

DATE: October 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21087

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 November 10, 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 James A. Young issued an unfavorable security clearance decision, dated ay 27, 2005.

Applicant appealed the Administrative Judge's unfavorable decision. On August 19, 2005, the Board issued a Decision and Remand Order, remanding the case to the Judge with instructions to issue a new decision after correction of the error concerning one of the falsification allegations in the case. The Judge issued an unfavorable remand decision, dated August 31, 2005.

Applicant appealed the Administrative Judge's unfavorable remand 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 erred by finding Applicant falsified a security clearance application; and (2) in the alternative, whether the Administrative Judge erred by not concluding Applicant's falsifications were mitigated. For the reasons that follow, the Board affirms the Administrative Judge's remand 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⁾

1. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. On the first appeal, the Board concluded the Administrative Judge's finding that Applicant falsified a security clearance application by not disclosing he had been ordered to attend Alcoholics Anonymous (SOR paragraph 3.c) was sustainable. However, the Board remanded the case because the Judge's finding that Applicant falsified a security clearance application by not disclosing a December 1997 arrest (SOR paragraph 3.b) was not sustainable because it was based on an erroneous reading of Applicant's response to SOR paragraph 3.b. On remand, the Judge corrected his error and explained why he found that Applicant falsified the security clearance application by not disclosing the December 1997 arrest (SOR paragraph 3.b). On appeal, Applicant challenges both of the Judge's findings of falsification.

There is no merit to Applicant's challenge to the Administrative Judge's finding of falsification as alleged in SOR paragraph 3.b. That finding of falsification was sustained on the first appeal and was not affected by the Board's August 19, 2005 Decision and Remand Order.

Applicant's challenge to the Administrative Judge's finding of falsification as alleged in SOR paragraph 3.b is not persuasive. On remand, the Judge explained why he found, based on the record evidence, that Applicant falsified the security clearance application as alleged in SOR paragraph 3.b. Considering the record as a whole, the Judge's finding is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. In the alternative, whether the Administrative Judge erred by not concluding Applicant's falsifications were mitigated. Applicant also contends, in the alternative, that the Administrative Judge should have concluded his falsifications were mitigated by the passage of time and the fact that he later disclosed to the government the information about his criminal record. Although Applicant does not cite Personal Conduct Mitigating Condition 2⁽²⁾ in his appeal brief, his appeal argument tracks the language of that mitigating condition.

On remand, the Administrative Judge noted that Applicant's falsifications were not recent and that Applicant later provided the omitted information to the government, but concluded that Personal Conduct Mitigating Condition 2 was not applicable because Applicant had committed two separate and distinct falsifications on the security clearance application.

To resolve this appeal, the Board need not decide whether Applicant's two falsifications on the same security clearance application provide a sufficient basis for the Administrative Judge to conclude Personal Conduct Mitigating Condition 2 is not applicable in this case. Given the record evidence in this case, Applicant's falsifications and subsequent disclosures do not warrant consideration of Personal Conduct Mitigating Condition 2, but rather Personal Conduct Mitigating Condition 3.⁽³⁾ *See, e.g.*, ISCR Case No. 99-0557 (July 10, 2000) at p. 4 and ISCR Case No. 97-0289 (January 22, 1998) at p. 3 (explaining why Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2, applies to cases involving a claim that a falsification was later corrected). And, given the sparse record evidence in this case, there would be no evidentiary basis for the Judge to conclude that application of Personal Conduct Mitigating Condition 3 is warranted. Therefore, even if the Board were to assume -- solely for purposes of deciding this appeal -- that the Judge's reasoning about Personal Conduct Mitigating Condition 2 was erroneous, such an error would be harmless in this case because it did not prejudice Applicant in any meaningful way.

Finally, Applicant's citation of favorable record evidence does not demonstrate the Administrative Judge should have concluded his falsification of the security clearance application was mitigated under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. Applicant had the burden of presenting evidence sufficient to rebut, explain, extenuate or mitigate the security concerns raised by his admitted or proven conduct.⁽⁴⁾ The favorable record evidence cited by Applicant did not compel the Judge, as a matter of law or logic, to conclude he had rebutted, extenuated or mitigated the security concerns raised by his falsifications.

Conclusion

The Board affirms the Administrative Judge's remand decision because Applicant has not demonstrated harmful 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains some factual assertions that go beyond, and seek to supplement, the record evidence that was before the Administrative Judge. Such factual assertions constitute a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will only consider those arguments made by Applicant that do not rely on a proffer of new evidence. Applicant's brief also contains some arguments about the matters covered by Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct). Because the Judge entered formal findings in favor of Applicant with respect to Guideline G and Guideline J, Applicant's arguments about them are moot.

2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).

3. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.3).

4. *See* Directive, Additional Procedural Guidance, Item E3.1.15.