

DATE: June 18, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01647

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 September 30, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption). Administrative Judge James A. Young issued an unfavorable security clearance decision dated March 12, 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 with respect to certain factual findings; and (2) whether the Administrative Judge erred by concluding that Applicant had not demonstrated sufficient reform and rehabilitation to warrant a favorable 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 with respect to certain factual findings. Applicant does not challenge the Administrative Judge's findings about his involvement in alcohol-related incidents that occurred in February 1995 and May 2000 (SOR paragraphs 1.b and 1.c). However, Applicant does challenge the Judge's finding that a November 2001 incident (SOR paragraph 1.a) was alcohol-related, and the Judge's finding that he did not stop drinking after the November 2001 incident.

During the proceedings below, Applicant gave his explanation about the November 2001 incident and denied that it was alcohol-related. Applicant's explanation is record evidence that the Administrative Judge had to consider. However, the Judge was not required to accept Applicant's explanation at face value. The Judge had to consider Applicant's explanation in light of: (a) his assessment of the credibility of Applicant's testimony, and (b) the record evidence as a whole. Giving due deference to the Judge's credibility determination, and considering the record evidence as a whole, the Judge's finding that the November 2001 incident was alcohol-related is sustainable.

During the proceedings below, Applicant claimed that he stopped drinking alcohol after the November 2001 incident. Applicant's statements about when he stopped drinking are record evidence that the Administrative Judge had to consider. Giving due deference to the Judge's credibility determination, and considering the record evidence as a whole, it was not arbitrary or capricious for the Judge to reject Applicant's claim that he stopped drinking altogether after the November 2001 incident.

2. Whether the Administrative Judge erred by concluding that Applicant had not demonstrated sufficient reform and rehabilitation to warrant a favorable security clearance decision. The Administrative Judge concluded Applicant's involvement in alcohol-related incidents in 1995, 2000 and 2001 demonstrated he had an alcohol problem, and further concluded that Applicant had not demonstrated sufficient evidence of reform and rehabilitation to warrant a favorable

security clearance decision. On appeal, Applicant cites to various portions of the record evidence in support of his claim that he presented evidence of reform and rehabilitation, and that the Judge should have found in his favor.

The Administrative Judge noted the evidence presented by Applicant, but indicated he had doubts about the sufficiency of Applicant's claims of reform. Under the Directive, the Board does not review cases *de novo*. Accordingly, the Board need not decide whether it would reach the same conclusion as the Judge did in this case. The doubts articulated by the Judge as to the sufficiency of Applicant's evidence of reform have an arguable basis in the record below. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's adverse conclusion is arbitrary, capricious, or contrary to law. Given the Judge's articulated doubts, it was not arbitrary, capricious, or contrary to law for the Judge to resolve them in favor of the national security. *See Directive, Adjudicative Guidelines, Item E2.2.2; Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains a variety of factual statements that go beyond the record evidence and, for all practical purposes, constitute an attempt to supplement the record evidence. Such statements constitute new evidence, which the Board cannot consider on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29*. During the proceedings below, Applicant had ample opportunity to present 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.