

DATE: November 4, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04740

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

David P. Price, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated December 30, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline H (Drug Involvement), Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated July 22, 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 issue: whether the Administrative Judge's 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 [\(1\)](#)

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. On appeal, Applicant argues that the Judge's findings and conclusions with respect to the Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) allegations are not sustainable because they are contrary to the uncontested testimony Applicant gave at the hearing. With respect to the Judge's findings and conclusions concerning Guideline G, Applicant contends that his testimony established that his alcohol consumption was significantly less than stated in his signed, sworn statement (Government Exhibit 2)--and was, therefore, not of security concern. With respect to the Judge's findings and conclusions concerning Guideline E, Applicant contends that his testimony established that he did not deliberately falsify his security clearance application, but was confused by question 28. Applicant's arguments do not persuade us that the Judge erred.

The Judge's findings and conclusions with respect to the Guideline G and E allegations are sustainable. Applicant's testimony was relevant evidence, but it was not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-07292 (January 29, 2004) at p. 4 ("An Administrative Judge is not required to accept testimony merely because it is unrebutted. It would be arbitrary and capricious to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other evidence."). *See also* ISCR Case No. 99-0710 (March 19, 2001 at p. 4 and n. 9. As the trier of fact, the Judge had to consider Applicant's testimony in light of the record evidence as a whole, and Applicant's testimony did not preclude the Judge from weighing the record evidence and making the findings that he did in this case. Here, the Judge's findings were reasonably supported by record evidence and the Judge's conclusions follow rationally from the Judge's findings.

Applicant asks, in the alternative, that the Board grant him a security clearance with a warning. The Board construes that request as raising the issue of whether the Administrative Judge erred by not recommending that Applicant be granted a security clearance with a warning. As discussed earlier in this decision, the Judge's adverse findings and conclusions under Guideline E and Guideline G are sustainable. Given those sustainable findings and conclusions, it

was not arbitrary or capricious for the Judge to render an adverse security clearance decision.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. The Administrative Judge found in favor of the Applicant with respect to paragraphs 1.a, 1.b, 1.c, 1.d, 2.a, and 2.b. Those favorable findings are not at issue on appeal.