

DATE: January 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06016

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated April 1, 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) and Guideline J (Criminal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated October 15, 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 issue has been raised on appeal: whether the Administrative Judge erred by not concluding that Applicant's falsification of a security clearance questionnaire was mitigated. 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 Issue

The Administrative Judge found that Applicant falsified a security clearance questionnaire in 2002 by failing to disclosing material facts about his criminal record. The Judge concluded that Applicant's falsification constituted a violation of 18 U.S.C. §1001, a felony. The Judge entered formal findings against Applicant under Guideline E (Personal Conduct) based on his findings and conclusions about Applicant's falsification. The Judge made findings about Applicant's past criminal conduct, and concluded that Applicant's past criminal conduct was mitigated by the passage of time without subsequent convictions. However, the Judge concluded that Applicant's violation of 10 U.S.C. §1001 was too serious and recent to warrant a favorable formal finding under Guideline J (Criminal Conduct).

On appeal, Applicant does not challenge the Administrative Judge's finding that he falsified a security clearance questionnaire. However, Applicant asserts that: (a) he has had a security clearance for 19 years without incident; (b) he has worked continuously in the defense industry since 1992; (c) he testified truthfully at the hearing; (d) he was embarrassed and remorseful about his falsification; and (e) Department Counsel failed to show a connection between his falsification and any compromise of national security. The Board construes Applicant's assertions as raising the issue of whether the Administrative Judge erred by not concluding that Applicant had demonstrated mitigation of his falsification sufficient to warrant a favorable security clearance decision.

The federal government does not have to wait until an applicant mishandles classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Accordingly, the absence of any security violations by Applicant did not preclude the Administrative Judge from considering whether Applicant's falsification of a security clearance application warranted an unfavorable security clearance decision. Moreover, although an applicant's honesty and candor at a hearing are relevant to a Judge's assessment of the credibility of the applicant's testimony, a favorable credibility determination does not preclude the Judge from considering the security implications of an applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 02-30603 (February 25, 2004) at p. 4.

Security clearance decisions are not limited to consideration of an applicant's job performance or conduct during duty hours. *See, e.g.*, ISCR Case No. 03-11231 (June 4, 2004) at p. 3. Moreover, Applicant's longevity in the defense industry is not material or relevant to an evaluation of the security implications of his falsification of a security clearance application.

Department Counsel does not have to present direct or objective evidence of a nexus between an applicant's conduct or circumstances and an unfavorable security clearance decision. All that is required is proof of conduct or circumstances that raise questions about an applicant's judgment, reliability, or trustworthiness. *See, e.g.*, ISCR Case No. 01-25941 (May 7, 2004) at p. 5. Falsification raises serious questions about a person's judgment, reliability and trustworthiness and clearly is relevant to assessing an applicant's security eligibility. *See, e.g.*, ISCR Case No.02-12329 (December 18, 2003) at p. 4 (discussing negative security implications of falsification). The Administrative Judge's unchallenged finding of falsification provided a rational basis for the Judge to conclude Department Counsel had met its burden of persuasion under the Directive.

Given Applicant's falsification, the burden shifted to him to present credible evidence showing extenuation or mitigation sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Considering the record as a whole, Applicant has failed to demonstrate it was arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant had not met his burden of persuasion.

Conclusion

Because Applicant has not demonstrated error below, the Board affirms the Administrative Judge's decision.

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