

DATE: July 6, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33091

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 the Applicant a Statement of Reasons (SOR), dated September 24, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline D (Sexual Behavior), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated March 26, 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 issue: whether the Administrative Judge erred by not concluding Applicant's conduct was extenuated or mitigated. 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

Whether the Administrative Judge erred by not concluding Applicant's conduct was extenuated or mitigated. Applicant contends that Administrative Judge should have concluded his conduct was extenuated or mitigated under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) because: (a) the Judge failed to consider the passage of time since Applicant's conduct occurred; (b) the Judge failed to consider whether Applicant is still vulnerable to coercion or pressure due his past conduct; (c) Applicant did not tell the truth in his signed, sworn statements because he thought things would go better for him if he told the investigator what he thought the investigator wanted to hear; and (d) the Judge failed to evaluate Applicant's conduct under the whole person concept.

The passage of time since an applicant last engaged in conduct is a relevant factor that a Judge should take into account when evaluating the record evidence. However, given the record of this case, Applicant overstates the significance of the passage of time since his last incident of criminal sexual misconduct. The Board need not decide whether that passage of time would be significant or decisive in this case because the Judge's decision is not based solely on Applicant's sexual misconduct. Rather, the Judge's decision is also predicated on his findings that Applicant is vulnerable to coercion or pressure because of that past conduct, and that Applicant engaged in acts of falsification in February 2001 and January 2002. The Judge's findings on this aspect of the case are unaffected by the passage of time since Applicant engaged in the sexual misconduct in question. Even dated conduct can be the source of an applicant's current vulnerability to coercion or influence. *See* ISCR Case No. 02-32254 (May 26, 2004) at pp. 4-5. And the passage of time since Applicant's acts of sexual misconduct do not extenuate or mitigate his later acts of falsification.

Applicant's contention that he did not tell the truth in his signed, sworn statements to the government because he thought things would go better for him if he told the investigator what he thought the investigator wanted to hear is predicated on factual assertions that go beyond the record below. Those assertions constitute new evidence. The Board is not permitted to consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

The Applicant was responsible for presenting evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proved or that Applicant admitted, and the Applicant also had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. The Judge had to consider the record evidence as a whole, both favorable and unfavorable, evaluate the facts and circumstances of Applicant's past conduct and current circumstances in light of pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. In deciding whether Applicant met this burden of persuasion, the Judge reasonably could consider whether Applicant presented evidence that was indicative of extenuation, mitigation, changed circumstances, or reform and rehabilitation. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 6; Directive Section 6.3.5 and Adjudicative Guidelines, Item E2.2.1.6.

After reviewing the Judge's decision in this case, it is our view that the Judge reasonably considered "whole person" factors, such as the 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 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: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board