

DATE: March 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23365

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Greg D. McCormack, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated June 10, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated November 5, 2003.

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 the Administrative Judge erred in concluding that the Guideline E allegations had not been mitigated, and (2) whether the Administrative Judge erred in considering evidence of conduct not alleged in the SOR in reaching his adverse security determination with respect to the Guideline E allegations. 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 erred in concluding that the Guideline E allegations had not been mitigated. The Administrative Judge found that the Guideline E allegations had not been mitigated in the Applicant's case. On appeal, the Applicant contends the Judge erred because Personal Conduct Mitigating Conditions 3⁽¹⁾

and 4,⁽²⁾

as well as Criminal Conduct Mitigating Condition 6,⁽³⁾

should have been applied by the Judge with respect to the Guideline E allegations. For the reasons set forth below, we conclude the Applicant has not demonstrated the Judge erred.

The Judge gave as his reason for not applying Personal Conduct Mitigating Condition 3, the fact that Applicant's disclosures to the investigator--some seven months after the falsification of his questionnaire--were incomplete. It was not until the hearing that the Applicant disclosed the full extent of his prior drug use, including his use while attending a junior college. The Judge's reasoning in not applying Personal Conduct Mitigating Condition 3 is sustainable. The fact that Applicant voluntarily made some disclosures to the investigator the first time he was interviewed did not preclude the Judge from considering the passage of time between the falsification and the subsequent disclosures, as well as the incomplete nature of those subsequent disclosures, and concluding Applicant's disclosures were not a "prompt good-faith effort" within the meaning of that mitigating condition. *See, e.g.*, ISCR Case No. 01-19513 (January 22, 2004) (Disclosures made at an applicant's first interview, six months after the falsification, not prompt); ADP Case No. 30-1130 (January 4, 2001) (Selective, partial disclosures that are parceled out to the federal government over an extended period of time do not constitute "prompt, good-faith efforts" to correct a falsification). Considering the record as a

whole, the Judge's reasoning reflects a plausible interpretation of the record evidence, and it is not arbitrary, capricious, or contrary to law. The ability of a party to argue for an alternate interpretation of the record evidence is insufficient, standing alone, to demonstrate error. *See, e.g.*, ISCR Case No. 97-0202 (January 20, 1998) at p. 4.

Likewise, given his conclusions regarding Personal Conduct Mitigating Condition 3, the Judge's determination that the Guideline E allegations had not been mitigated under Personal Conduct Mitigating Condition 4 was also sustainable. Where an applicant argues, as he does here, that his falsification was contributed to by improper advice from authorized personnel, he has the burden of establishing that the omitted information was later "promptly and fully provided." He did not meet that burden. As noted above, the Judge concluded that the Applicant's disclosures subsequent to the falsification in question were not prompt and were made in a piece-meal fashion. Those conclusions were not arbitrary, capricious or contrary to law. Regarding the issue of improper advice from authorized personnel, even if the Board were to assume, solely for the purposes of deciding this appeal, that the first falsification had been the result of bad advice, that would not explain Applicant's other falsifications.

Finally, the Applicant's contention that the Judge erred by not concluding that the Guideline E allegations had been mitigated under Criminal Conduct Mitigating Condition 6 is without merit. The Applicant cites no legal authority for his assertion that disqualifying conduct under one guideline can, should, or must be mitigated by evidence falling under the mitigating condition of a different guideline--and we are unaware of any such authority. Moreover, we note that the Judge reasonably considered the "whole person" factors, set forth in the Directive's Section 6.3, ⁽⁴⁾

which included the presence or absence of rehabilitation, and nevertheless concluded that the evidence presented in the case was insufficient to overcome the security concerns raised by Applicant's conduct under Guideline E. In that regard, the Judge's application of the relevant Section 6.3 factors, and his weighing of the record evidence, was not arbitrary, capricious, or contrary to law. ⁽⁵⁾

Given the record evidence in this case, it was not unreasonable for the Judge to conclude that the Applicant's falsifications amounted to personal conduct of security concern under Guideline E, even though they no longer represented a criminal concern under Guideline J.

Department Counsel asserts on appeal, as an alternative ground for affirming the decision in this case, that there is not sufficient evidence of rehabilitation to warrant the Judge's application of Criminal Conduct Mitigating Condition 6. Because the Judge's decision is otherwise sustainable, the Board need not address the merits of Department Counsel's argument.

2. Whether the Administrative Judge erred in considering evidence of conduct not alleged in the SOR in reaching his adverse security determination with respect to the Guideline E allegations. At the hearing, the Applicant testified that he had used marijuana on several occasions while in junior college--a fact previously unknown to the Government. No motion was made to amend the SOR in conformity with that evidence so as to add that use to the factual allegations against the Applicant. Accordingly, in his decision, the Judge indicated that that marijuana use would not be considered in arriving at a decision in the case. ⁽⁶⁾

On appeal, the Applicant argues that the Judge erred when he did in fact use that evidence as part of his conclusion that the Applicant had not met his burden in establishing the applicability of Personal Conduct Mitigating Condition 3. For the reasons set forth below, we conclude the Applicant has not demonstrated the Judge erred.

The SOR issued to Applicant did not allege that he had used marijuana while in junior college, and at the hearing Department Counsel did not move to amend the SOR to allege that use. An applicant is entitled to receive reasonable notice of the allegations being made against him so that he can have a meaningful opportunity to respond to the allegations. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. However, an SOR need not allege every piece of evidence that is relevant and material to evaluating an applicant's security eligibility. *See, e.g.*, ISCR Case No. 01-07360 (April 10, 2002) at p. 5. Furthermore, as long as there is fair notice to an applicant about the matters that are at issue in his case, and the applicant has a reasonable opportunity to respond, a security clearance case should be adjudicated on the merits of the relevant issues and should not be overly concerned with pleading niceties. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. Finally, conduct not alleged in an SOR may be considered: (a) to

assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; or (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at p. 9.

In this case, Applicant was placed on reasonable notice that his failure to disclose his history of illegal or improper drug use was being considered in assessing his security eligibility under Guideline E. Additionally, the Applicant had a reasonable opportunity to present evidence about his history of drug use in response to the evidence submitted by Department Counsel at the hearing. The Judge did not evaluate the Applicant's use of marijuana while in junior college as part of his determination as to whether the Government had met its burden of proving conduct of security concern under the disqualifying conditions of Guideline E. Rather, the Judge only used that evidence in his assessment the Applicant's credibility and his evaluation as to whether the Applicant had met his burden of producing sufficient evidence in mitigation to meet the requirements of Personal Conduct Mitigating Condition 3. In that regard, the Judge's use of the evidence in question was permissible.

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 individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Enclosure 2, Item E2.A5.1.3.3).

2. "Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided" (Directive, Enclosure 2, Item E2.A5.1.3.4).

3. "There is clear evidence of successful rehabilitation" (Directive, Enclosure 2, Item E2.A10.1.3.6).

4. Directive, Section 6.3 and Enclosure 2, Items E2.2.1.1 through E2.2.1.9.

5. Applicant's brief contains references to new evidence which was not before the Administrative Judge. Such new

evidence cannot be considered on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

6. Judge's Decision, at pp. 3 and 5.