

DATE: January 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29328

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Timothy R. Garrison, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated January 16, 2004, 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 H (Drug Involvement). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated September 8, 2004.

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: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's falsification of a security clearance application had not been mitigated. 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 security concerns raised by Applicant's falsification of a security clearance application had not been mitigated. On appeal, Applicant argues that the Judge erred in concluding that the security concerns raised by his falsification of a security clearance application had not been mitigated because: (1) multiple character references had stated that Applicant was generally trustworthy, honest, reliable, upstanding, patriotic, a good employee, and/or an asset to the United States, (2) the omitted information had been fully disclosed to the government in a subsequent interview, (3) Applicant had regretted the falsification and had apologized for it, (4) Applicant had falsified the application out of concern for his privacy, (5) the falsification had occurred over two years ago and was an isolated incident, (6) Applicant was not subject to coercion, exploitation, or duress, and (7) there is little likelihood the conduct would recur. Applicant essentially summarizes the favorable evidence of record, reargues his case, and asserts that the Judge should have applied the Guideline E mitigating conditions and "whole person" factors in Applicant's favor. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 (April 3, 1997) at p. 3. Furthermore, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 6. Applicant is essentially rearguing his case, asserting that he is honest and has held a security clearance without any problems. Those arguments do not demonstrate the Judge erred. As noted above, the Board does not review a case *de novo*.

This case involved the deliberate omission of information of obvious security significance. The Administrative Judge is not required, as a matter of law, to conclude that the security concerns raised by Applicant's falsification were necessarily mitigated by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (Judge did not err by concluding government's security concerns were not mitigated by the fact that

Applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (Judge had a rational basis for concluding government's security concerns were not mitigated by the fact Applicant had "come clean" and "had nothing left to hide"). Similarly, the Judge was not required to conclude such concerns were mitigated by Applicant's favorable professional and work record. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6 (security clearance decisions not limited to consideration of an applicant's conduct during duty hours; off-duty conduct that raises security concerns can be considered in assessing an applicant's security eligibility). After reviewing the Judge's decision, it is the Board's view that Applicant has not demonstrated that the Judge weighed the evidence as a whole in an arbitrary and capricious manner. Nor has Applicant demonstrated that the Administrative Judge was obligated to conclude that the favorable evidence cited by Applicant was sufficient to overcome the security concerns raised by the disqualifying conduct. The Judge also considered the "whole person" factors, such as the Applicant's age, the circumstances surrounding the conduct, his motivation, and the likelihood of continuance or recurrence, and nevertheless concluded that the evidence presented in the case was insufficient to overcome the security concerns raised by Applicant's conduct. Applicant has not shown that the Judge's application of the relevant Adjudicative Guidelines mitigating conditions and "whole person" factors, or her weighing of the record evidence, was arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Applicant's falsification of a security clearance application provided a sufficient rational basis for the Judge's unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification).

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraph 2.a. That favorable finding is not at issue on appeal.