

DATE: November 4, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04147

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 August 31, 2004, 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). Administrative Judge Thomas M. Crean issued an unfavorable security clearance decision, dated July 28, 2005.

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 issue has been raised on appeal: whether the Administrative Judge's adverse conclusions under Guideline J (Criminal Conduct) are arbitrary, capricious, or contrary to law. 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 Issue

Applicant does not challenge the Administrative Judge's findings of fact about his history of criminal conduct, which included incidents in 1991 or 1992, 1995, 1996, 1997, 2001, and 2002. Because there is no presumption of error below, the Judge's unchallenged findings of fact about Applicant's history of criminal conduct stand.

Applicant makes the following arguments in challenging the Administrative Judge's unfavorable decision: (a) the Judge should have reached different conclusions under the Criminal Conduct Disqualifying Conditions; (b) Applicant's past criminal conduct was not recent enough, not of sufficient severity, and not of sufficient number to warrant an unfavorable security clearance decision; (c) Applicant's acts of criminal conduct were not of a nature or quality to pose a threat to the national security; (d) Applicant is rehabilitated, currently maintains alcohol counseling, and has not committed any criminal conduct since the last incident; and (e) an interview of Applicant's coworkers and family would show Applicant is fit to be granted a security clearance. The Board construes these arguments as raising the issue of whether the Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law.

Applicant's first argument lacks merit. Given the Administrative Judge's unchallenged findings of fact, it was not arbitrary or capricious for the Judge to conclude that Applicant's criminal conduct fell under Criminal Conduct Disqualifying Condition 1 [\(1\)](#) and Criminal Conduct Disqualifying Condition 2. [\(2\)](#)

A reading of the decision below shows that the Administrative Judge evaluated the facts and circumstances of Applicant's history of criminal conduct in a manner consistent with his obligation to consider Applicant's conduct under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. To the extent Applicant seems to argue that the Judge should have evaluated the security significance of each incident of criminal conduct in isolation, such an argument does not demonstrate the Judge erred. A Judge must consider the totality of an applicant's conduct and circumstances, not just individual events or incidents in a piecemeal manner. *See, e.g.*, ISCR Case No. 02-01093 (December 11, 2003) at p. 4 ("Under the whole person concept, the Administrative Judge must not consider and weigh

incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances."(citations omitted). Applicant's disagreement with the Judge's conclusions is not sufficient to demonstrate the Judge's conclusions are arbitrary or capricious.

Applicant's contention that his history of criminal conduct does not have security significance lacks merit. 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). Department Counsel is not required to prove that an applicant has committed a security violation, or poses a clear and present danger or imminent threat to the national security. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of conduct or circumstances that raise serious questions or doubts about an applicant's judgment, reliability or trustworthiness. *See, e.g.*, ISCR Case No. 02-10454 (November 23, 2004) at p. 4. A history of criminal conduct raises serious questions and doubts about a person's judgment, reliability, and trustworthiness. The Administrative Judge's unchallenged findings of fact about Applicant's overall history of criminal conduct provide a legally sufficient basis for his adverse conclusions about Applicant's security eligibility under Guideline J (Criminal Conduct).

The Administrative Judge is responsible for considering the record evidence as a whole, both favorable and unfavorable, and reach reasonable conclusions as to whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and whether an applicant has presented evidence to refute, extenuate or mitigate the applicant's admitted or proven conduct sufficiently to warrant a favorable security clearance decision.⁽³⁾ Applicant disagrees with the Judge's weighing of the record evidence, but does not show that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Error below is not demonstrated by Applicant's statement that an interview of his coworkers and family would show he is fit to be granted a security clearance. First, the Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Second, it would not be proper for the Board to engage in further investigation and fact-finding on appeal. Third, a review of the proceedings below shows that Applicant had a reasonable opportunity to prepare for his hearing and present witnesses or documentary evidence on his behalf for the Administrative Judge to consider in his case. Applicant is not entitled to ask to keep the record in his case kept open so that additional evidence can be developed and considered in his case. *See, e.g.*, ISCR Case No. 01-21274 (January 8, 2004) at p. 3.

Conclusion

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

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. "Allegations or admission of criminal conduct, regardless of whether the person was formally charged" (Directive, Adjudicative Guidelines, Item E2.A10.1.2.1).
2. "A single serious crime or multiple lesser offenses" (Directive, Adjudicative Guidelines, Item E2.A10.1.2.2).
3. Directive, Additional Procedural Guidance, Item E3.1.15.