

DATE: January 23, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32303

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 July 14, 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 J (Criminal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision dated November 12, 2003.

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's decision is arbitrary, capricious, or contrary to law because Applicant has not had any security violations; and (2) whether the Board should reverse the Administrative Judge's decision to give Applicant an opportunity to work for a defense contractor so he can help protect against threats to the United States. 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's decision is arbitrary, capricious, or contrary to law because Applicant has not had any security violations. The Administrative Judge found that Applicant falsified a security clearance application by failing to disclose fully his past use of marijuana and failing to disclose his one-time use of LSD in the past. The Judge concluded Applicant's falsification of the security clearance application raised security concerns that warranted adverse formal findings under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), and an adverse security clearance decision.

On appeal, Applicant does not challenge the Administrative Judge's findings that he falsified the security clearance application. However, Applicant argues that he held a security clearance for more than three years without having any security violations, that his positive track record proves that he can be trusted to handle classified information, and therefore, the Board should reverse the Judge's unfavorable security clearance decision. Applicant's argument is not persuasive.

The federal government is not required to wait until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Even if there is no evidence that an applicant has committed a security violation, the government can deny or revoke an applicant's access to classified information based on proof of conduct or circumstances that raise security concerns.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *See Cafeteria & Restaurant Workers Union, Local*

473 v. McElroy, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Falsification of a security clearance application raises serious questions about a person's trustworthiness and reliability. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964) (lying on application for government position requiring a security clearance raises serious questions about person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965). Given the Judge's findings about Applicant's falsification of the security clearance application, the Judge had a rational basis for his adverse conclusions about Applicant's security eligibility.

2. Whether the Board should reverse the Administrative Judge's decision to give Applicant an opportunity to work for a defense contractor so he can help protect against threats to the United States. Applicant states that he wants to have an opportunity to continue to work for a defense contractor so that he can "commit to protecting our country from foreign and domestic threats." Applicant's desire to have an opportunity to work on defense-related projects is irrelevant to his security eligibility, and it is irrelevant to whether the Administrative Judge's decision is sustainable. As discussed earlier in this decision, the Judge's findings about Applicant's falsification of a security clearance application provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility. Applicant's desire to continue to work for a defense contractor with a security clearance does not demonstrate any factual or legal error by the Judge, and it provides no legitimate basis for reversing the Judge's decision.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Administrative Judge's security clearance decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board