

DATE: October 20, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21242

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 December 30, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Carol G. Ricciardello issued an unfavorable security clearance decision, dated September 30, 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 erred by finding that Applicant engaged in deliberate falsification. 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⁽¹⁾

The Administrative Judge found that Applicant falsified a security clearance application by failing to disclose alcohol-related incidents that occurred in September 1985 and December 1999. On appeal, Applicant argues that he did not deliberately try to conceal those incidents from the government.

Part of Applicant's appeal brief consists of factual assertions that go beyond the record evidence below. Such factual assertions constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. A review of the proceedings below shows Applicant had a reasonable opportunity to submit evidence for consideration by the Administrative Judge in his case. Applicant cannot fairly challenge the Judge's findings of fact based on a proffer of new evidence on appeal.

On appeal, the Board does not review the record evidence *de novo* and make its own findings of fact. As discussed earlier in this decision, when an Administrative Judge's findings of fact are challenged on appeal, the Board must decide whether the challenged findings of fact reflect a reasonable or plausible interpretation of the record evidence as a whole. The appealing party must do more than just disagree with a Judge's findings of fact. The appealing party must present a cogent reason or argument as to how or why the Judge's findings of fact are not supported by substantial evidence, do not reflect a reasonable or plausible interpretation of the record evidence, or are otherwise legally or logically flawed.

In the proceedings below, the Administrative Judge had record evidence concerning Applicant's statements and explanations about why he did not disclose the September 1985 and December 1999 alcohol-related incidents when he completed the security clearance application. Applicant's statements and explanations were relevant evidence that the Judge had to consider, but they were not binding or conclusive evidence. The Judge had to consider Applicant's statements and explanations in light of the record as a whole and decide whether Applicant's omission of the two alcohol-related incidents was a deliberate falsification or not. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record evidence as a whole, the Judge's finding of falsification is sustainable. Applicant's argument

to the contrary is not persuasive.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings under Guideline G (Alcohol Consumption) that are favorable to Applicant. Those favorable formal findings are not at issue on appeal.