help a *pro se* party make their case," but goes on to argue that because of the nature of the case presented by him at the hearing, "the Judge should have made some attempt to elicit relevant information from the [Applicant]." Applicant also argues "the procedure is not designed to be a one-sided interrogation and argument, but rather a two-sided adversarial process, with evidence and argument coming from both sides." Applicant's arguments fail to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

An Administrative Judge must conduct a hearing in a fair and impartial manner. *See* Directive, Section 4.1; Additional Procedural Guidance, Item E3.1.10. Each party is obligated to prepare for a hearing and present witnesses and other evidence in support of the party's case. *See* Directive, Additional Procedural Guidance, Items E3.1.14 and E3.1.15. Apart from the provisions of the Directive, the "Prehearing Guidance for DOHA hearings" informed Applicant that "[t]he hearing is an adversarial proceeding in which the parties have the responsibility to present their respective cases" and "[e]ach party is expected to be prepared to present at the hearing whatever evidence (testimonial or documentary, or both) that party intends to offer." Moreover, at the hearing the Judge stated that "[e]ach party is responsible for producing evidence that it wants in the record" (Hearing Transcript at p. 4). Furthermore, the Judge told Applicant that, apart from the SOR and Applicant's answer to the SOR, "if you wish for me to consider anything in my determination, you need to present it during this hearing" (Hearing Transcript at pp. 5-6). Considering the record as a whole, the Board concludes Applicant was on adequate notice that he had the responsibility to prepare for the hearing and was expected to present evidence for the Judge to consider in his case. Furthermore, the record below does not support Applicant's suggestion that the Judge failed to allow him "an opportunity to explain."

The Board does not find persuasive Applicant's suggestion that the Administrative Judge is at fault because Applicant received "a completely one-sided hearing." Having elected to represent himself, Applicant cannot now fairly complain about the quality of his self-representation. *See, e.g.*, ISCR Case No.96-0544 (May 12, 1997) at p. 2 (citing *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975)). The presiding Judge should not be blamed for the failure of a party to take good advantage of the hearing process. Applicant's failure to take better advantage of the hearing process does not translate into a denial of his right to due process under the Directive. *See, e.g.*, *Dusanek v. Hannon*, 677 F.2d 538, 542-543 (7th Cir. 1982)("The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure."), *cert. denied*, 459 U.S. 1017 (1982).

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

2. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."