

DATE: September 17, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00280

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 January 28, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated June 29, 2004.

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 erred by finding that Applicant falsified a security clearance application in May 2002; and (2) whether the Administrative Judge had a rational basis for his unfavorable security clearance decision. 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 erred by finding that Applicant falsified a security clearance application in May 2002. On appeal, Applicant states he is sorry about not disclosing various matters when he completed a security clearance application in May 2002, and asserts that he was not trying to mislead anyone at the time. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge erred by finding Applicant falsified the security clearance application by not disclosing: (a) six arrests and/or criminal charges (which spanned the period from 1995 to 2001); and (b) alcohol counseling he received in 1997 or 1998 while in the U.S. Navy.

The record evidence of Applicant's explanation for omitting various information when he completed the security clearance application was before the Administrative Judge. That evidence was material and relevant, but it was not binding or conclusive on the Judge. Rather, as the trier of fact, the Judge had to consider Applicant's explanation in light of the record evidence as a whole and make a finding of fact as to whether Applicant did or did not falsify the security clearance application, as alleged in the SOR. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record evidence as a whole, the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge had a rational basis for his unfavorable security clearance decision. Applicant also: (a) expresses great pride in the United States and his ability to serve in the U.S. military; (b) states he is proud that he is not a drug user; (c) claims that his past misconduct is not serious enough to preclude him from holding a security clearance; (d) expresses remorse for his failure to make full disclose when he completed the security clearance application; and (e) asserts that he poses no risk to his company or the security of the United States. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge had a rational basis for his unfavorable security clearance decision.

The Administrative Judge's findings of fact about Applicant's history of episodic alcohol abuse have not been challenged on appeal. Those unchallenged findings of fact provide a rational basis for the Judge's adverse conclusions under Guideline G. The Judge's findings of fact about Applicant's criminal record have not been challenged on appeal. Those unchallenged findings of fact provide a rational basis for the Judge's adverse conclusions under Guideline J. As discussed earlier in this decision, the Judge's finding that Applicant falsified a security clearance application in May 2002 is sustainable. That finding of falsification -- plus the Judge's unchallenged findings about Applicant's criminal record -- provide a rational basis for the Judge's adverse conclusions under Guideline E.

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). The Administrative Judge's findings about Applicant's history of alcohol abuse, Applicant's criminal record, and Applicant's falsification of a security clearance application in May 2002 provide a rational and legally sufficient basis for his unfavorable security clearance decision. Applicant's appeal arguments do not demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. Applicant's appeal brief contains statements about what has happened to him since the Administrative Judge's unfavorable security clearance decision was issued. Those statements constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.