

DATE: July 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29952

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 Applicant a Statement of Reasons (SOR), dated March 25, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline G (Alcohol Consumption), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge LeRoy F. Foreman issued an unfavorable security clearance decision, dated February 8, 2005.

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: (1) whether the Administrative Judge erred by finding Applicant's falsification of his security clearance questionnaire and signed, sworn statement was deliberate, and (2) whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. 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⁾

1. Whether the Administrative Judge erred by finding Applicant's falsification of his security clearance questionnaire and signed, sworn statement was deliberate. On appeal, Applicant contends that he did not deliberately falsify his security clearance application and a signed, sworn statement by failing to disclose his prior use of marijuana. Rather, he now contends the omission of the information in question was the result of a mistake. ⁽²⁾ Applicant's argument does not persuade us that the Judge erred.

The record evidence contains Applicant's signed, sworn statement, dated August 22, 2002, wherein he admitted that he had not been truthful about his marijuana use on his security forms and in interviews. The record evidence also contains Applicant's hearing testimony wherein he admitted on both direct and cross examination that he had not been truthful with the Government regarding his marijuana use. Considering this record, the Judge had a sufficient basis to find that Applicant's omissions were deliberate and intentional. Accordingly, the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. ⁽³⁾ Applicant argues that the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the Judge erred in the application of the "whole person" concept. In support of that argument, Applicant reiterates the omissions from his questionnaire were not deliberate, and further contends that: (a) he disclosed the omitted information in subsequent interviews with the government's agent, and (b) his employment history and references have been outstanding. Applicant's arguments do not persuade us that the Judge erred.

The security concerns raised by an applicant's falsifications are not necessarily mitigated by the fact that the information

was subsequently disclosed. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (government's security concerns 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 (government's security concerns not mitigated by the fact Applicant had "come clean" and "had nothing left to hide"). Likewise, such concerns are not necessarily mitigated by an 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 in this case, it is our view that the Judge reasonably considered "whole person" factors, such as 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. Considering the record as a whole, the Judge's application of the relevant Section 6.3 factors and his weighing of the record evidence was not arbitrary, capricious, or contrary to law.

Conclusion

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

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to the Guideline G (Alcohol Consumption) allegations. Those favorable findings are not at issue on appeal.
2. In his Appeal Brief, Applicant submitted further information to rebut, explain, extenuate, or mitigate the government's security concerns. This information constitutes new evidence. The Board is not permitted to consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
3. Directive, Section 6.3 and Enclosure 2, Items E2.2.1.1 through E2.2.1.9.