

DATE: September 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22603

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 October 17, 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). Administrative Judge Richard A. Cefola issued an unfavorable security clearance decision dated April 26, 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 issues have been raised on appeal: (1) whether the Administrative Judge erred by not addressing the evidence concerning Applicant's drug abuse under Guideline H (Drug Involvement); (2) whether the Administrative Judge erred by not concluding Applicant's history of drug abuse was extenuated or mitigated; and (3) whether the Administrative Judge erred by not complying with paragraph 3.e of the DOHA Operating Instruction concerning the handling of cases under 10 U.S.C. §986. 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

Applicant does not challenge the Administrative Judge's findings of fact about his criminal record, which resulted in three separate convictions in the late 1970s (one of which resulted in his serving 18 months in jail). However, Applicant does challenge other aspects of the Judge's decision.

1. Whether the Administrative Judge erred by not addressing the evidence concerning Applicant's drug abuse under Guideline H (Drug Involvement). In the decision below, the Administrative Judge referred to record evidence of Applicant's use of marijuana and crack cocaine. On appeal, Applicant does not challenge the Judge's findings that he used those drugs. However, Applicant does contend the Judge erred by not evaluating the record evidence of his history of drug use under Guideline H (Drug Involvement).

The SOR did not allege that Applicant had used illegal drugs. However, there is documentary evidence in the record concerning Applicant's use of illegal drugs, Applicant testified about his drug use, and Applicant was asked about it by Department Counsel and the Administrative Judge. No motion to amend was made by either Department Counsel or Applicant. Even without a motion to amend made by Department Counsel or Applicant, the Judge could have amended the SOR to reflect the record evidence of Applicant's drug use. ⁽¹⁾

However, the Judge did not amend the SOR to reflect Applicant's drug use.

Although the Administrative Judge could have amended the SOR to reflect Applicant's drug use, given the record evidence and procedural history of this case, Applicant has not shown the Judge's failure to amend the SOR was arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge erred by not concluding Applicant's history of drug abuse was extenuated or mitigated. Applicant also argues: (a) the Administrative Judge linked the evidence of Applicant's history of drug use with his analysis of Applicant's criminal record under Guideline J; (b) the Judge focused only on the negative aspects of Applicant's history of drug use; (c) the Judge failed to discuss or consider the record evidence showing Applicant had mitigated his history of drug use; (d) Applicant's favorable evidence was presented in support of a recommendation by the Judge that Applicant's case be considered for a waiver under 10 U.S.C. §986; and (e) in other cases, Hearing Office Judges have concluded that comparable drug use had been mitigated sufficiently to warrant a favorable security clearance decision.

Although Applicant's history of drug use was not alleged in the SOR or made the subject of an amendment to the SOR, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider the record evidence of Applicant's drug use because that evidence was relevant to Applicant's claim of reform and rehabilitation.⁽²⁾

However, although it was legally permissible for the Judge to take that evidence into consideration when evaluating Applicant's security eligibility, the Judge did not have unfettered discretion when considering that evidence.

Although an Administrative Judge is not required to discuss each and every piece of record evidence in making a decision,⁽³⁾

the Judge cannot simply ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision.⁽⁴⁾

If faced with significant record evidence that a reasonable person would characterize as fairly supporting both the "pros" and the "cons" of a security clearance decision, a Judge cannot -- without a rational explanation -- simply discuss or rely on just the evidence supporting the "pros" or just the evidence supporting the "cons." An unexplained absence or lack of weighing or balancing the significant "pros" and "cons" of a case suggests arbitrary and capricious action by a Judge. As noted earlier in this decision: (i) the Board must consider not only whether there is record evidence supporting an Administrative 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; and (ii) 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.

As discussed earlier in this decision, it was legally permissible for the Administrative Judge to take into account Applicant's admissions of drug use. However, given the Judge's finding that Applicant had not used illegal drugs after June 1994, a reasonable person could expect the Judge to explain why he apparently did not place much weight on the passage of almost 10 years without any illegal drug use by Applicant.⁽⁵⁾

By focusing solely on the negative aspects of Applicant's history of drug use and not explaining why he seems to disregard or discount an apparently significant piece of evidence favorable to Applicant, the Judge: (a) failed to consider an important aspect of the case, and (b) failed to articulate an adequate explanation for his adverse conclusions about Applicant's overall history of illegal drug use in light of the particular record evidence in this case.

Applicant's reliance on decisions by Hearing Office Administrative Judges in other cases is misplaced. A decision by a Judge is not legally binding precedent that must be followed by that Judge's colleagues in other cases.⁽⁶⁾

Accordingly, the Judge in this case was not required to follow the decisions of his colleagues in other cases. Applicant's ability to cite to Hearing Office Judge decisions in other cases that he believes should be followed in his case does not demonstrate factual or legal error by the Judge in this case.

3. Whether the Administrative Judge erred by not complying with paragraph 3.e of the DOHA Operating Instruction concerning the handling of cases under 10 U.S.C. §986. Applicant also contends the Administrative Judge failed to comply with paragraph 3.e of the DOHA Operating Instruction concerning the handling of cases under 10 U.S.C. §986 (7)

because the Judge did not state whether he was recommending or not recommending Applicant's case be considered for a waiver under that statute.

Under the plain language of Paragraph 3.e of the DOHA Operating Instruction, an Administrative Judge *must* make a recommendation concerning waiver *if* the Judge issues an unfavorable decision based solely on the application of 10 U.S.C. §986. In this case, it is not clear whether the Judge based his unfavorable decision solely on the application of 10 U.S.C. §986. Although a Judge has broad discretion and latitude when writing a decision, the Judge must issue a decision that allows the parties and the Board to discern what findings the Judge is making, what conclusions the Judge is reaching, and what legal rulings the Judge has made. (8)

The Judge's decision in this case leaves the Board unable to discern whether the Judge complied or failed to comply with paragraph 3.e of the DOHA Operating Instruction.

Conclusion

Applicant has demonstrated error below that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with the following instructions:

The Judge must issue a new decision -- consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25 -- that: (a) includes findings as to whether Applicant demonstrated reform and rehabilitation of his drug use; and (b) explains how the Judge's findings fit into his analysis of Applicant's security eligibility. If the Judge's remand decision is an unfavorable one, the Judge must explicitly state whether it is based solely on the application of 10 U.S.C. §986. If the Judge makes an unfavorable decision based solely on the application of 10 U.S.C. §986, then the Judge must comply with the requirements of Paragraph 3.e of the DOHA Operating Instruction. However, if the Judge makes an unfavorable decision not based solely on the application of 10 U.S.C. §986, then the Judge must explicitly state what else besides the application of 10 U.S.C. §986 forms the basis for his unfavorable decision.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. *See* Directive, Additional Procedural Guidance, Item E3.1.17 ("The SOR may be amended at the hearing by the Administrative Judge on his or her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted or for other good cause. When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or other good cause.")
2. *See, e.g.*, ISCR Case No. 02-23365 (March 22, 2004) at p. 5 (it is legally permissible for an Administrative Judge to consider evidence of conduct not alleged in an SOR to evaluate an applicant's claim of extenuation, mitigation, or changed circumstances).
3. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3.
4. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 6 ("... the Judge's decision cannot simply be silent about what, as a matter of common sense, appears to be a relevant factor that could be an important aspect of the case") (footnote omitted); ISCR Case No. 02-02195 (April 9, 2004) at p. 4 ("Furthermore, if a Judge does not discuss or even mention a significant aspect of the case that reasonably could be expected to be explicitly taken into account in the Judge's decision, then a serious question arises as to whether the Judge forgot that aspect, ignored it, failed to take it into account, dismissed that aspect of the case for no apparent reason, failed to understand the significance of that aspect of the case, or engaged in an arbitrary or capricious analysis.").
5. *Compare* ISCR Case No. 02-08032 (May 14, 2004) at p. 7 ("If the record evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then the Judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform and rehabilitation."). *See also* ISCR Case No. 02-24452 (August 4, 2004) at pp. 5-6.
6. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges).
7. Paragraph 3.e of the DOHA Operating Instruction states: "If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement 'I recommend further consideration of this case for a waiver of 10 U.S.C. 986' or 'I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.'"
8. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 2.