

DATE: May 5, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22404

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 Applicant a Statement of Reasons (SOR), dated July 28, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline G (Alcohol Consumption), Guideline C (Foreign Preference), and Guideline E (Personal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated November 10, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether Applicant was denied effective assistance of counsel, and (2) whether the Administrative Judge's 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 Issues ⁽¹⁾

1. Whether Applicant was denied effective assistance of counsel. Applicant contends that the Administrative Judge's decision should be reversed because Applicant's attorney did not adequately represent him during the proceedings below and failed to present certain evidence that Applicant believes would have helped his case. In support of his contention, Applicant's brief contains assertions about matters that go outside the record evidence, including: (a) recitations concerning disagreements between him and his attorney about how to proceed with his case and what evidence to present, (b) assertions that his attorney neglected his case, failed to set up meetings, did not respond to Applicant's telephone calls and written inquiries, and was unfocused and unprepared at the hearing, and (c) a claim that his attorney was under the influence of drugs at the hearing. It also contains a copy of a purported newspaper article, dated subsequent to the decision in Applicant's case, which alleges that Applicant's counsel is currently facing criminal charges for trading legal services for drugs.

The actions or inactions of Applicant's counsel during the proceedings below do not provide a basis for the Board to conclude that the Administrative Judge's decision should be reversed. DOHA proceedings are civil in nature and the ineffective assistance of counsel doctrine does not apply to them. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 3; ISCR Case No. 96-0127 (July 29, 1997) at p. 2. Even if the Board were to assume, solely for the sake of discussion, that Applicant's appeal assertions are correct, Applicant's remedy, if any, would be in another forum.

2. Whether the Administrative Judge's decision is arbitrary, capricious or contrary to law. Applicant contends that the Administrative Judge's decision should be reversed because the Judge's adverse findings and conclusions are erroneous. In support of his contention, Applicant essentially reargues his case, providing a detailed explanation, characterized as a rebuttal, to each of the SOR subparagraphs--including those which the Judge found in his favor. Applicant also takes issue with the Judge's finding that Applicant was not candid with the individuals who submitted letters of reference on his behalf.

The Judge's findings and conclusions with respect to the Guideline G, C and E allegations are sustainable. To the extent that Applicant's explanations in his brief go beyond the factual record of the hearing, they may not be considered on appeal. Applicant's testimony at the hearing about the events at issue and his character reference letters were relevant evidence, but they were not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-07292 (January 29, 2004) at p. 4 ("An Administrative Judge is not required to accept testimony merely because it is unrebutted. It would be arbitrary and capricious to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other evidence."). *See also* ISCR Case No. 99-0710 (March 19, 2001) at p. 4 and n. 9. As the trier of fact, the Judge had to consider Applicant's testimony and his uncross-examined character references in light of the record evidence as a whole, and Applicant's testimony and character reference letters did not preclude the Judge from weighing the record evidence and making the findings that he did in the case. Here, the Judge's material findings were reasonably supported by record evidence, and the Judge's conclusions follow rationally from the Judge's findings.

In his decision, the Administrative Judge noted that all of the letters of reference submitted by Applicant praised Applicant's technical competency and contributions, but contained no specific references to the problems or misconduct described in the SOR. As a result, the Judge stated that he could "only deduce from this that Applicant was not completely candid with those whose help he sought."⁽²⁾

The Judge's finding in that regard is arguably speculative, in that the content of the letters could also have reflected the fact that Applicant's character references were aware of his problems, but chose to only accentuate Applicant's positive attributes in their written submissions. However, it was not unreasonable for the Judge to draw such a conclusion, given that Applicant had chosen to submit the references in a form which was not reasonably subject to cross-examination. Applicant could have dispelled any ambiguity in this regard by having the individuals testify at the hearing.

Conclusion

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to paragraphs 2.b, 2.d, 2.g, and 2.i. Those favorable findings are not at issue on appeal.

2. Decision at p. 5.