

DATE: March 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01009

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Jeffrey C. Eglash, Esq.

David C. Scheper, Esq.,

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), undated, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated July 19, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. Department Counsel filed a cross-appeal. 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 faxed information knowing that it would be communicated to Israeli Military Industries; and (2) whether the Administrative Judge erred, as a matter of law, by refusing to consider the extensive evidence in mitigation.

The following issues have been raised on cross-appeal: (1) whether the Administrative Judge erred by concluding that Applicant did not exercise poor judgment in connection with the incident covered by SOR paragraph 1.b; and (2) whether the Administrative Judge erred by concluding that Applicant's conduct under SOR paragraph 1.c did not indicate poor judgment.

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 erred by finding that Applicant faxed information knowing that it would be communicated to Israeli Military Industries. The Administrative Judge found that: (a) Applicant faxed, or had someone else fax, unclassified engineering information concerning data and diagrams for the marketing of a weapon system to an individual outside his company knowing that the information would be communicated to Israel Military Industries; and (b) Applicant was reprimanded by his company facility security officer as a result of the fax incident. On appeal, Applicant challenges those findings of fact, arguing that the totality of the record evidence shows: (i) Applicant did not fax information to Israel Military Industries; and (ii) Applicant was not reprimanded in connection with the fax incident.

There is conflicting record evidence as to whether Applicant faxed information to Israel Military Industries. Indeed, the Administrative Judge explicitly noted that there is conflicting record evidence concerning the matter (Decision at p. 4). Faced with that conflicting evidence, the Judge had to consider the record evidence as a whole, assess the credibility of Applicant's testimony, and make a finding of fact as to whether Applicant faxed information to Israel Military Industries. Although it was legally permissible for Applicant to offer testimony and other evidence to explain away or recant his admission that he had faxed information to Israel Military Industries (Government Exhibit 7), the Judge was not compelled to accept Applicant's explanation or recantation of his admission. It was legally permissible for the Judge

to consider Applicant's explanation or recantation of that admission in light of the record evidence as a whole and her assessment of the credibility of Applicant's testimony.⁽¹⁾ Considering the record as a whole, and recognizing the deference owed to the Judge's credibility determinations, the Board concludes the Judge had a sufficient basis for finding that Applicant faxed, or had someone else fax, information to Israel Military Industries. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.* Applicant's appeal arguments seek to have the Board weigh the record evidence *de novo* and make its own finding of fact.

The SOR alleged that Applicant had been reprimanded by his employer's security officer in connection with the fax incident. However, whether Applicant was reprimanded by his company in connection with the fax incident is not material to the security concerns raised by his conduct in faxing, or having someone else fax, information to Israel Military Industries.⁽²⁾ Accordingly, the Board need not address or resolve the arguments made by both sides concerning the Judge's finding concerning this aspect of the case. *See Directive, Additional Procedural Guidance, Item E3.1.32* (Board must address the *material* issues raised by the parties).

2. Whether the Administrative Judge erred, as a matter of law, by refusing to consider the extensive evidence in mitigation. Applicant contends the Administrative Judge refused to consider the extensive evidence in mitigation, contrary to her obligation to consider all the record evidence. In support of this contention, Applicant argues: (a) the Judge demonstrated that she refused to consider mitigating evidence presented by Applicant when she stated the following: "The Applicant cannot mitigate conduct that he does not admit" (Decision at p. 8); and (b) the Judge erred by concluding that Applicant's statements and explanations about the fax incident are inconsistent and drawing adverse inferences from that conclusion. For the reasons that follow, the Board concludes this claim of error is not persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.⁽³⁾ Applicant's citation of one sentence in the Judge's decision is not sufficient to rebut or overcome that presumption. The Board does not review individual sentences from a Judge's decision in isolation. Rather, the Board will consider the Judge's decision in its entirety to discern the Judge's findings, conclusions, and legal rulings.⁽⁴⁾ A review of the Judge's decision shows that the Judge specifically noted and considered the evidence Applicant offered in mitigation (Decision at pp. 5-6). Although the Judge's decision could have been clearer on this aspect of the case, the Board does not review Hearing Office decisions against a standard of perfection.⁽⁵⁾

Furthermore, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider whether Applicant gave inconsistent statements and explanations about the fax incident. To the contrary, it is legally permissible for the Judge to consider whether Applicant gave consistent or inconsistent statements and explanations about that incident.⁽⁶⁾ Moreover, it is not arbitrary or capricious for the Judge to take into consideration whether Applicant admits or acknowledges responsibility for his conduct. If there is record evidence that leads a Judge to reasonably conclude that an applicant is unwilling to admit his or her misconduct, then it would not be arbitrary or capricious for the Judge to further conclude that the applicant's denial of having engaged in misconduct tends to undercut any claim of mitigation made by the applicant.⁽⁷⁾ The Board does not have to decide whether it would reach the same conclusion as the Judge did to conclude that the Judge acted within the bounds of her discretion by considering whether Applicant admitted his responsibility for the fax incident, and whether Applicant's denial of responsibility for that incident undercut his claim of mitigation.

Cross-Appeal Issues

1. Whether the Administrative Judge erred by concluding that Applicant did not exercise poor judgment in connection with the incident covered by SOR paragraph 1.b. Department Counsel does not challenge the Administrative Judge's finding that Applicant acted on the advice of a bankruptcy trustee when he removed documents concerning a weapon system contract from the premises of his company in 1993. However, Department Counsel challenges the Judge's conclusion that Applicant's conduct did not demonstrate poor judgment within the meaning of Guideline E (Personal Conduct). In support of this claim of error, Department Counsel argues the record evidence shows that: (a) Applicant was on notice that the weapon system contract covered a program was protected within the Defense Industrial Security Program; (b) Applicant was on notice that there were responsibilities associated with protecting both classified information and unclassified information associated with defense contracts; and (c) Applicant removed the documents

and stored them in his garage for several years without taking any precautions to protect them. Department Counsel also argues that the Judge's analysis of the matter covered by SOR paragraph 1.b was piecemeal in nature and failed to take into account the totality of the record evidence concerning the matter. Applicant counters that: (i) the record evidence supports the Judge's conclusion that Applicant acted reasonably under the circumstances; (ii) Department Counsel failed to demonstrate Applicant had any obligation under the National Industrial Security Program Manual (NISPOM) to protect unclassified information; and (iii) the Judge's analysis was not piecemeal in nature. For the reasons that follow, the Board concludes that Department Counsel's claim of error is persuasive.

As a preliminary matter, the Board does not find persuasive Applicant's argument concerning the applicability of the NISPOM. ⁽⁸⁾ Because the NISPOM was promulgated in January 1995, it is not surprising that the SOR did not allege that Applicant's actions in 1993 violated the NISPOM. Furthermore, the Board does not have supervisory jurisdiction over DOHA personnel who issue SORs ⁽⁹⁾ or Department Counsel who present cases at hearing. ⁽¹⁰⁾ Accordingly, the Board will not presume to opine or speculate as to why the SOR did not allege, or why Department Counsel did not move to amend the SOR to allege, that Applicant's conduct after January 1995 violated the NISPOM. Since the SOR did not allege Applicant's conduct violated the NISPOM, the Board does not attribute any legal significance to Department Counsel's choice to not seek to persuade the Administrative Judge that Applicant's conduct violated the NISPOM.

The Board rejects Applicant's implicit premise that the absence of proof that he mishandled classified documents takes his case outside the scope of Guideline E. The federal government is not required to wait until an applicant has mishandled classified information before it can make an unfavorable security clearance decision. ⁽¹¹⁾ Moreover, acceptance of Applicant's implicit premise would result in the untenable situation that all Guidelines except Guideline K (Security Violations) would be rendered superfluous, or dependent on a showing that conduct alleged under each Guideline implicated a security violation of some kind. The Board will not interpret or construe the Directive or the Adjudicative Guidelines in a manner that results in rendering any provision superfluous or meaningless. ⁽¹²⁾ Furthermore, mishandling of sensitive, unclassified information can provide a rational basis for an unfavorable security clearance decision. ⁽¹³⁾ Accordingly, the absence of proof that classified documents were included in the documents Applicant removed from the company premises in 1993 and stored in his garage is not fatal to Department Counsel's case under Guideline E.

Department Counsel persuasively argues that the Administrative Judge failed to articulate a sustainable basis for her conclusion that Applicant's removal of documents in 1993 and his storage of them in his garage for several years did not demonstrate poor judgment. Department Counsel is correct in asserting there is record evidence that shows the security officer of Applicant's employer informed Applicant (in connection with the fax incident covered by SOR paragraph 1.a) that the particular weapon system contract involved material protected by the Defense Industrial Security Program (Government Exhibit 5). Furthermore, there is no record evidence that Applicant made any effort to ascertain whether the documentation he was removing from the premises of the company contained classified or other sensitive information that would require more secure storage than that provided by his garage. Finally, the Judge failed to explain why it was reasonable for Applicant to rely on the advice of a bankruptcy trustee about the handling and disposition of documents pertaining to a weapon system contract without trying to ascertain from appropriate Department of Defense officials whether there was any governmental interest in how those documents were handled, stored, or disclosed to third parties.

A private company's decision to file for bankruptcy does not vitiate or nullify any legal right or interest that the federal government might have in protecting documents or other assets pertaining to a weapon systems contract being performed or otherwise worked on by the private company. Nor does such a decision relieve a private company (or its officers, employees and other agents) from the obligation to take reasonable steps to fulfill obligations to the federal government pertaining to the handling of documents or other assets pertaining to a weapon system contract. Although Applicant could rely on the bankruptcy trustee for advice on bankruptcy matters, Applicant could not simply rely on the bankruptcy trustee for advice without taking into account the possibility that his actions might have an effect on the legal rights or interests the federal government could have in documents pertaining to a weapon system contract. At a minimum, Applicant had an affirmative obligation to: (a) report to appropriate Department of Defense officials that he had removed documents pertaining to a weapon system contract from the premises of the company, and provide them with a description of the documents he removed so that they could make a reasoned decision as to whether there was

any federal right or interest implicated or affected by the document removal; and (b) make a reasonable, timely effort to inventory the documents he removed from the company premises to ensure that they did not include classified or other sensitive information that required more secure storage than he was providing in his garage, or that should be surrendered to appropriate officials of the Department of Defense.⁽¹⁴⁾ By focusing on Applicant's attention to the private interests of his company during the bankruptcy process, the Judge failed to take into account the absence of record evidence that Applicant made any effort to ascertain whether his actions could adversely affect any interest of the federal government in the documents pertaining to a weapon systems contract that Applicant took possession of and stored in his garage.

In light of Applicant's failures to address his affirmative obligations, the Administrative Judge's conclusion that Applicant's conduct in removing documents from the company premises and storing them in his garage did not demonstrate poor judgment under Guideline E was arbitrary and capricious because it: (a) fails to articulate a satisfactory explanation for that conclusion; (b) does not consider relevant factors; (c) fails to consider an important aspect of the case; and (d) reflects a piecemeal analysis of the facts and circumstances surrounding Applicant's actions and inactions with respect to the documents he removed from the company premises and stored in his garage. Accordingly, the Judge's favorable conclusion concerning SOR paragraph 1.b cannot be sustained. Applicant's arguments to the contrary are not persuasive.

2. Whether the Administrative Judge erred by concluding that Applicant's conduct under SOR paragraph 1.c. did not indicate poor judgment. The Administrative Judge found the following: (a) Applicant made various attempts to contact influential people through a friend in order to obtain funding for a weapon system project that he had worked on in the past, but which had been terminated; (b) on one occasion, when performing as part of an orchestra at a party given at the home of a reputed foreign arms dealer, Applicant tried to get the opportunity to talk with the reputed arms dealer in an effort to obtain funding for the weapon system project he was trying to develop and sell; and (c) the reputed foreign arms dealer declined to speak with Applicant, and Applicant did not have the opportunity to speak with the reputed foreign arms dealer. The Judge concluded that "[t]he Applicant's efforts to market his weapon proposal to friends of friends and influential people, even if those individuals may be scandalous or carry a bad reputation, has not been shown to be illegal and it itself is not indicative of poor judgment."

Department Counsel contends the Administrative Judge erred because: (a) the record evidence shows that Applicant did more than just ask if he could talk with the reputed foreign arms dealer; (b) the record evidence does not support the Judge's favorable conclusions about the incident involving the reputed foreign arms dealer; and (c) Applicant's failure to get results is irrelevant to whether Applicant demonstrated poor judgment by seeking financing for his proposed weapon system from a reputed foreign arms dealer. Applicant counters by arguing the record evidence supports the Judge's conclusion that Applicant's actions did not demonstrate poor judgment. For the reasons that follow, the Board concludes Department Counsel's claim of error is persuasive.

Given the totality of the record evidence in this case, the Board cannot sustain the Administrative Judge's conclusion that Applicant's effort to obtain financing for a proposed weapon system from a reputed foreign arms dealer did not demonstrate poor judgment. It is not plausible for Applicant to argue that it was reasonable for him to seek financial backing for his proposed weapon system from a reputed arms foreign dealer (whom he believed to be under house arrest, and about whom Applicant told the FBI "I realized that I would have difficulties due to his citizenship & current problems as an alleged arms dealer . . ."). How could Applicant reasonably expect that obtaining financial backing from a reputed foreign arms dealer whom he believed to be under house arrest would benefit the U.S. government? How could Applicant reasonably expect that such a reputed foreign arms dealer whom he believed to be under house arrest would be interested in backing a proposed weapon system so that the U.S. government -- not the arms dealer -- would be the beneficiary? Furthermore, Applicant's failure in obtaining financial backing from the reputed foreign arms dealer does not diminish or reduce the significance of Applicant's poor judgment in trying to get such financial backing in the first instance. The nature of an action that a person tries to undertake does not turn on whether the person is successful or unsuccessful in committing or completing the action. A person is not less irresponsible or reckless merely because the person's attempt to commit an irresponsible or reckless act fortuitously is not successful. Applicant's willingness to risk embroiling himself with a reputed foreign arms dealer whom he believed to be under house arrest in order to obtain financial backing for a proposed weapon system reflects a serious lack of judgment, if not a reckless disregard for the potential consequences of his actions.

The Administrative Judge's favorable conclusion concerning Applicant's efforts to obtain financial backing from a reputed foreign arms dealer whom he believed to be under house arrest is arbitrary and capricious because: (a) it fails to articulate a satisfactory explanation for the favorable conclusion, including a rational connection between the facts found and the choice made; (b) it reflects a clear error of judgment; (c) it fails to consider important aspects of the case; (d) it offers an explanation for the decision that runs contrary to the record evidence; and (e) it is so implausible that it cannot be ascribed to a mere difference of opinion.

Applicant argues, in the alternative, that if the Board concludes Department Counsel's cross-appeal has merit, then the Board should remand the case to the Administrative Judge for further consideration and issuance of a new decision after correction of identified errors. Considering the record as a whole, the Board concludes that such a remand is not warranted.

Conclusion

Applicant's appeal of the Administrative Judge's unfavorable conclusions concerning SOR paragraph 1.a fails to demonstrate error below. Department Counsel's cross-appeal of the Judge's favorable conclusions concerning SOR paragraphs 1.b and 1.c demonstrates the Judge erred by entering formal findings in favor of Applicant with respect to those aspects of the case. Accordingly, the Judge's unfavorable security clearance decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 01-03683 (August 9, 2002) at p. 3 (it was legally permissible for Administrative Judge to give more weight to the applicant's statements against interest than to the applicant's other statements that sought to minimize his drug use); ISCR Case No. 96-0897 (December 9, 1997) at p. 3 (Judge had to assess the applicant's demeanor and credibility and decide, in light of the record evidence, whether to accept the applicant's recantation of earlier admissions).

2. Evidence concerning what actions an applicant's employer or supervisor took in response to an applicant's conduct may be relevant to understanding the facts and circumstances of a case. However, in assessing the nature and seriousness of an applicant's conduct, an Administrative Judge is not bound by the position that an applicant's employer or supervisor took as to whether the applicant's conduct warranted disciplinary action.

3. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.

4. *See, e.g.*, ISCR Case No. 03-05645 (September 15, 2004) at p. 5.
5. *See, e.g.*, ISCR Case No. 02-29608 (December 17, 2003) at p. 3.
6. *Cf. Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) ("... factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it.").
7. *See* ISCR Case No. 97-0625 (August 17, 1998) at p. 5 (an applicant's refusal to acknowledge his misconduct or accept responsibility for it seriously undercuts a finding that the applicant has mitigated his misconduct). *Cf.* ISCR Case No. 98-0424 (July 16, 1999) at p. 3 ("An applicant's acknowledgment of the wrongfulness of his or her past misconduct, if found to be credible, has some probative value with respect to a Judge's consideration of whether an applicant has demonstrated reform and rehabilitation. However, an acknowledgment of wrongdoing is merely a first step and does not constitute evidence of conduct that demonstrates reform and rehabilitation."); *Singletary v. Department of Air Force*, 94 M.S.P.B. 553, 560 (2003) (an agency may take into account whether an employee admits misconduct and expresses remorse for his or her misconduct, as well as the timing and circumstances under which an employee acknowledges responsibility for, and expresses remorse about, his or her misconduct).
8. Contrary to Applicant's contention, the NISPOM is not silent on the matter of sensitive, unclassified information. *See, e.g.*, NISPOM, Section 5-508 ("Disclosure of Export Controlled Information to Foreign Persons"); Section 10-102b ("The Export Administration Act (EAA)(50 U.S.C. app 2401 Note)"); and Section 102d ("The Defense Authorization Act of 1984 (10 U.S.C. 130)").
9. *See, e.g.*, ISCR Case No. 99-0481 (November 29, 2000) at p. 4 (Board does not have jurisdiction or authority to adjudicate the manner in which DOHA personnel decide to issue or not issue SORs, to order DOHA personnel to issue or not issue SORs, or to dismiss an SOR).
10. *See, e.g.*, ISCR Case No. 02-04344 (September 15, 2003) at p. 3 (Board does not have supervisory jurisdiction over Department Counsel).
11. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). *See also Department of Navy v. Egan*, 484 U.S. 518, 528 (1988)(noting a security clearance decision "is only an attempt to predict [a person's] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, [the person] *might compromise* sensitive information")(italics added).
12. *See, e.g.*, ISCR Case No. 02-11454 (June 7, 2004) at p. 4 ("The Board has declined to interpret or construe the Directive in a manner that renders any provision meaningless or superfluous.")
13. *See, e.g., Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990)(security clearance case involving applicant who mishandled company proprietary information), *cert. denied*. 499 U.S. 905 (1991).
14. Given the record evidence of Applicant's experience with defense-related projects, Applicant would know, or should be expected to know, that documents pertaining to such projects could contain classified or other sensitive information. *See, e.g.*, ISCR Case No. 99-0228 (March 12, 2001) at pp. 4-5 (discussing concept of imputed knowledge and citing earlier Board decisions applying the concept).