

DATE: July 19, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30913

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

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

FOR APPLICANT

Whitney B. Polson, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated March 5, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision, dated November 29, 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: (1) whether the Administrative Judge erred in admitting Government Exhibits 1, 8, and 9 into evidence, (2) whether the Administrative Judge erred in considering Government Exhibits 8 and 9 in reaching his adverse clearance decision, and (3) whether the Administrative Judge erred in his application of the "whole person" concept as set forth in the Directive. 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 in admitting Government Exhibits 1, 8, and 9 into evidence. Applicant argues that it was error for the Administrative Judge to admit Government Exhibits 1, 8, and 9 into evidence over Applicant's objection in the absence of an authenticating witness. Applicant's contention in this regard lacks merit.

On appeal, Applicant asserts that the Administrative Judge's stated theory for the admission of Government Exhibits 1, 8, and 9, which were security clearance applications executed by Applicant, was the public records exception to the hearsay rule as outlined in Federal Rule of Evidence 803(8). Applicant argues that the provisions of this Rule preclude the admission of Government Exhibits 1, 8, and 9 without an authenticating witness.

The Board need not address the merits of Applicant's argument regarding the public records exception to the hearsay rule to decide this issue. First, after reading the hearing transcript, the Board is not convinced that the Administrative Judge relied exclusively on the public records exception as the basis for his admission of the documents. The Judge did not make an unequivocal statement on the record as to the basis for his ruling. The colloquy between the Judge and counsel for both sides on this issue contained references to the business records exception to the hearsay rule (embodied by Paragraph E3.1.20 of the Directive's Additional Procedural Guidance and Federal Rule of Evidence 803(6)) as well as the public records exception. Second, even if the Board were to conclude that the Judge did rely exclusively on the public records exception, and then concluded that such reliance was in error, the fact that the Judge made an erroneous evidentiary ruling is not dispositive. *See, e.g.*, ISCR Case No. 96-0785 (September 3, 1998) at p. 3. As a matter of judicial economy, the Board can affirm an evidentiary ruling by a Judge on any proper basis supported by the record, even if that basis was not the one relied on by the Judge. *See, e.g., LaBarre v. Sheppard*, 84 F.3d 496, 500 (1st Cir.

1996); *American Home Assurance Co. v. American President Lines, Ltd.*, 44 F.3d 774, 779 (9th Cir. 1994); *Metallurgical Industries, Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1207 (5th Cir. 1986). To do otherwise would be to place form over substance. For the reasons that follow, the Board concludes the Judge's admission of Government Exhibits 1, 8, and 9 is sustainable.

Government Exhibits 1, 8, and 9 were security clearance applications or questionnaires executed by the Applicant in 2002, 1993 and 1995 respectively. The documents were official records or evidence compiled or created in the regular course of business, which had been furnished by an investigating agency pursuant to its responsibilities in connection with assisting the Secretary of Defense to safeguard classified information within industry under Executive Order 10865, and they were not DoD personnel background reports of investigation. Therefore, the Judge could properly receive those exhibits into evidence without an authenticating witness according to the plain language of Directive, Additional Procedural Guidance, Item E3.1.20.

2. Whether the Administrative Judge erred in considering Government Exhibits 8 and 9 in reaching his adverse clearance decision. Applicant contends that it was error for the Administrative Judge to consider the fact that Applicant had omitted his history of criminal conduct on his 1993 and 1995 security clearance applications (which were admitted into evidence as Government Exhibits 8 and 9) in reaching his adverse clearance decision with respect to the Guideline J (Criminal Conduct) and E (Personal Conduct) allegations. In support of his contention, Applicant argues that the Statement of Reasons (SOR) only alleged Applicant had deliberately falsified his 2002 security clearance application (Government Exhibit 1) under those Guidelines--not Government Exhibits 8 and 9. Therefore, by considering the fact that Applicant had omitted his history of criminal conduct in Government Exhibits 8 and 9, the Judge was improperly basing his adverse clearance decision on disqualifying conduct not alleged in the SOR. Given the record in this case, Applicant's contention lacks merit.

As noted above, Government Exhibits 8 and 9 were provided to the Applicant in advance of the hearing, and the Applicant was present at the hearing and had a reasonable opportunity to dispute or explain any information contained in those exhibits. Therefore, Applicant was on reasonable notice that the documents and the information they contained could potentially be used against him insofar as they related to the allegations in the SOR. During his hearing testimony, Applicant asserted that he had been instructed by a company representative not to list various felony arrests at the time Applicant completed a security clearance application in 1993. Applicant further testified that the manner in which he answered questions about his police record on the 1995 and 2002 security clearance applications derived directly from the instruction he received in 1993. Applicant also asserted at the hearing that he had been truthful and forthcoming in disclosing his true record before being directly confronted by investigators. Applicant argued that this was a matter in mitigation. Against this backdrop of Applicant's theory of the case regarding falsification, the Administrative Judge could reasonably consider the fact that Applicant had omitted his history of criminal conduct on his 1993 and 1995 security clearance applications for such relevant purposes as: (1) evaluating Applicant's overall credibility, (2) assessing the level of Applicant's experience and familiarity with the security clearance process and its forms, (3) determining whether the omission of information from Applicant's 2002 security clearance application was deliberate, or the result of misunderstanding, oversight or mistake, and (4) evaluating the applicability of any Guideline J or E Mitigating Factors to the case. In this case, the Judge's sustainable finding that Applicant had deliberately falsified his 2002 security clearance application (Government Exhibit 1), as alleged in the SOR, was alone sufficient to support his adverse clearance decision under Guidelines J and E, absent any adverse findings with respect to the omissions from the 1993 and 1995 documents. After an overall reading of the Judge's decision, the Board concludes that the Judge referenced Applicant's answers to the 1993 and 1995 security clearance applications as part of his evaluation of the alleged 2002 falsification listed in the SOR, and did not use the falsifications on the earlier applications as an independent basis for his adverse security clearance determination.

3. Whether the Administrative Judge erred in his application of the "whole person" concept as set forth in the Directive. (2) Applicant contends that the Judge's decision is arbitrary, capricious, or contrary to law because the Judge erred by not applying the "whole person" concept. In support of that contention, Applicant notes that his disqualifying conduct fell under only two of thirteen Guidelines. Applicant's contention in this regard lacks merit.

The SOR issued to Applicant cited Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). It is legally irrelevant that the SOR issued to Applicant did not cite any of the eleven other Guidelines listed in the Directive.

Nothing in Executive Order 10865 or the Directive indicates or suggests that an applicant must be granted a security clearance unless that applicant's conduct and circumstances fall under or implicates all thirteen Guidelines listed in the Directive. The mere fact that the SOR cited only Guideline J and Guideline E did not preclude the Administrative Judge from making an adverse security clearance decision based on an evaluation of Applicant's conduct and circumstances under those two Guidelines. *See, e.g.*, ISCR Case No. 01-12922 (April 18, 2003) at p. 3. The Judge was not required to consider Applicant's conduct and circumstances in the areas addressed by the eleven other Guidelines listed in the Directive before making his adverse security clearance decision. As the Board has noted, "Even if an applicant has not engaged in other conduct that has more serious negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct applicant did engage in." ISCR Case No. 99-0254 (February 16, 2000) at p. 3.

Moreover, after reviewing the Judge's decision in this case, the Board concludes that the Administrative Judge reasonably considered "whole person" factors within the framework of the Adjudicative Guidelines referenced in the SOR, such as the Applicant's age, the circumstances surrounding the conduct, his motivation, and the likelihood of continuance or recurrence of the conduct. Indeed, the Judge found in Applicant's favor with respect to many of the allegations contained in the SOR. After considering the "whole person" factors along with the record evidence in this case, the Judge nevertheless concluded that the favorable 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 listed in the Directive 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made favorable findings with respect to SOR allegations 1.a, 1.b, 1.c, 1.d, 1.e, 1.f, 1.g, 1.h, and 1.j. Those favorable findings are not at issue in this appeal.
2. Directive, Section 6.3 and Enclosure 2, Items E2.2.1.1 through E2.2.1.9.