

DATE: October 19, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26331

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Thomas Blount, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 8, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline M (Misuse of Information Technology Systems). Administrative Judge Carol G. Ricciardello issued an unfavorable security clearance decision, dated April 25, 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 acted without authorization when he crashed a coworker's computer; (2) whether the Administrative Judge erred by finding that Applicant made harassing telephone calls to a coworker; and (3) whether the Administrative Judge's adverse conclusions under Guideline E (Personal Conduct) are 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 the Administrative Judge erred by finding that Applicant acted without authorization when he crashed a coworker's computer. The Administrative Judge found that Applicant intentionally crashed a coworker's computer, and that his actions were without authorization and unauthorized. Applicant challenges the Judge's finding, contending the Judge erred by focusing on wording in Applicant's answer to the SOR and Applicant's written statement to an investigator instead of considering the record evidence as a whole.

Applicant's claim of error is unpersuasive. It was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider Applicant's answer to the SOR and Applicant's written statement to an investigator. Moreover, it was not arbitrary, capricious, or contrary to law for the Judge to consider Applicant's hearing testimony in light of her assessment of his demeanor when he gave that testimony. Apart from disagreeing with the Judge's negative credibility determination, Applicant presents no cogent argument or reason for why the Judge's negative credibility determination was arbitrary, capricious, or contrary to law. ⁽²⁾ Considering the record as a whole, the Judge's challenged finding is sustainable.

2. Whether the Administrative Judge erred by finding that Applicant made harassing telephone calls to a coworker. The Administrative Judge also found that Applicant made harassing calls to the coworker whose computer he intentionally crashed. Applicant challenges that finding of fact, contending that although he made "prank" calls to the coworker, the evidence does not support the Judge's finding that those calls were harassing in nature.

Applicant's opinion as to the nature of the calls he made to the coworkers was part of the record evidence. However, the Administrative Judge was not bound, as a matter of law, to accept Applicant's opinion about the nature of his calls to the ⁽³⁾

coworker. Although strict rules of evidence do not apply in DOHA proceedings, it does not follow that an applicant's opinion testimony should be deemed to have the same evidentiary value as the applicant's factual testimony. Moreover, an applicant's opinion about, or characterization of, his or her conduct or circumstances is not binding or conclusive on an Administrative Judge. A Judge must make findings of fact that are supported by substantial record evidence⁽⁴⁾ and reach conclusions that are not arbitrary, capricious, or contrary to law.⁽⁵⁾ However, in making findings of fact and reaching conclusions, the Judge is not compelled to accept an applicant's opinion about, or characterization of, his or her conduct or circumstances. The Judge is not constrained to make only those findings of fact, or reach only those conclusions, that a party wants the Judge to do.⁽⁶⁾

Considering the record as a whole, the Administrative Judge had sufficient evidence to decide that Applicant's calls to the coworker were harassing in nature. The Judge's characterization of Applicant's calls to the coworker reflects a reasonable interpretation of the record evidence.

3. Whether the Administrative Judge's adverse conclusions under Guideline E (Personal Conduct) are arbitrary, capricious, or contrary to law. Applicant also contends the Administrative Judge erred by: (a) concluding his conduct fell under Guideline E (Personal Conduct); (b) deciding to apply Personal Conduct Disqualifying Condition 4; (c) failing to take into account the favorable evidence presented on behalf of Applicant; and (d) not rendering a favorable security clearance decision based on evaluation of his case under the whole person concept. For the reasons that follow, the Board concludes Applicant's contentions fail to demonstrate harmful error by the Judge.

(a) To the extent Applicant argues that none of the Personal Conduct disqualifying conditions applies to his case, Applicant fails to demonstrate the Administrative Judge erred. The presence or absence of Adjudicative Guidelines disqualifying or mitigating conditions is not dispositive of a case.⁽⁷⁾ As discussed earlier in this decision, the Judge's challenged findings of fact are sustainable. Given the Judge's findings of fact, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's conduct demonstrated poor judgment and unreliability within the scope of the Concern section of Guideline E (Personal Conduct).

(b) Applicant's claim of error concerning Personal Conduct Disqualifying Condition 4⁽⁸⁾ has merit. Given the record evidence in this case, the Judge failed to articulate a sustainable rationale for applying Personal Conduct Disqualifying Condition 4. However, that error is harmless. As discussed in the preceding paragraph, the presence or absence of a particular Adjudicative Guidelines disqualifying or mitigating condition is not dispositive of a case, and the Administrative Judge's adverse security clearance decision is sustainable on grounds not affected by this error.

(c) There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically stated otherwise.⁽⁹⁾ The presumption is not rebutted by an appealing party's mere disagreement with the Judge's weighing of the record evidence.⁽¹⁰⁾ Applicant strongly disagrees with the Judge's weighing of the record evidence, but he has not articulated any cogent argument that shows the Judge failed to consider the record evidence as a whole. Indeed, Applicant's appeal argument fails in the face of the Judge's explicit discussion of the favorable evidence (Decision at p. 4) that he claims she failed to take into account.

(d) Applicant's argument about the whole person concept⁽¹¹⁾ fails to demonstrate the Administrative Judge erred. Applicant strongly disagrees with the Judge's evaluation of his security eligibility, but fails to articulate any cogent argument or reason why the Judge's evaluation is inconsistent with application of the whole person concept.⁽¹²⁾ Reading the Judge's decision in its entirety, the Board concludes it reflects a reasonable evaluation of Applicant's security eligibility in light of the whole person concept.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate harmful error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered a formal finding in favor of Applicant with respect to Guideline M (Misuse of Information Technology Systems). That favorable formal finding is not at issue on appeal.
2. The Board must give deference to an Administrative Judge's credibility determination. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. A party challenging a Judge's credibility determination has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 00-0433 (August 8, 2002) at p. 4 (discussing reasons why an appealing party must do more than just disagree with a Judge's credibility determination).
3. *See* Directive, Additional Procedural Guidance, Item E3.1.19.
4. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
5. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3.
6. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at pp. 8-9 (noting that, if an applicant's opinion about the security significance of his or her conduct or situation were deemed to be binding on an Administrative Judge, the federal government would be unable to deny or revoke a security clearance unless the applicant affirmatively agrees that he or she poses a security risk).
7. *See, e.g.*, ISCR Case No. 03-32006 (October 28, 2004) at p. 5.
8. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail" (Directive, Adjudicative Guidelines, Item E2.A5.1.2.4).
9. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
10. *See, e.g.*, ISCR Case No. 01-26723 (November 30, 2004) at p. 3; ISCR Case No. 02-18093 (July 15, 2004) at p. 4.
11. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.
12. *See, e.g.*, ISCR Case No. 02-06194 (July 15, 2004) at p. 4 (appealing party must do more than just disagree with the Administrative Judge's weighing of the record evidence and the Judge's conclusions in order to demonstrate the Judge erred in evaluating an applicant's security eligibility under the whole person concept).