

DATE: September 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05007

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

John F. Mardula, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated November 10, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct). Administrative Judge Roger E. Willmeth issued a favorable security clearance decision dated April 26, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 Applicant did not misappropriate company computers in December 2001; and (2) in the alternative, even if the Board concludes the first claim of error is not persuasive, whether the Administrative Judge erred because the record evidence shows Applicant lacked judgment because he did not act to resolve questions in his own mind about whether he had misappropriated company computers in December 2001. 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 Applicant did not misappropriate company computers in December 2001. The Administrative Judge concluded that Applicant had presented credible evidence that rebutted and refuted the record evidence presented by Department Counsel in support of the SOR allegation that Applicant had misappropriated company computers in December 2001, and found that Applicant did not in fact misappropriate company computers. On appeal, Department Counsel challenges that finding.

Given Applicant's answer to the SOR and the Government Exhibits, Department Counsel met its burden of presenting a sufficient case in support of the SOR allegation such that the burden of persuasion shifted to Applicant. Under Directive, Additional Procedural Guidance, Item E3.1.15, Applicant had the burden to present credible evidence in refutation, explanation, extenuation or mitigation of his conduct. Considering the totality of the record evidence in this case (including testimony by third parties that corroborated Applicant's explanation about the circumstances surrounding his handling of the company computers in December 2001), it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant presented credible evidence of refutation and explanation that satisfied his burden of persuasion under Item E3.1.15. The Judge's finding that Applicant did not misappropriate company computers is sustainable under Directive, Additional Procedural Guidance, Item E3.1.32.1. Department Counsel's arguments to the contrary are not persuasive. *See, e.g.*, ISCR Case No. 02-23133 (June 9, 2004) at p. 5 (Department Counsel's establishment of a *prima facie* case does not foreclose the possibility that an applicant could present credible evidence that rebuts or negates the evidence presented against the applicant).

2. In the alternative, even if the Board concludes the first claim of error is not persuasive, whether the Administrative Judge erred because the record evidence shows Applicant lacked judgment because he did not act to resolve questions in

his own mind about whether he had misappropriated company computers in December 2001. Department Counsel contends, in the alternative, that the Board should conclude the Administrative Judge erred even if it sustains his finding that Applicant did not misappropriate company computers in December 2001. In support of this contention, Department Counsel argues that the record evidence shows that Applicant lacked judgment because he did not act to resolve questions in his own mind about whether he had misappropriated company computers, and that this lack of judgment raised sufficient security concerns under Guideline E to preclude a favorable security clearance decision.

Given the totality of the record evidence in this case, Department Counsel's arguments fail to persuade the Board that the Administrative Judge's favorable conclusions about Applicant's judgment are arbitrary, capricious, or contrary to law. Applicant persuasively argues that the Judge's conclusions reflect a reasonable interpretation of the totality of the record evidence (which included third-party corroboration of Applicant's testimony) about the facts and circumstances surrounding Applicant's handling of company computers in December 2001

Conclusion

Department Counsel has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's favorable 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board