

DATE: October 21, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33256

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 August 29, 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 E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated July 13, 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: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's sexual behavior and falsification of a signed, sworn statement had not been 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 in concluding that the security concerns raised by Applicant's sexual behavior and falsification of a signed, sworn statement had not been mitigated. On appeal, Applicant argues that the Judge erred in concluding that the security concerns raised by his prior sexual behavior and the falsification of a signed, sworn statement had not been mitigated. Specifically he contends: (1) it was not Applicant's intent to deceive the government, (2) the information has now been fully disclosed, (3) Applicant could not be subject to blackmail or coercion, (4) the Judge's decision did not discuss a psychological evaluation concerning Applicant's sexual behavior, which had been admitted into evidence at the hearing, and (5) Applicant has had access to classified information for over 30 years with no security violations or compromise of classified information. In support of his appeal, Applicant reiterates the testimony he gave at the hearing, summarizes the favorable evidence of record, and offers some additional explanations about his conduct. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

The Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Therefore, we may not consider Applicant's new explanations as to his conduct. The submission of such new evidence does not demonstrate error on the part of the Judge, or render his decision arbitrary, capricious or contrary to law. Applicant had a reasonable opportunity to submit evidence for the Administrative Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence.

Based upon the record before him, the Judge's findings in this case are sustainable. Applicant's statements about his intent and state of mind during the occurrence of the events alleged in the SOR were relevant evidence, but they were not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp. 6-7. As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's denial of any intent to falsify a statement or solicit a prostitute did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials.

Likewise, the Administrative Judge was not required, as a matter of law, to conclude that the security concerns raised by Applicant's disqualifying conduct were mitigated by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (Judge had rational basis for concluding security concerns were not mitigated by the fact that Applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (it was not arbitrary or capricious for the Judge to conclude the government's security concerns raised by falsifications were not mitigated by the fact the applicant had "come clean" and had "nothing left to hide"). Moreover, the Administrative Judge was not required to conclude such concerns were mitigated by Applicant's favorable professional and work record. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6 (security clearance decisions not limited to consideration of an applicant's conduct during duty hours; off-duty conduct that raises security concerns can be considered in assessing an applicant's security eligibility). After reviewing the Judge's decision in light of the record as a whole, the Board concludes the Judge's weighing of the record evidence was not arbitrary, capricious, or contrary to law.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. The Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3. Therefore, the absence of discussion of the particular evidence referred to by Applicant does not show the Judge erred.

Finally, Applicant argues that he has held a security clearance for many years without any problems. That argument does not demonstrate the Judge erred. The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The Judge's findings about Applicant's overall history of sexual behavior and his falsification of a signed, sworn statement provide a sufficient rational basis for the Judge's unfavorable security clearance decision.

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