

DATE: August 19, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21087

APPEAL BOARD DECISION AND REMAND ORDER

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. 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 that Applicant falsified a security clearance application; and (2) whether the Administrative Judge erred by concluding that Applicant had not presented evidence sufficient to mitigate the security concerns raised by his conduct. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing consistent with the Board's rulings and instructions.

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 erred by finding that Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application by failing to disclose a December 1997 arrest for family violence, and the fact that he had been ordered to attend Alcoholics Anonymous (AA). Applicant challenges the Judge's finding of falsification.

The Administrative Judge based his finding of falsification on his conclusion that "Applicant admits he falsified material facts on his [security clearance application] . . ." (Decision at p. 4). However, Applicant's answer to the SOR does not fully support the Judge's conclusion. When responding to the SOR, Applicant wrote "I admitt" (sic) after each of the two SOR paragraphs alleging falsification (SOR paragraphs 3.b and 3.c), but also submitted a December 23, 2003 letter which contains a denial of the allegation that he falsified the security clearance application by not disclosing the December 1997 arrest (SOR paragraph 3.b).⁽¹⁾ Applicant's December 23, 2003 letter does not contain any apparent denial of the falsification allegation set forth in SOR paragraph 3.c.

Department Counsel has the burden of presenting evidence to prove controverted facts.⁽²⁾ If an applicant admits an SOR allegation, then such admission provides an Administrative Judge with a legally sufficient basis to find that the applicant engaged in the conduct covered by the applicant's admission. Therefore, Applicant's unqualified admission to SOR paragraph 3.c provided a legally sufficient basis for the Judge's conclusion that Applicant admitted that he falsified a security clearance by failing to disclose that he had been ordered to attend AA. However, Applicant's denial of the falsification allegation set forth in SOR paragraph 3.b precluded the Judge from concluding, without explanation, that Applicant admitted that falsification allegation.

Experience in the industrial security program shows that in cases involving allegations of falsification: (a) some applicants admit or deny the falsification allegation and say nothing about the matter alleged to have been concealed or misrepresented; (b) some applicants admit or deny the falsification allegation, but also address the matter alleged to have been concealed or misrepresented; (c) some applicants do not admit or deny the alleged falsification, but address the matter alleged to have been concealed or misrepresented; (d) some applicants provide answers that fail to inform the reader whether the applicant is responding to the alleged falsification or the matter alleged to have been concealed or misrepresented; and (e) some applicants admit or deny the falsification allegation, but then provide an explanation or elaboration that is inconsistent with the applicant's admission or denial. When faced with an applicant's admission or denial of an SOR paragraph that is followed by an explanation that is inconsistent with the applicant's admission or denial, the Judge cannot characterize the inconsistent answer one way or the other without an explanation. Given Applicant's inconsistent answer to SOR paragraph 3.b, it was arbitrary and capricious for the Judge to characterize it as an admission without an explanation for why the Judge discounted Applicant's denial of the falsification alleged by SOR paragraph 3.b. [\(3\)](#)

2. Whether the Administrative Judge erred by concluding that Applicant had not presented evidence sufficient to mitigate the security concerns raised by his conduct. The Administrative Judge concluded that Applicant had failed to mitigate security concerns raised under Guideline E by (i) his dismissal from a court-ordered anger management program because of unexcused absences; and (ii) falsification of the security clearance application. On appeal, Applicant: (a) makes some arguments about his criminal conduct and alcohol consumption; (b) argues the Judge should have applied Personal Conduct Mitigating Condition 2; (c) states he is proud of his work for the U.S. military and has received letters of recognition concerning his work; and (d) asserts that he has learned a valuable lesson from his experience, and claims he will not fail to disclose information about himself in the future. The Board construes Applicant's statements as raising the issue of whether the Judge erred by concluding that Applicant had not presented evidence sufficient to mitigate the security concerns raised by his conduct.

Because the Administrative Judge entered formal findings in favor of Applicant with respect to Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption), Applicant's arguments about his criminal conduct and alcohol consumption are moot.

Applicant's contention concerning Personal Conduct Mitigating Condition 2 [\(4\)](#) has merit in light of the Administrative Judge's error concerning SOR paragraph 3.b. The Judge declined to apply Personal Conduct Mitigating Condition 2 based on his conclusion that Applicant had committed two separate and distinct falsifications (Decision at p. 4). Since the Judge erred by concluding, without explanation, that Applicant admitted the falsification alleged under SOR paragraph 3.b, the Judge's reasoning concerning Personal Conduct Mitigating Condition 2 is placed in question. Unless the Judge makes a sustainable finding of falsification under SOR paragraph 3.b, his reason for not applying Personal Conduct Mitigating Condition 2 cannot be sustained.

Because the Board concludes that the case should be remanded, it would be premature for the Board to address the rest of Applicant's appeal arguments.

Conclusion

Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with instructions. On remand, the Judge must issue a new decision, consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25. In the new decision, the Judge must: (a) make new findings about the alleged falsification covered by SOR paragraph 3.b after correction of the error identified in this decision; (b) explain what effect, if any, those new findings have on the Judge's consideration of Personal Conduct Mitigating Condition 2, and his evaluation of Applicant's conduct under the whole person concept (Directive, Adjudicative Guidelines, Item E2.2.1) and the general factors of Directive, Section 6.3.

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. The File of Relevant Material identifies the December 23, 2003 letter as part of Applicant's answer to the SOR.
2. *See* Directive, Additional Procedural Guidance, Item E3.1.14.
3. Because Department Counsel has the burden of proving controverted facts, an Administrative Judge's disbelief of an applicant's denial -- standing alone -- is not sufficient to support a finding that the applicant engaged in the conduct being denied. *See, e.g.*, ISCR Case No. 02-24452 (August 4, 2004) at p. 4; ISCR Case No. 01-23156 (September 24, 2003) at p. 4 n.3. Similarly, a Judge cannot transform disbelief of an applicant's denial of an SOR paragraph into the functional equivalent of an admission to that SOR paragraph.
4. "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).