

DATE: March 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02097

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 January 20, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline J (Criminal Conduct), Guideline H (Drug Involvement), Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated October 27, 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: (1) whether the Administrative Judge's decision with respect to the criminal conduct allegations is arbitrary, capricious, or contrary to law, (2) whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's drug involvement had not been mitigated, (3) whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of financial difficulties had not been mitigated, (4) whether the Administrative Judge erred by finding the Applicant's falsifications were deliberate, (5) whether the Administrative Judge's decision with respect to the personal conduct allegations is arbitrary, capricious, or contrary to law, and (6) whether the Administrative Judge was biased. 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 decision with respect to the criminal conduct allegations is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge erred by: (1) failing to apply Criminal Conduct Mitigating Conditions 3 ⁽¹⁾ and 4, ⁽²⁾ and (2) not stating in the Finding of Fact that Applicant acted in self defense with respect to the December 2001 arrest for battery. The Board interprets Applicant's appeal brief as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The Administrative Judge found that Applicant had committed 14 criminal acts between 1989 and 2001. Applicant offers no explanation as to how the Judge erred by not applying Criminal Conduct Mitigating Conditions 3 and 4 to Applicant's criminal history, or what evidence either mandated or supported their application in the context of the record as a whole. Applicant has failed to demonstrate error.

As for the claim of self defense, 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. 96-0228 (April 3, 1997) at p. 3; DISCR Case No. 93-1186 (January 5, 1995) at p. 5. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 5.

Applicant has not met his burden of demonstrating that the Administrative Judge's material findings and conclusions either: (1) do not reflect a reasonable or plausible interpretation of the record evidence, or (2) are not a legally sufficient

application of Directive provisions. Considering the record evidence as a whole, the Judge's material findings of fact and his conclusions with respect to the Criminal Conduct allegations are sustainable.

2. Whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's drug involvement had not been mitigated. Applicant contends the Judge should have concluded that the security concerns raised by his prior drug use had been mitigated by application of Drug Involvement Mitigating Conditions 1, (3) 2, (4) and 3. (5) In support of those contentions, Applicant asserts that he does not now abuse drugs and his last use of drugs was in August 2000.

Considering the record as a whole, the Board concludes that the Administrative Judge was not compelled to apply Drug Involvement Mitigating Condition 2 when the record evidence reasonably supports the Judge's conclusion that it did not apply. It is untenable for Applicant to claim on this record that his use of drugs is an isolated or aberrational event.

Considering the record as a whole, it was not arbitrary or capricious for the Judge to conclude that the record evidence did not warrant application of Drug Involvement Mitigating Conditions 1 or 3. Applicant's ability to argue for an alternative interpretation of the record evidence is not sufficient to demonstrate the Judge erred by deciding application of those two mitigating conditions was not justified in light of the record evidence.

In this case, the Administrative Judge found Applicant had a lengthy and serious history of improper or illegal drug use, which included multiple arrests on drug-related criminal charges. The Judge also doubted Applicant's credibility because Applicant had failed to disclose this extensive history of drug use on his Security Clearance Application and in an interview with a government agent. In light of the foregoing, the Judge had a rational basis to conclude that Applicant's overall history of improper or illegal drug use raised serious security concerns under Guideline H, and that the evidence which the Applicant had presented in mitigation was insufficient to overcome those security concerns. Therefore, we conclude that the Judge's decision was not arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of financial difficulties had not been mitigated. Applicant contends the Administrative Judge's decision should be reversed because the Judge erred in not applying Financial Considerations Mitigating Condition 3. (6) In support of his contention, Applicant argues that he is not at risk of engaging in illegal acts to generate funds because he now has a great job and he submitted a post hearing exhibit which outlined a debt reduction plan.

Applicant has not met his burden of demonstrating that the Judge erred in concluding that the financial considerations allegations had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3.

In this case, Applicant had a history of not meeting financial obligations which ran over multiple years. At the time the case was submitted for decision, he still had significant outstanding debts. Applicant had only finalized his debt reduction plan subsequent to the hearing and well after the initiation of the security clearance process. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and still ongoing. Likewise the Judge could also reasonably conclude that Applicant's promises to resolve his indebtedness and his recent efforts to resolve that indebtedness were not a substitute for a consistent record of timely remedial action. Therefore, the Judge was not required as a matter of law to conclude Applicant's efforts to address his financial difficulties warranted application of Financial Considerations Mitigating Condition 3.

4. Whether the Administrative Judge erred by finding the Applicant's falsifications were deliberate. Applicant contends that he did not deliberately provide false information on his security clearance application and in an interview with a government agent. Rather, he contends the omission of the information in question was the result of: (1) misunderstanding the questions, (2) fear of the repercussions of his prior mistakes, (3) his faulty memory, (4) lack of knowledge, and (5) some of the information being more than seven years old. Applicant's arguments do not persuade us that the Judge erred.

An applicant's statements about his intent and state of mind, when responding to the government's inquiries during a

background investigation, are relevant evidence, but they are not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at p.6; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts Applicant's denial. This case involved the omission of information which was of obvious security significance in two different contexts--on his security clearance application and in an interview with a government agent. Given the record evidence, it was not unreasonable for the Judge to conclude that the Applicant's failure to disclose the relevant information had been intentional--despite his denials.

5. Whether the Administrative Judge's decision with respect to the personal conduct allegations is arbitrary, capricious, or contrary to law. Applicant contends the Judge erred by: (1) failing to apply Personal Conduct Mitigating Conditions 2, ~~(7)~~ 3, ~~(8)~~ 4, ~~(9)~~ 5-~~(10)~~ and 7. ~~(11)~~

The Board interprets Applicant's appeal brief as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

Applicant offers no explanation as to how the Judge erred by not applying Mitigating Conditions 2, 4, 5 and 7, or what evidence either mandated or supported their application within the context of the record as a whole. Accordingly, the Applicant has not met his burden of demonstrating that the Judge's material findings and conclusions either: (1) do not reflect a reasonable or plausible interpretation of the record evidence, or (2) are not a legally sufficient application of Directive provisions. Applicant's claims on appeal are not adequately supported by such record evidence as to conclude that the Judge was obligated to apply Personal Conduct Mitigating Condition 3.

6. Whether the Administrative Judge was biased. Applicant also asserts that the Judge was biased against him. However, he offers no explanation as to how the Judge was biased or point to any evidence of record in support of that contention.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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

1. Directive, Enclosure 2, Item E2.A10.1.3.3. ("The person was pressured or coerced into committing the act and those

pressures are no longer present in that person's life").

2. Directive, Enclosure 2, Item E2.A10.1.3.4. ("The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur").

3. Directive, Enclosure 2, Item E2.A8.1.3.1. ("The drug involvement was not recent").

4. Directive, Enclosure 2, Item E2.A8.1.3.2. ("The drug involvement was an isolated or *aberrational* event").

5. Directive, Enclosure 2, Item E2.A8.1.3.3. ("A demonstrated intent not to abuse any drugs in the future").

6. Directive, Enclosure 2, Item E2.A6.1.3.3 ("The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)").

7. Directive, Enclosure 2, Item E2.A5.1.3.2. ("The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily").

8. Directive, Enclosure 2, Item E2.A5.1.3.3. ("The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts").

9. Directive, Enclosure 2, Item E2.A5.1.3.4. ("Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided").

10. Directive, Enclosure 2, Item E2.A5.1.3.5. ("The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or *duress*").

11. Directive, Enclosure 2, Item E2.A5.1.3.7. ("Association with persons involved in criminal activities has ceased").