

DATE: January 19, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00763

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 March 25, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Michael J. Breslin issued an unfavorable security clearance decision, dated September 28, 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's findings about Applicant's history of marijuana use are supported by substantial record evidence; (2) whether the Administrative Judge erred by finding Applicant did not disclose his marijuana use until confronted by investigators; and (3) whether the Administrative Judge failed to evaluate Applicant's case properly under the "whole person" concept. 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 findings about Applicant's history of marijuana use are supported by substantial record evidence. The Administrative Judge made the following findings about Applicant's history of marijuana use: (a) between 1986 and 1994, Applicant used marijuana about three or four times; and (b) between 1994 and 2001, Applicant used marijuana about every other weekend. On appeal, Applicant challenges those findings, asserting that the Judge exaggerated the frequency of his marijuana use. Applicant's claim of error lacks merit. The Judge's findings about Applicant's marijuana use are supported by Applicant's admissions to the SOR and the record evidence as a whole.

2. Whether the Administrative Judge erred by finding Applicant did not disclose his marijuana use until confronted by investigators. The Administrative Judge found that Applicant falsified material facts about his marijuana use on four separate occasions: (a) when he completed a security clearance questionnaire in November 1988; (b) when he completed a security clearance questionnaire in January 1991; (c) when he completed a security clearance questionnaire in August 1994; and (d) when he completed a security clearance questionnaire in March 2001. The Judge also found that Applicant did not disclose his marijuana use to the federal government until he was confronted by an investigator.

On appeal, Applicant does not challenge the Administrative Judge's findings of falsification. However, Applicant contends the Judge erred by finding he did not disclose his marijuana use until he was confronted by an investigator, asserting that he voluntarily disclosed it to the investigator in March 2001. Considering the record as a whole, there is insufficient evidence: (i) to support the Judge's finding that Applicant was confronted by the investigator during the March 2001 interview; or (ii) to support Applicant's claim that he voluntarily disclosed his marijuana use to the investigator during the March 2001 interview.

Given the Administrative Judge's unchallenged findings that Applicant falsified material facts about his marijuana use on the four separate occasions noted above, it is not material whether Applicant disclosed his marijuana use during the March 2001 interview voluntarily or only after being confronted by the investigator. Even if Applicant had voluntarily disclosed his marijuana use during the March 2001 interview before being confronted by the investigator, the Judge could conclude that Applicant's history of repeated falsifications over a period of approximately 13 years demonstrated poor judgment, unreliability, and untrustworthiness under Guideline E (Personal Conduct) that was not extenuated or mitigated by Applicant's belated disclosures about his marijuana use. The Judge was not compelled, as a matter of law or logic, to conclude that Applicant's history of repeated falsifications was mitigated by his belated disclosures about his marijuana use.

3. Whether the Administrative Judge failed to evaluate Applicant's case properly under the "whole person" concept. Applicant also contends: (a) his last use of marijuana was not recent because it occurred in February 2001; (b) the Administrative Judge failed to take into account his job performance; (c) he has had no security violations; (d) he does not have a history of criminal conduct; (e) he has shown that he is sorry about his falsifications; and (f) there is favorable record evidence that the Judge should have taken into account to enter at least some formal findings in favor of Applicant. The Board construes these arguments as raising the issue of whether the Judge failed to evaluate Applicant's case properly under the "whole person" concept.

The absence of any security violations by Applicant did not preclude the Administrative Judge from considering the negative security implications of Applicant's history of marijuana use and Applicant's repeated falsifications about his marijuana use. The federal government is not required to wait until an applicant mishandles classified information before it can make an unfavorable security clearance decision. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

Applicant's reliance on the record evidence about his job performance is misplaced. Security clearance decisions are not limited to consideration of an applicant's job performance or conduct during duty hours. The federal government can consider the security implications of an applicant's conduct during non-duty hours. *See, e.g.*, ISCR Case No. 02-20576 (May 4, 2004) at p. 3. The record evidence about Applicant's job performance did not preclude the Judge from considering the negative security implications of Applicant's history of marijuana use and repeated acts of falsification about his marijuana use.

Given the Administrative Judge's findings about Applicant's repeated acts of falsification, the Judge properly concluded that each falsification constituted a violation of 18 U.S.C. §1001, a felony. Given those findings and conclusions by the Judge, it was not arbitrary, capricious, or contrary to law for the Judge to enter formal findings against Applicant under Guideline J (Criminal Conduct).

Considering the record evidence as a whole, the Board concludes the Administrative Judge's findings reflect a reasonable interpretation of the record evidence, the Judge's conclusions follow rationally from the Judge's findings, and the Judge's decision reflects a reasonable evaluation of the facts and circumstances of Applicant's case under the "whole person" concept. Applicant's contention to the contrary is not persuasive.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error that warrants remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board