

DATE: June 18, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23186

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated June 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 J (Criminal Conduct) and Guideline G (Alcohol Consumption). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated March 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 issues have been raised on appeal: (1) whether the Administrative Judge adequately addressed Applicant's rehabilitation and reform; and (2) whether the 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. Whether the Administrative Judge adequately addressed Applicant's rehabilitation and reform. Applicant submitted a response to the SOR. He requested that his case be decided without a hearing. Applicant had the opportunity to submit a response to the File of Relevant Material (FORM), but did not do so. The FORM contained Applicant's response to the SOR as well as statements Applicant made to investigators in July 1995 and November 2000. Applicant referred to his rehabilitation and reform briefly in his response to the SOR and in more detail in his statement of November 2000. ⁽¹⁾

There is a rebuttable presumption that an Administrative Judge considered all the evidence in the record, even if he did not discuss it in his decision. The Judge stated conclusions about Applicant's rehabilitation based on the record before him. Applicant has not rebutted the presumption that the Judge considered all the evidence on that issue that Applicant submitted. *See, e.g.*, ISCR Case No. 01-02677 (October 17, 2002) at pp. 5-6. The fact that Applicant could have submitted further evidence on the issue of rehabilitation and reform, but did not do so, is not indicative of error on the part of the Judge.

2. Whether the Judge's decision is arbitrary, capricious, or contrary to law. Applicant does not dispute the Judge's findings of fact. On the contrary, he admitted them in his SOR response. He disagrees with the Judge's conclusions and argues for a favorable decision based on his unblemished security record in the past, his favorable work record, and his otherwise responsible behavior.

When an Administrative Judge's conclusions are challenged, the Board is required to examine the decision to determine whether it can be reasonably supported by the evidence in the FORM and whether it articulates a satisfactory explanation for its conclusions. The Judge must weigh the record evidence as a whole and determine whether the unfavorable evidence outweighs the favorable evidence or *vice versa*. In this case, the Judge articulated a reasonable connection between his findings under Guidelines J and G, and his adverse conclusions about Applicant's security eligibility. Applicant's disagreement with the Administrative Judge's conclusions is not indicative of error. Nothing in

the record indicates that the Judge's decision is arbitrary, capricious, or contrary to law. Accordingly, the Judge's decision is sustainable.

Moreover, Applicant's reliance on his work history and unblemished security record in support of his assertions of error is misplaced. While the facts cited by Applicant constitute favorable evidence that the Judge was required to consider, the fact that Applicant has no security violations in his record does not preclude an adverse security decision. The government need not wait until an applicant violates security policies before it can deny or revoke a security clearance. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969) *cert. denied*, 397 U.S. 1039 (1970).

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Administrative Judge's security clearance decision is affirmed.

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. In his Appeal Brief, Applicant submitted further information about his "reformation and reform" which does not appear in the record below. This information constitutes new evidence. The Board is not permitted to consider new evidence on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29.*