

DATE: January 20, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31428

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pamela B. Stuart, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 20, 2003, 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 F (Financial Considerations). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision, dated March 29, 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 issues have been raised on appeal: (1) whether the Administrative Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law; and (2) whether the Administrative Judge's adverse security clearance decision lacked a rational basis. 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

The Administrative Judge found that Applicant deliberately falsified his tax returns for 1990, 1995, and 1998, and falsified a final inspection certificate for the refinancing of his newly renovated home. The Judge also found that Applicant filed amended tax returns in 2001 after his conduct came to light during a routine polygraph examination conducted in connection with his SCI access. The Judge concluded that Applicant had failed to mitigate the security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations), and further concluded it was not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

1. Whether the Administrative Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law. In support of this contention, Applicant argues: (a) the Judge ignored Applicant's testimony and documentary evidence; (b) the Judge erred by giving conclusive weight to unreliable polygraph evidence; and (c) failed to give due weight to evidence showing that it is "highly unlikely that the Applicant would risk his career by deliberately understating his tax obligations as alleged."

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically stated otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. It is not unusual for a Judge to be faced with the need to consider and weigh conflicting record evidence. A Judge faced with conflicting record evidence must decide how much weight to give to the conflicting pieces of record evidence and make findings of fact that reflect a reasonable interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5. A Judge must -- of practical necessity -- weigh the record evidence, decide what evidence is credible and persuasive, and make findings of fact concerning controverted factual issues. Because a Judge's findings of fact concerning controverted issues are not likely to follow both of the rival theories of the case advocated by the opposing parties, it is to be expected that the party whose theory of the case is not the prevailing one will be dissatisfied with the Judge's fact-

finding. Standing alone, a party's disagreement with the Judge's findings of fact is not sufficient to rebut or overcome the presumption that a Judge considered all the record evidence.

Applicant's argument about the unreliability of polygraph evidence is somewhat misplaced. Government Exhibit 3h contains a report of a polygraph examination that Applicant underwent in July 2000 and an interview conducted in November 2000 without a polygraph examination. That document was admitted without objection from Applicant at the hearing.⁽¹⁾ Significantly, that document does not contain polygraph charts or a polygrapher's opinion as to whether Applicant was truthful or deceptive during the polygraph examination. There is a critical difference between the results of a polygraph examination and the statements a person may make during the course of a polygraph examination. *See Wyrick v. Fields*, 459 U.S. 42, 48 n.* (1982) ("Although the results of the polygraph examination might not have been admissible evidence, the statements [the defendant] made in response to questioning during the course of the polygraph examination surely would have been."). The oral or written statements made by the subject of a polygraph examination are not the same as the polygraph charts, or the polygrapher's opinion whether the subject's statements are truthful or deceptive. The reliability or unreliability of the polygraph machine, a polygrapher's interpretation of a polygraph chart, or a polygrapher's opinion as to the veracity of a person undergoing a polygraph examination are factually and legally distinct from the statements a person may make during or after a polygraph examination. *See also* ISCR Case No. 94-1057 (August 11, 1995) at p. 6 (citing *Wyrick v. Fields*, 459 U.S. 42, 48 n.* (1982) and noting the difference between a polygraph examination chart and an applicant's post-polygraph statements).

As to the weight the Administrative Judge should have given to Government Exhibit 3h, the Board notes that: (i) Applicant did not object to the admissibility of that document, and (ii) Applicant had the opportunity to present evidence as to what he said or did not say during the polygraph examination and the later interview. The Judge was not required, as a matter of law, to believe or disbelieve Government Exhibit 3h or Applicant's evidence about what he said or did not say during the polygraph examination or the later interview.⁽²⁾ Applicant makes a plausible argument for why the Judge should have given less weight to Government Exhibit 3h and more weight to Applicant's evidence about what he said or did not say during the polygraph examination and the later interview. However, Applicant's ability to make such a plausible argument is not sufficient to demonstrate the Judge weighed the conflicting record evidence in a manner that is arbitrary, capricious, or contrary to law.

Similarly, the Board does not find persuasive Applicant's argument that the Administrative Judge failed to give due weight to evidence showing that it is "highly unlikely that the Applicant would risk his career by deliberately understating his tax obligations as alleged." Here too, Applicant argues for a plausible, alternate interpretation of the record evidence, which is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. It was within the bounds of the Judge's discretion, as the trier of fact, to consider the record evidence as a whole and find that Applicant deliberately understated his tax obligations. The Board does not have to agree with the Judge's findings to conclude they reflect a plausible interpretation of the record evidence as a whole.

2. Whether the Administrative Judge's adverse security clearance decision lacked a rational basis. Applicant contends the Administrative Judge's decision lacks a rational basis because: (a) the Judge's factual findings are erroneous⁽³⁾; (b) Department Counsel failed to establish a *prima facie* case against Applicant; (c) the Judge failed to evaluate Applicant's security eligibility in terms of the "whole person" concept; (d) there is no rational connection between Applicant's purported misconduct and his security eligibility; (e) whatever questionable judgment Applicant demonstrated, it was regrettable but not sufficient to warrant an unfavorable security clearance decision; (f) the record evidence shows that Applicant has learned that he has to obtain professional tax advice and will not repeat his past tax return mistakes; and (g) the Judge erred by concluding Applicant's conduct under SOR paragraph 1.a was not mitigated under Personal Conduct Mitigating Condition 2.

As discussed earlier in this decision, the Administrative Judge's challenged findings of fact reflect a plausible interpretation of the record evidence as a whole, and are sustainable. Given the Judge's sustainable findings of fact, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Department Counsel had met its burden of proving a *prima facie* case that shifted the burden of persuasion to Applicant.

A review of the decision below persuades the Board that the Administrative Judge evaluated Applicant's case under the general factors of Directive, Section 6.3 and the "whole person" concept set forth in Directive, Adjudicative Guidelines,

Item E2.2.1. The decision below includes discussion of both the favorable and unfavorable evidence, including the evidence submitted by Applicant concerning his character, expertise, job performance, reputation, and family life. Applicant's strong disagreement with the Judge's conclusions is based on a plausible, alternate interpretation of the record evidence, but it is not sufficient to demonstrate the Judge failed to evaluate Applicant's case under the general factors of Directive, Section 6.3 or the "whole person" concept.

Given the Administrative Judge's sustainable findings of fact, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's misconduct raised security concerns under Guideline E (Personal Conduct) and Guideline F (Financial Considerations). The Judge articulated a rational basis for his unfavorable conclusions as to Applicant's judgment and honesty, and his willingness to engage in deceptive or fraudulent actions for financial gain. The Judge also explained why he concluded Applicant had not successfully mitigated the security concerns raised under Guideline E and Guideline F. Applicant vigorously disagrees with the Judge's unfavorable conclusions, but has failed to demonstrate that they are arbitrary, capricious, or contrary to law.

Applicant's argument about the applicability of Personal Conduct Mitigating Condition 2 ⁽⁴⁾ is not persuasive. Applicant contends the Administrative Judge erred by not applying Personal Conduct Mitigating Condition 2 because Department Counsel failed to prove Applicant engaged in misconduct other than that admitted under SOR paragraph 1.a. As discussed earlier in this decision, the Judge's challenged findings of fact are sustainable. Given those sustainable findings of fact, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that application of Personal Conduct Mitigating Condition 2 was not warranted.

Conclusion

The Board affirms the Administrative Judge's security clearance 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. On appeal, Applicant offers an explanation for why no objection was made to the admissibility of Government Exhibit 3h at the hearing. That proffered explanation is misplaced. Absent an objection to Government Exhibit 3h, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to admit it into evidence and consider it, along with the other record evidence, in making his findings of fact and reaching conclusions about Applicant's security eligibility. On the other hand, Applicant's decision to not object to the admissibility of Government Exhibit 3h at the

hearing does not preclude Applicant from challenging, on appeal, the weight the Judge gave to that exhibit. *Cf.* ISCR Case No. 02-09907 (March 17, 2004) at p. 6 n. 6 ("[T]he absence of any objection to a witness's testimony does not relieve an Administrative Judge of the responsibility to consider and evaluate such testimony and decide what weight reasonably can be given to it in light of the record evidence as a whole.").

2. There is no rule of law that requires an Administrative Judge to accept at face value the testimony of any witness. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 5. In considering Applicant's testimony, the Administrative Judge could weigh Applicant's testimony in light of: (a) his assessment of Applicant's demeanor while he testified; and (b) the record evidence as a whole.

3. Applicant's answer to the SOR admitted the conduct alleged in SOR paragraph 1.a. On appeal, Applicant does not seek to retract that admission, or challenge the Judge's reliance on it. However, Applicant does argue the Judge erred by concluding Applicant failed to mitigate that conduct.

4. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).