

DATE: September 23, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33169

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 November 7, 2003, 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), Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated June 25, 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's decision is arbitrary, capricious, or contrary to law because it fails to recommend Applicant's case for further consideration for waiver under 10 U.S.C. §986(d), and (2) whether the Administrative Judge was biased. 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's decision is arbitrary, capricious, or contrary to law because it fails to recommend Applicant's case for further consideration for waiver under 10 U.S.C. §986(d). The SOR alleged under Guideline J that between 1979 and 1990, Applicant had engaged in a history or pattern of criminal activity. The Administrative Judge concluded that Applicant's 1980 conviction for arson fell under 10 U.S.C. §986 because Applicant was sentenced to six years confinement, of which he served four years. ⁽²⁾

The Judge's decision contained no recommendation, either favorable or unfavorable, as to whether Applicant's case should be considered further for a waiver under 10 U.S.C. §986(d). The SOR also alleged under Guideline E that Applicant had deliberately provided false information on a Security Clearance Application and a signed statement to the Defense Security Service. The Judge found against Applicant with respect to those allegations. On appeal, Applicant does not challenge the applicability of 10 U.S.C. §986 to his 1980 conviction, or the Judge's adverse findings and conclusions with respect to the Guideline E allegations. Rather, Applicant contends that the Judge erred by not making a favorable recommendation concerning waiver with respect to the Guideline J allegations, based upon Applicant's "work history and performances." Applicant's contention in that regard is without merit.

In a June 7, 2001 memorandum implementing the provisions of 10 U.S.C. §986, the Deputy Secretary of Defense stated: "The decision as to whether a particular case involves a meritorious case that would justify pursuing a request for waiver shall be the province of the DoD Component concerned (i.e. all Components authorized to grant, deny or revoke access to classified information) beginning with the Director of the Component Central Adjudication Facility (CAF), the Component appellate authority or other appropriate senior Component official." For purposes of the June 7, 2001 memorandum, the Director, DOHA is the Director of the Component's Central Adjudication Facility for industrial

security clearance cases.

To implement the June 7, 2001 memorandum, the Director, DOHA issued an operating instruction (dated July 10, 2001) which states the following:

"Administrative Judges are responsible for initial resolution as to whether or not 10 U.S.C. 986 applies to the facts of the case." (Operating Instruction, paragraph 2.e.)

"In the event of an appeal raising an issue as to the applicability of 10 U.S.C. 986, the Appeal Board is responsible for final resolution of the issue." (Operating Instruction, paragraph 2.f.)

"In the event of a final determination that 10 U.S.C. 986 applies to the facts of a case, the Director is solely responsible for the discretionary decision as to whether to recommend to the Deputy General Counsel (Legal Counsel) that 10 U.S.C. 986 should be waived by the Secretary of Defense." (Operating Instruction, paragraph 2.g.)

"If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement 'I recommend further consideration of this case for a waiver of 10 U.S.C. 986' or 'I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.'" (Operating Instruction, paragraph 3.e.)

"If the Appeal Board issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Appeal Board shall include without explanation either the statement 'The Appeal Board recommends consideration of this case for a waiver of 10 U.S.C. 986' or 'The Appeal Board does not recommend consideration of this case for a waiver of 10 U.S.C. 986.'" (Operating Instruction, paragraph 3.f.)

"In any case in which [the] Administrative Judge, or [the] Appeal Board in the event of an appeal, recommends consideration of a waiver of 10 U.S.C. 986, the Director shall within his sole discretion determine whether or not to forward the case to the Deputy General Counsel (Legal Counsel) for further consideration of a possible waiver of 10 U.S.C. 986 by the Secretary of Defense together with such rationale as may be requested by the Deputy General Counsel (Legal Counsel)." (Operating Instruction, paragraph 3.g.)

In this case, the Judge did not deny or revoke Applicant's clearance solely as a result of 10 U.S.C. §986. Rather, the Judge's denial of Applicant's clearance was also based upon his adverse findings and conclusions with respect the Guideline E allegations. The Applicant did not appeal the Judge's findings and conclusions with respect to the Guideline E allegations. Therefore, pursuant to Operating Instruction paragraph 3.e, cited above, the Judge was not required to make a recommendation concerning waiver, and his failure to do so was not error.

2. Whether the Administrative Judge was biased. Applicant also asserts that the Administrative Judge's decision was biased because the Judge stated during the hearing that "[he was] not aware of any waiver ever being granted. . . ." ⁽³⁾ This claim of bias lacks merit.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. The issue is not whether Applicant personally believes that the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 (March 27, 2003) at p.3. Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions in a case. *See, e.g.*, ISCR Case No. 94-0954 (October 16, 1995) at p. 4. Moreover, even if an appealing party demonstrates error by the Judge, proof of such error standing alone does not demonstrate the Judge was biased. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5. In this case, nothing in the record below or the Judge's decision supports Applicant's claim of bias.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's security clearance decision. Because the Board's affirmance of the Administrative Judge's decision is not based solely on the application of 10 U.S.C. §986, the Board does not make a recommendation as to whether Applicant's case should be considered further for a waiver under that statute.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

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 found in favor of the Applicant with respect to the allegations under Guidelines F, G and H. Those favorable findings are not at issue on appeal.

2. Under 10 U.S.C. § 986, the Department of Defense may not grant or renew a security clearance for a defense contractor official or employee that falls under any of four statutory categories [10 U.S.C. §986(c)(1) through (c)(4)]. Convictions which result in a sentence of imprisonment for more than one year fall under 10 U.S.C. §986(c)(1).

3. Transcript at p.23.