

DATE: June 3, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04931

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 October 2, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement), Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). Administrative Judge Joan Caton Anthony issued an unfavorable security clearance decision, dated December 22, 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 by finding that Applicant expressed an intention to use marijuana in the future; (2) whether the Administrative Judge's adverse conclusions under Guideline J (Criminal Conduct) are arbitrary or capricious; (3) whether the Administrative Judge erred by finding Applicant falsified his security clearance application; and (4) whether Applicant can be granted a conditional security clearance. 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 erred by finding that Applicant expressed an intention to use marijuana in the future. The Administrative Judge found that Applicant stated that he intended to continue to use marijuana in the future. On appeal, Applicant challenges that finding, asserting that: (a) he did not understand the investigator's questions and was confused and misled by the investigator; and (b) he did not mean to say that he intended to use marijuana in the future.

Applicant gave a written statement to an investigator in June 2002 in which he indicated he would use marijuana in the future "on an occasional basis with friends in social settings." In response to the SOR, Applicant admitted making that statement to the investigator, and gave an explanation about his meaning and intent when he made the statement to the investigator. When responding to the File of Relevant Material, Applicant did not make any statements or provide any additional information about his intentions concerning the use of marijuana in the future.

Considering the record as a whole, the Administrative Judge's challenged finding reflects a plausible, legally permissible interpretation of the record evidence. Applicant's appeal arguments do not demonstrate the Judge erred.

2. Whether the Administrative Judge's adverse conclusions under Guideline J (Criminal Conduct) are arbitrary or capricious. Applicant contends the Administrative Judge erred by finding that he was cited in July 1997 for possession of marijuana, asserting the record evidence shows he was cited in February 1997. Applicant asserts the erroneous finding, when viewed with other record evidence, gives a misleading impression that he committed numerous offenses in a single month. Applicant also asserts the record evidence shows that he has committed no criminal acts in the last seven years. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse conclusions

under Guideline J are arbitrary or capricious.

For purposes of this case, it is not material whether Applicant was cited in February 1997 or July 1997 for possession of marijuana. Nothing in the decision below indicates or suggests the Administrative Judge's adverse conclusions under Guideline J (Criminal Conduct) were based on whether Applicant was cited in February 1997 or July 1997 for possession of marijuana.

Although there is no evidence that Applicant was arrested, charged, convicted for any conduct he committed after 1997, that does not mean the Administrative Judge's adverse conclusions under Guideline J are arbitrary or capricious. In DOHA proceedings, a Judge can make a finding of criminal conduct even if the applicant has not been formally charged with a criminal offense by the relevant criminal justice authorities. *See, e.g.*, ISCR Case No. 00-0713 (February 15, 2002) at p. 5. The Judge found Applicant deliberately falsified a security clearance application in June 2001, and concluded that Applicant's falsification was a violation of 18 U.S.C. 1001, a federal felony. Falsification of a security clearance application is a violation of 18 U.S.C. 1001. *See United States v. Yermian*, 468 U.S. 63 (1984). Accordingly, the Judge had a rational basis for concluding that Applicant engaged in criminal conduct after 1997. Moreover, the Judge had a rational basis for concluding that the record evidence demonstrated a pattern of criminal conduct by Applicant, not just an isolated incident of criminal conduct.

In view of the foregoing, the Board concludes Applicant has failed to demonstrate the Administrative Judge's conclusion under Guideline J are arbitrary or capricious.

3. Whether the Administrative Judge erred by finding Applicant falsified his security clearance application. The Administrative Judge found Applicant falsified a security clearance application in June 2001. On appeal, Applicant asserts he "was absent-minded" when he filled out the security clearance application. The Board construes Applicant's statement as raising the issue of whether the Judge erred by finding Applicant falsified a security clearance application.

Applicant's claim of error has mixed merit. In a written statement Applicant gave to an investigator in June 2002, he admitted he falsified the security clearance application by not disclosing all of his drug use. In response to the SOR, Applicant admitted that he falsified the security clearance application with respect to his drug abuse history. As to the SOR allegation that Applicant falsified the security clearance application by not disclosing three delinquent accounts worth approximately \$3,980, Applicant did not make any admissions of falsification. Given the sparse record evidence in the case, the Judge's finding that Applicant falsified his security clearance application by failing to disclose the three delinquent accounts is problematic. However, the Board need not decide whether there is sufficient record evidence to sustain the Judge's finding that Applicant falsified the security clearance application by failing to disclose the three delinquent accounts. Even if the Board were to assume, solely for purposes of deciding this appeal, that there is not sufficient record evidence to support that finding, the factual error would be harmless. Applicant's admissions provide an ample basis for the Judge's finding that Applicant falsified the security clearance application in an effort to conceal the full extent of his drug abuse.

4. Whether Applicant can be granted a conditional security clearance. Applicant asks that his security clearance be reinstated, volunteers to take random drug tests, and says he will pay his delinquent debts by the end of 2005. The Board construes those statements as raising the issue of whether Applicant can be granted a conditional security clearance. Under the Directive, there is no authority to grant a conditional security clearance. *See, e.g.*, ISCR Case No. 01-21274 (January 8, 2004) at p. 3.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board