

DATE: March 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29373

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 J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision dated November 1, 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 misapplied the burden of proof guidelines; (2) whether the Judge erred in his weighing of the evidence; and (3) whether the Judge's decision is 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. Whether the Administrative Judge misapplied the burden of proof guidelines. ⁽¹⁾ The SOR alleged that Applicant supplied a false response on a security clearance application question. Applicant does not deny that he gave a false response. He maintains that he did so unintentionally and that his answer resulted from a misinterpretation of the application question. Department Counsel introduced into the record the application and court documents to show that Applicant's response was incorrect. During the hearing of the case, Department Counsel also produced evidence showing that Applicant had been untruthful in a response to the SOR and had made a misrepresentation to an insurance company regarding his motivations for reporting an accident. Department Counsel also developed evidence showing that Applicant was a well-educated and intelligent person who had expertise and skill in a highly technical field. For his part, Applicant stated his case that he did not make his incorrect response to the security clearance questionnaire intentionally, and he submitted the results of extensive neuro-psychological tests to establish a possible medical explanation for his security clearance questionnaire answer. The Administrative Judge weighed the evidence before him and found that Applicant knowingly falsified the security clearance application. ⁽²⁾

The Judge specifically mentioned prior examples of Applicant's lack of truthfulness as well as his background when stating that he did not find Applicant's testimony credible. The Judge's findings regarding Applicant's falsification are supported by the record evidence.

Given the entirety of the evidence in this case, Department Counsel met its burden of establishing that Applicant intentionally falsified his response on his security clearance application. The burden then shifted to Applicant to explain or otherwise overcome Department Counsel's evidence. Applicant has not demonstrated error as to the burden of proof.

2. Whether the Administrative Judge erred in his weighing of the evidence. Applicant's second appeal argument

overlaps his first appeal argument to an extent. Applicant states that the Judge included in the findings section of his decision evidence Applicant presented at the hearing--his testimony as to why his answer to question 26 on his security clearance application was incorrect and the psychological test results. Applicant argues that the Judge's conclusions are inconsistent with the findings because, in Applicant's view, Applicant's evidence should have led the Judge to conclusions favorable to Applicant.

There is a presumption that an Administrative Judge has considered all the evidence in the record. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p. 5. Here, the Judge specifically referred to Applicant's testimony, which he said he did not find credible. He also referred to the psychological testing and explained how other evidence contradicted the results of that testing. Applicant has not shown that the Judge failed to take his evidence into account. As to the Judge's statement that he did not find Applicant's testimony credible, deference is to be afforded a Judge's credibility determinations. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at p. 7.

Applicant's denial of any intent to falsify his security clearance application was relevant and material evidence. However, that denial was not binding on the Administrative Judge. Rather, the Judge had to assess Applicant's denial in light of his assessment of Applicant's credibility and the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-10168 (August 1, 2003) at p. 4. Considering the record as a whole and giving due deference to the Administrative Judge's assessment of Applicant's credibility (Directive, Additional Procedural Guidance, Item E3.1.32.1), the Board concludes the Judge's finding of falsification reflects a reasonable interpretation of the record evidence that is sustainable. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Administrative Judge's finding of falsification is erroneous. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 4.

The Administrative Judge obviously did not give the same weight to Applicant's evidence that Applicant gives it. The fact that Applicant disagrees with the Judge's weighing of the evidence and would have weighed the evidence differently or reached different conclusions does not show error on the part of the Administrative Judge. *See, e.g.*, ISCR Case No. 00-0063 (October 24, 2003) at p. 5. Applicant has not overcome the presumption that the Judge considered all the record evidence. The record contains adequate support for the Judge's findings and conclusions, and Applicant has not demonstrated error.

Applicant argues that the Administrative Judge's conclusion that other criminal allegations were mitigated obligated the Judge to reach favorable conclusions with regard to the falsification. The fact that in a decision in 2004 the Judge applied mitigating factors to Applicant's prior criminal record did not relieve Applicant of the duty to accurately answer a question about that record on his security clearance application in 2001. Falsification of a security clearance application, by itself, provides a rational basis for denial of a security clearance. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964) (lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965). The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include considerations of a person's judgment, reliability, and trustworthiness. *Cafeteria Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd* 367 U.S. 886 (1961). Applicant has not demonstrated error on this issue.

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant argues that the Judge also erred by focusing on a limited part of Applicant's life and behavior, thereby failing to apply the "whole person" concept as required under the Directive, Adjudicative Guidelines, Item E2.2.3. He notes that both Item E2.2.3 and Section 6.3 of the Directive state that a security clearance decision should reflect an overall "common sense" approach. The Board interprets those comments as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

In the SOR under Guideline J, there were four allegations--two arrests, an unrelated crime report, and falsification of a security clearance application for failure to report the arrests. The Judge found the offenses other than the falsification mitigated and therefore, as to Guideline J, issued formal findings for Applicant on the first three allegations and against him on the fourth. Since the Judge found that Applicant knowingly gave a false response on his security clearance application, he found against Applicant as to Guideline E.

As Applicant contends, the Directive states that the Administrative Judge's decision should be a "common sense determination" with regard for the "whole person" concept. A review of the decision below indicates that the Judge considered all the evidence before him (including Applicant's explanations and favorable evidence regarding his reputation and character) and made findings of fact (both favorable and unfavorable to Applicant). Applicant has failed to demonstrate that the Administrative did not properly apply the provisions of the Directive (including the Adjudicative Guidelines), or failed to articulate reasonable explanations for his conclusions. Considering the record as a whole, Applicant has not demonstrated that the Administrative Judge's adverse conclusions were inconsistent with the "whole person" concept. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 6.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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. Under the Directive, Additional Procedural Guidance, Items E3.1.14 and E3.1.15, Department Counsel has the burden of establishing facts alleged in the SOR that have been controverted. Then the burden shifts to the Applicant to present witnesses and other evidence to "rebut, explain, extenuate, or mitigate facts admitted by Applicant or proven by Department Counsel." Applicant "has the ultimate burden of persuasion."

2. The Judge's weighing of the evidence will be discussed further in issue two, *infra*.