

DATE: August 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29631

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 January 15, 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 Paul J. Mason issued an unfavorable security clearance decision, dated June 13, 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 concluding that Applicant did not present evidence sufficient to mitigate his falsification of a security clearance application. 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 Issue

Whether the Administrative Judge erred by concluding that Applicant did not present evidence sufficient to mitigate his falsification of a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application by failing to disclose an October 1995 alcohol-related incident and an overdue debt.⁽¹⁾ The Judge considered Applicant's stated reasons for not disclosing those facts when he completed the security clearance application and concluded that Applicant's explanation was not sufficient to mitigate his falsification of the security clearance application.

On appeal, Applicant makes several arguments about the October 1995 incident and his financial situation. The Administrative Judge's adverse decision is based on his findings and conclusions about Applicant's falsification of the security clearance application, not the October 1995 alcohol-related incident or Applicant's financial difficulties. Therefore, Applicant's arguments about the October 1995 incident and his financial situation matters are moot.⁽²⁾

Applicant's explanation for his omissions from the security clearance application was relevant and material evidence that the Administrative Judge had to consider. The Judge considered Applicant's explanation and concluded that it was not sufficient to mitigate Applicant's falsification. Considering the record as a whole, the Board concludes Applicant has not shown that it was arbitrary or capricious for the Judge to decide that Applicant failed to mitigate his falsification of the security clearance application. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. Falsification raises serious questions about an applicant's judgment, reliability and trustworthiness, and provides a rational basis for an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at pp. 4-5 (discussing security significance of falsification). The Judge was not required to conclude that Applicant's falsification was mitigated by his concern that disclosing the truth could jeopardize his job. It was reasonable for the Judge to conclude that Applicant's concern for protecting his personal interests did not justify his falsification of the security clearance application. *See, e.g.*, ISCR Case No. 96-0685

(November 17, 1997) at p. 2 (noting that an applicant's self-interest is not a valid justification for lying to the government).

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

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's favorable findings and conclusions about SOR paragraphs 1.b.(2) and 1.b.(3) are not at issue on appeal.

2. Furthermore, falsification of a security clearance application has security significance that is independent of the security significance of the facts and circumstances that an applicant tries to conceal from the federal government. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at pp. 3-4.