

DATE: October 19, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04244

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 June 3, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations), Guideline J (Criminal Conduct), Guideline E (Personal Conduct) and Guideline G (Alcohol Consumption). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated June 2, 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 issues have been raised on appeal: (1) whether the Administrative Judge erred by finding that Applicant falsified material facts on a security clearance application; and (2) whether the Administrative Judge's unfavorable security clearance decision is 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 Issues⁽¹⁾

1. Whether the Administrative Judge erred by finding that Applicant falsified material facts on a security clearance application. The Administrative Judge found that Applicant falsified material facts on a security clearance application by intentionally failing to disclose he had been arrested and charged with various offenses in 1991, 1997, 1998 (twice), and 1999. On appeal, Applicant challenges the Judge's finding of falsification, denying that he omitted those offenses intentionally.

The Board does not retry a case on appeal. Rather, the Board reviews an Administrative Judge's decision to determine whether factual or legal error has been identified. *See* Directive, Additional Procedural Guidance, Item E3.1.32. To the extent Applicant's brief seeks to have the Board review the record evidence and make its own findings of fact about his alleged falsifications, Applicant seeks a form of review to which he is not entitled under the Directive.

Applicant's challenge to the Administrative Judge's findings of falsification is based, in part, on factual assertions that go beyond the record evidence and seek to supplement it on appeal. Such factual assertions constitute a proffer of new evidence, which the Board cannot consider on appeal.⁽²⁾ In reviewing the Judge's challenged findings of falsification, the Board will consider whether there is sufficient record evidence to sustain those findings.⁽³⁾

When responding to the SOR, Applicant denied that he falsified the security clearance application. Accordingly, the SOR allegations concerning falsification were controverted, and Department Counsel had the burden of presenting evidence to prove that Applicant had engaged in the falsifications alleged in the SOR.⁽⁴⁾ At the hearing, Department Counsel offered documentary evidence in support of the falsification allegations in the SOR, and cross-examined Applicant about the omissions from the security clearance application. Applicant testified about the omissions from the

security clearance application, offering his explanation for them.

The Administrative Judge had to consider the record evidence as a whole, assess the credibility of Applicant's testimony, and make findings of fact about Applicant's intent and state of mind when he completed the security clearance application. Applicant's denials of any intent to falsify were part of the record that the Judge had to consider, but those denials were not binding or conclusive on the Judge.⁽⁵⁾ Considering the record as a whole, and giving due deference to the Judge's credibility determination, the Board concludes the Judge's findings of falsification are sustainable.

2. Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. Applicant refers to his military record and his job performance, asserts that he has improved his life personally and professional over the last several years, states that he has not violated security, and claims that he has done everything he possibly can to prove he is honest, dependable, and not a security risk. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information.⁽⁶⁾ The federal government is not required to wait until an applicant commits a security violation before it can deny or revoke the applicant's access to classified information.⁽⁷⁾ All that is required is admitted or proven conduct that raises security concerns sufficient to preclude a determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant. In this case, the Administrative Judge's sustainable findings of falsification provide a rational basis for his adverse conclusions about Applicant's judgment and reliability.⁽⁸⁾

The favorable evidence referred to by Applicant on appeal was part of the record evidence that the Administrative Judge had to consider in evaluating Applicant's security eligibility under the whole person concept.⁽⁹⁾ However, the presence of favorable record evidence did not preclude the Judge from making an unfavorable security clearance decision. Rather, the Judge had to decide whether the favorable record evidence was sufficient to refute, extenuate or mitigate the security concerns raised by Applicant's falsifications.⁽¹⁰⁾ Considering the record as a whole, the favorable evidence presented by Applicant did not compel the Judge to conclude that Applicant had extenuated or mitigated the security concerns raised by his falsifications sufficiently to warrant a favorable security clearance decision. Applicant's appeal arguments do not demonstrate that the Judge's evaluation of his security eligibility was arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline F (Financial Considerations), Guideline G (Alcohol Consumption), and Guideline J (Criminal Conduct). Those favorable formal findings are not at issue on appeal.
2. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
3. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
4. *See* Directive, Additional Procedural Guidance, Item E3.1.14.
5. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3.
6. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).
7. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).
8. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at pp. 3-4 (discussing security significance of falsification).
9. *See* Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.
10. *See* Directive, Additional Procedural Guidance, Item E3.1.15.