

DATE: June 10, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28917

APPEAL BOARD DECISION AND REVERSAL ORDER

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 10, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated February 2, 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 issue has been raised on appeal: Whether the Administrative Judge erred by finding that Applicant falsified a security clearance application. For the reasons that follow, the Board reverses 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 Issue

Whether the Administrative Judge erred by finding that Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application by deliberately failing to disclose all of his delinquent debts when he completed a security clearance application in arch 2002. Based on that finding of falsification, the Judge entered an adverse formal finding under Guideline E (Personal Conduct) and rendered an unfavorable security clearance decision. [\(1\)](#)

On appeal, Applicant challenges the Administrative Judge's finding of falsification for various reasons, some of which are unpersuasive and do not warrant discussion. However, making allowances for Applicant's *pro se* status, the Board can discern the following line of argument from various portions of Applicant's appeal brief: (a) the Administrative Judge erred by finding that Applicant failed to add an explanation to the security clearance application that would alert an investigator examining the application that there were other delinquent debts before Applicant was confronted with the facts at his interview; (b) in response to Question 43 of the security clearance application, Applicant stated that he had other debts that had been charged off and was unsure of the amounts involved; (c) the Judge did not consider or address the record evidence concerning the alleged falsification; and (d) the Judge's finding of falsification is not supported by the record evidence in this case.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to rebut or overcome that presumption. However, the Board finds Applicant's remaining arguments persuasive when viewed cumulatively.

As the trier of fact, the Administrative Judge had to consider the evidence as a whole (including Applicant's explanations), assess the credibility of Applicant's testimony, and make a finding of fact as to the SOR allegation

[\(2\)](#)

concerning falsification. Although deference must be given to the Judge's credibility determination, it cannot be relied on by the Judge to the exclusion of documentary or other objective record evidence that is relevant and pertinent to the Judge's findings of fact. *See, e.g.*, ISCR Case No. 00-0620 (October 19, 2001) at p. 3 (quoting from *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)). In this case, there is documentary evidence that undercuts the Judge's ability to simply dismiss Applicant's testimony about the security clearance application.

Government Exhibit 1 shows that Applicant's answer to Question 43 is the following: "Item #38 some accounts were charged off. I not sure of the amounts. This was when I was working only part time in 1999." Applicant's answer to Question 43 is not a detailed or particularly informative answer, but it is sufficient to place an investigator on notice that Applicant was admitting to unspecified delinquent debts beyond the one delinquent debt listed in response to Question 38. An investigator would not have to wait until interviewing Applicant to know that Applicant had admitted that he had unspecified delinquent debts in addition to the one listed in response to Question 38. Since Applicant's answer to Question 43 would place an investigator on notice that Applicant had more delinquent debts than the one listed in response to Question 38, it was arbitrary and capricious for the Administrative Judge to find Applicant failed to add an explanation to the security clearance application that would alert an investigator that Applicant had other delinquent debts. (3)

The conclusion that the Administrative Judge's finding of falsification is not sustainable is reinforced by a passage in the hearing transcript that shows the Judge acted in an arbitrary and capricious manner when considering the record evidence pertaining to Applicant's alleged falsification. At the hearing, the Judge stated:

"Well, I will tell you, Mr. [Applicant's last name] and Ms. [Department Counsel's last name], having looked at the secur[ity] clearance application, Government Exhibit 1, and your sworn statement to DSS, Government Exhibit 3, and considering your statements today and the fact that you did mention yes to question 38 and you added additional information to question 43, I don't really see any intent to deceive anywhere near that, so I'll tell you right now I'll rule in your favor on that part." (Hearing Transcript at p. 47).

Although the Judge's statement did not preclude the Judge, as a matter of law, from changing his mind after taking the case under advisement, the Judge could not make a ruling on the record at the hearing and then simply later change that ruling without any explanation. *See, e.g.*, ISCR Case No. 98-0476 (July 22, 1999) at p.3; ISCR Case No. 96-0360 (September 25, 1997) at p. 3 n.3. Having told the parties, on the record, that he was going to find in Applicant's favor with respect to the falsification allegation, the Judge acted in an arbitrary and capricious manner by finding against Applicant on the falsification allegation without acknowledging his earlier ruling and articulating a rational explanation for changing that ruling.

For the foregoing reasons, the Board concludes the Administrative Judge's finding of falsification is not sustainable.

Conclusion

Applicant has identified harmful error below. As noted earlier in this decision, the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations) are not at issue on appeal. Since the only basis for the Judge's unfavorable security clearance decision was his finding of falsification, and that finding is not sustainable, the Judge's decision cannot stand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Judge's unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's findings and conclusions under Guideline F (Financial Considerations) are not at issue on appeal.
2. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
3. Whether there is sufficient record evidence to support an Administrative Judge's findings of fact is a question of law, not a question of fact. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p. 8 n.24. A Judge does not have *carte blanche* to make whatever findings of fact the Judge wants. A Judge must weigh the evidence in a reasonable manner, draw inferences that are fairly supported by the record evidence, and make findings that reflect a reasonable interpretation of the record evidence that takes into account all the record evidence--including any record evidence that fairly detracts from the Judge's findings. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p.3.