

DATE: May 4, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20576

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 June 12, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision dated February 27, 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's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. 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

The Administrative Judge made findings of fact about Applicant's history of alcohol abuse, Applicant's involvement in alcohol-related incidents (two in 1996, one in 2000) that resulted in arrests and adjudications of guilt, and Applicant's falsification of a security clearance application in March 2001. On appeal, Applicant does not challenge the Judge's findings of fact. However, Applicant states: (1) he would like the Board to re-evaluate the unfavorable security clearance decision in his case; (2) he takes his job seriously; (3) he has always taken the security of the United States seriously; and (4) he has learned from his past mistakes.

There is no presumption of error below and the appealing party has the burden of raising and demonstrating factual or legal error. Because Applicant does not challenge the Administrative Judge's findings of fact, those findings stand and need not be reviewed by the Board. Making allowances for Applicant's *pro se* status, the Board construes Applicant's brief as raising the issue of whether the Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law.

As noted earlier in this decision, the Board does not conduct *de novo* review of a case on appeal. The Board will not ignore the Administrative Judge's decision and conduct its own assessment of Applicant's security eligibility. Rather, the Board reviews the Judge's decision under the limits of its appellate authority, as set forth in the Directive and well-established principles of appellate review. Accordingly, the Board will consider Applicant's appeal brief only to ascertain whether it shows any factual or legal error by the Judge.

Applicant's statement about his job performance shows no error by the Administrative Judge. Security clearance decisions are not limited to consideration of an applicant's performance during duty hours. Even if an applicant has a good job record, that does not preclude a Judge from making an unfavorable security clearance decision based on an applicant's off-duty conduct that raises security concerns. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at p. 4.

Given the Judge's findings of fact about Applicant's history of alcohol abuse, Applicant's three alcohol-related incidents, and Applicant's falsification of the security clearance application, the Judge had a rational basis for concluding Applicant's overall conduct raised serious security concerns.

There is no evidence that Applicant has ever been involved in any security violations. However, the absence of any such evidence is not dispositive. The federal government is not required to wait until an applicant fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The Administrative Judge's findings about Applicant's history of alcohol abuse, Applicant's three alcohol-related incidents, and Applicant's falsification of the security clearance application provide a rational basis for the Judge's negative conclusions about Applicant's security eligibility.

Applicant's statement that he has learned from his past mistakes raises the question of whether the Administrative Judge should have concluded Applicant had presented sufficient evidence to overcome the negative security concerns raised by his overall history of conduct and demonstrate it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See Directive, Additional Procedural Guidance, Item E3.1.15* (applicant has ultimate burden of persuasion as to receiving a favorable security clearance decision). The Board will not disturb a Judge's weighing of the record evidence unless the appealing party demonstrates the Judge acted in a manner that is arbitrary, capricious, or contrary to law when weighing the record evidence. *See, e.g., ISCR Case No. 02-07757* (March 29, 2004) at p. 5. Nothing in Applicant's appeal brief shows the Judge weighed the evidence improperly in this case.

Conclusion

The Board affirms the Administrative Judge's unfavorable security clearance decision because Applicant has failed to demonstrate error below.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board