

DATE: December 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05647

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 February 13, 2004, 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), Guideline H (Drug Involvement), and Guideline J (Criminal Conduct). Administrative Judge Michael J. Breslin issued an unfavorable security clearance decision, dated July 28, 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 Applicant was denied due process because he did not receive assistance from DoD personnel and better information about the hearing process; (2) whether the Administrative Judge ignored relevant information; (3) whether the Administrative Judge's findings and conclusions under Guideline E are arbitrary, capricious, or contrary to law; (4) whether the Administrative Judge's findings and conclusions under Guideline J are arbitrary, capricious, or contrary to law; and (5) whether the Administrative Judge's findings and conclusions under Guideline H 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 Issues ⁽¹⁾

1. Whether Applicant was denied due process because he did not receive assistance from DoD personnel and better information about the hearing process. The Board construes Applicant's brief as raising the issue of whether he was denied due process because: (a) various DoD personnel did not provide him with advice and guidance on how best to prepare his case for presentation to the Administrative Judge; (b) he was not adequately informed that DOHA proceedings were adversarial in nature; and (c) without such advice, guidance, and information, he was not able to adequately prepare his case for consideration by the Judge.

The Board has reviewed the procedural history of this case, and concludes Applicant was provided with fair and adequate notice of: (i) the adversarial nature of DOHA proceedings; (ii) his rights and obligations under the Directive; and (iii) his right to retain legal counsel at his own expense if he wanted. Nothing in Executive Order 10865, the Directive, or generally applicable principles of federal administrative law entitles him to expect or to receive the assistance of DoD personnel as surrogate advocates for him.

Having decided to represent himself in the proceedings below, Applicant cannot fairly complain that he did not do a better job to prepare and present his case for the Administrative Judge to consider. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3.

2. Whether the Administrative Judge ignored relevant information. Applicant contends the Administrative Judge ignored various portions of the record evidence that he asserts is relevant to his case. This contention is not persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to rebut or overcome that presumption. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5.

3. Whether the Administrative Judge's findings and conclusions under Guideline E are arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant falsified material facts about his drug use: (a) on security clearance applications submitted in 1981, 1984, 1988, 1993, and 2000; and (b) during an interview with an investigator in 1994. The Judge concluded Applicant's multiple falsifications warranted adverse formal findings under Guideline E (Personal Conduct).

On appeal, Applicant challenges the Administrative Judge's findings and conclusions under Guideline E. In support of that challenge, Applicant asserts that: (i) he tried to fully disclose his drug use; (ii) he did not attempt to minimize his drug use; (iii) he made good faith disclosures to the investigator; (iv) any mistakes he made in disclosing his drug use and his January 2000 arrest were not intentional; (v) he placed himself in considerable jeopardy by coming clean about his drug use; (vi) the Judge should have concluded his conduct was mitigated under Personal Conduct Mitigating Conditions 2 and 5; and (vii) the Judge's adverse conclusions are not consistent with the whole person concept and the favorable record evidence concerning Applicant's lifestyle and employment history.

Considering the admissions in Applicant's answer to the SOR and the record evidence below, the Administrative Judge had an ample basis for finding Applicant engaged in multiple acts of deliberate falsification concerning his drug use. Applicant's arguments to the contrary lack merit.

Given the record evidence of Applicant's long history of deliberate falsifications about his drug use, it was not arbitrary or capricious for the Administrative Judge to conclude Applicant's belated disclosures in 2002 about his drug use history did not extenuate or mitigate his multiple acts of falsification, which extended over a period of many years. Applicant's argument to the contrary is without merit.

Given the record evidence of Applicant's multiple acts of falsification, it is frivolous for Applicant to claim the Administrative Judge should have applied Personal Conduct Mitigating Condition 2.⁽²⁾ A Judge is not required to apply a mitigating condition that has no reasonable support in the record evidence. The Judge's explanation for not applying this mitigating condition is a reasonable one that is supported by the record evidence in this case.

The Board need not decide whether Applicant's argument concerning Personal Conduct Mitigating Condition 5⁽³⁾ has merit. Even if the Board were to conclude that Applicant's argument had merit, it would not demonstrate harmful error. Considering the Administrative Judge's decision in its entirety, there is not a significant chance that application of Personal Conduct Mitigating Condition 5 would have resulted in a different decision.⁽⁴⁾ The security concerns raised by Applicant's long history of falsification are not negated or significantly diminished merely because Applicant cannot now be threatened by another person disclosing Applicant's drug use history to the federal government. The absence of vulnerability to blackmail or coercion does not preclude a Judge from considering whether an applicant's conduct or circumstances raise security reasons unrelated to such a vulnerability. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 10 n.39. The poor judgment and dishonesty demonstrated by Applicant's multiple acts of falsification, standing alone, provide a sufficient basis for the Judge's adverse conclusions about Applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsification).

As discussed earlier in this decision, Applicant has failed to rebut the presumption that the Administrative Judge considered all the record evidence. The Judge had to consider the record as a whole, decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and reach a rational conclusion as to whether Applicant had presented evidence sufficient to overcome the security concerns raised by his conduct and warrant a favorable security clearance decision. *See, e.g.*, ISCR Case No. 02-00578 (April 6, 2004) at p. 3. Considering the Judge's decision in light of the record evidence in this case (including the favorable evidence cited by Applicant on appeal), the Judge's conclusions under Guideline E are consistent with a whole person analysis and do not reflect an arbitrary or capricious weighing of the record evidence as a whole.

4. Whether the Administrative Judge's findings and conclusions under Guideline J are arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant's multiple acts of falsification constituted violations of 18 U.S.C. §1001 and warranted adverse conclusions under Guideline J (Criminal Conduct). Applicant contends the Judge erred because: (a) his last criminal conduct was not recent; (b) his last false statement occurred in 1994; (c) his last drug use while holding a security clearance was not recent because it occurred in 1997; (d) the record evidence shows his criminal conduct is not likely to recur; (e) the Judge should have concluded he had successfully rehabilitated himself with respect to his false statements; and (f) the Judge should have applied Criminal Conduct Mitigating Conditions 1, 2, 3, 4, and 6.

As discussed earlier in this decision, the Administrative Judge's findings of falsification are sustainable. Given those findings of falsification, the Judge properly concluded they constituted violations of 18 U.S.C. §1001, a federal felony. Applicant's claim that his last false statement occurred in 1994 lacks merit.

Applicant's argument about when he last used drugs while holding a security clearance is irrelevant to the Administrative Judge's findings and conclusions under Guideline J.

Given the record evidence of Applicant's multiple falsifications over a period of many years, it was reasonable for the Administrative Judge to decide that application of Criminal Conduct Mitigating Conditions 1⁽⁵⁾ and 2⁽⁶⁾ was not warranted. Furthermore, considering the record as a whole, the Judge was not compelled, as a matter of law or logic, to conclude Applicant had demonstrated his criminal conduct (*i.e.*, multiple falsifications) was not likely to recur, or that Applicant had successfully rehabilitated himself with respect to his multiple false statements.

There is no record evidence that supports Applicant's contention that the Administrative Judge should have applied Criminal Conduct Mitigating Condition 3.⁽⁷⁾ As noted earlier in this decision, a Judge is not required to apply a mitigating condition that has no reasonable support in the record evidence.

Applicant does not identify record evidence that would warrant a conclusion that the Administrative Judge should have applied Criminal Conduct Mitigating Conditions 4⁽⁸⁾ or 6.⁽⁹⁾ Applicant's arguments to the contrary are wholly unpersuasive. Given the record evidence in this case, it was reasonable for the Judge to conclude these two mitigating conditions were not applicable.

5. Whether the Administrative Judge's findings and conclusions under Guideline H are arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant's history of marijuana use, which included use while he had a security clearance, warranted adverse conclusions under Guideline H (Drug Involvement). Applicant contends the Judge erred because: (a) the Judge should have concluded his drug use was an aberration in his life; (b) his last drug use occurred in 2000; (c) his last drug use while holding a security clearance occurred in 1997; (d) he has shown he is now drug-free; (e) the Judge should have accepted his statements about not intending to use drugs in the future; and (f) the Judge should have concluded his history of marijuana was mitigated by Drug Involvement Mitigating Conditions 1, 2, 3, and 4.

Given the record evidence concerning Applicant's history of marijuana use, it is untenable for Applicant to contend the Administrative Judge should have concluded his marijuana use was aberrational in nature and warranted the application of Drug Involvement Mitigating Condition 2.⁽¹⁰⁾

There is no rule of law that requires an Administrative Judge to accept at face value the testimony or written statements of an applicant or a witness, or to accept such testimony or written statements in isolation from other record evidence. *See, e.g.*, ISCR Case No. 01-07292 (January 29, 2004) at p. 4. Given the Judge's findings about Applicant's history of marijuana use and Applicant's multiple acts of falsification concerning his marijuana use, the Judge had a rational basis for not accepting at face value Applicant's claims that he did not intend to use marijuana again and not applying Drug Involvement Mitigating Condition 3.⁽¹¹⁾ In light of Applicant's multiple acts of falsification, it was not arbitrary or capricious for the Judge to have doubts about Applicant's statements about his intentions concerning marijuana use.

Considering the record evidence in this case, there is no reasonable basis for Applicant's contention that the

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Administrative Judge should have applied Drug Involvement Mitigating Condition 4. The record evidence that Applicant went for counseling after a January 2000 arrest for spousal abuse and was told to stop using marijuana falls far short of satisfying that mitigating condition.

The Board need not decide whether the Administrative Judge erred by not applying Drug Involvement Mitigating Condition 1. ⁽¹³⁾ Even if the Board were to conclude the Judge should have applied that mitigating condition, there is not a significant chance that its application would result in a favorable security clearance decision in this case. ⁽¹⁴⁾ Independent of the Judge's findings and conclusions about Applicant's history of marijuana use, the Judge's findings and conclusions under Guideline E and Guideline J are sufficient to support his unfavorable security clearance decision.

Conclusion

With the exception of two possible errors that would be harmless under the particular facts of this case, Applicant has failed to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Because harmless errors do not warrant remand or reversal, the Board affirms the Administrative Judge's security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Under the Directive, the Board is required to address material issues raised on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Applicant's appeal brief contains numerous statements, assertions, and claims, many of which do not raise any material appeal issue. The Board will address only the material issues raised by Applicant's brief.

2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).

3. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.5).

4. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (error is harmless if there is not a significant chance that, but for the error, the Administrative Judge would have reached a different result).

5. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).

6. "The crime was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.2).
7. "The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.3).
8. "The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.4).
9. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).
10. "The drug involvement was an isolated or aberrational event" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.2).
11. "A demonstrate intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).
12. "Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.4).
13. "The drug involvement was not recent" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.1).
14. *See* footnote 4.