

DATE: January 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27698

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 to Applicant a Statement of Reasons (SOR), dated March 3, 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 J (Criminal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated October 15, 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 finding Applicant falsified material facts about his past conduct in March 2002; and (2) whether the Administrative Judge erred by not concluding Applicant's conduct was mitigated sufficiently to warrant a favorable security clearance decision. 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

On appeal, Applicant submitted letters from five people who make favorable comments about his character, career, and job performance. Those letters constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to submit evidence for the Administrative Judge to consider in his case during the proceedings below. Applicant cannot fairly challenge the Judge's decision based on a proffer of evidence that he did not submit for the Judge's consideration. The Board will only consider those arguments Applicant makes that do not rely on a proffer of new evidence.

1. Whether the Administrative Judge erred by finding Applicant falsified material facts about his past conduct in March 2002. The Administrative Judge found Applicant falsified material facts about his past conduct with a teenage girl that resulted in: (a) his prosecution and conviction for allowing an unlicensed driver to operate his motor vehicle, which resulted in imposition of a March 2000 sentence; (b) his allowing the teenage girl to operate his motor vehicle, while he was a passenger, after he was sentenced in March 2000; and (c) his probation being revoked in April 2000. The Judge found Applicant committed the falsification in a written statement he gave to an investigator in arch 2002. On appeal, Applicant challenges the Judge's finding of falsification by asserting that he disclosed his conviction and probation violation when he completed a security clearance application. [\(1\)](#)

The Administrative Judge did not find that Applicant falsified the security clearance application he signed in May 2001. Rather, the Judge found that Applicant falsified a written statement that he gave to an investigator in March 2002. Considering the record evidence as a whole, the Administrative Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. It was not arbitrary, capricious, or contrary to law for the Judge to find that Applicant falsified material facts in the March 2002 written statement despite Applicant's earlier disclosures about his criminal record in the security clearance application.

2. Whether the Administrative Judge erred by not concluding Applicant's conduct was mitigated sufficiently to warrant a favorable security clearance decision. Applicant asserts: (a) his life has changed significantly since the events of 2000, and he has put that unfortunate situation behind him; and (b) his past military service and dedication to his defense contractor employer have not been questioned. The Board construes Applicant's assertions as raising the issue of whether the Administrative Judge erred by not concluding Applicant's conduct was mitigated sufficiently to warrant a favorable security clearance decision.

Given the Administrative Judge's findings about Applicant's conduct with a teenage girl in 2000, and Applicant's falsification of a March 2002 written statement, the Judge properly concluded that the burden had shifted to Applicant to present credible evidence showing extenuation or mitigation sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The record evidence cited by Applicant on appeal did not compel the Judge, legally or logically, to conclude Applicant had demonstrated extenuation or mitigation of his conduct sufficient to warrant a favorable security clearance decision. Considering the record as a whole, Applicant has failed to demonstrate it was arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant had not met his burden of persuasion.

Conclusion

Applicant has not demonstrated error below. Therefore, the Administrative Judge's decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant has not challenged the Administrative Judge's findings of fact about his conduct with a teenage girl and the adverse legal consequences that ensued from that conduct. Because there is no presumption of error below, the Board need not review the Judge's unchallenged findings of fact.