

DATE: October 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08073

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 22, 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). Administrative Judge Thomas M. Crean issued an unfavorable security clearance decision, dated April 7, 2005.

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 considered evidence which was too old to be a legitimate part of the adjudicative record; (2) whether the Administrative Judge erred in his findings of fact; (3) whether the Administrative Judge considered "the full investigation" including interviews by character references; (4) whether certain actions by Department Counsel denied Applicant a fair and impartial hearing; and (5) whether the Administrative Judge's decision was 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 considered evidence which was too old to be a legitimate part of the adjudicative record. The Administrative Judge admitted and considered record evidence which was pertinent to SOR allegations 1.a (regarding an August 1994 Non-Judicial Punishment for false official statement) and 1.b (regarding revocation of Applicant's Top Secret clearance in 1995). Applicant argues that this evidence was not properly before the Judge because (1) the scope of his investigation and adjudication should not have gone back further than his last investigation in 1998 and (2) the scope of his investigation should not have included information that was more than 10 years old.

Applicant's first argument is unpersuasive. The Board has previously held that there is no right to a security clearance, nor is there a presumption in favor of continuing or granting a security clearance. *See, e.g.*, ISCR Case No. 02-00318 (February 25, 2004) at p. 8. The Board has also noted, citing federal cases, that the government cannot be precluded from protecting classified information under the doctrine of equitable estoppel. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3. Moreover, the government has the right to reconsider the security significance of past conduct in light of more recent conduct having negative security significance. *See, e.g.*, DISCR Case No. 91-0775 (August 25, 1992) at p. 3 and ISCR Case No. 02-17609 (May 19, 2004) at pp. 3-4.

Applicant's second argument is unpersuasive. Applicant cites "the rulings of the Federal Court in Norfolk Virginia, against v. Department of Homeland Security" as authority for his proposition that there is a time limit (in this case 10 years) on "data" that can be used against a person. Given that Applicant's citation was erroneous on its face, the Board was unable to locate any case that resembled Applicant's cited authority in form or content. The Board is unaware of any ruling of law that excludes an administrative judge's consideration of evidence that is more than 10 years old. Furthermore, the contested evidence was not 10 years old when Applicant's investigation commenced (presumably the

date of Applicant's SF-86, January 29, 2002) nor was it 10 years old as late as the issuance of the SOR (June 22, 2004).

(2) Whether the Administrative Judge erred in his findings of fact. Applicant makes the following challenges regarding the Administrative Judge's findings of fact: (a) the Judge erred in finding that Applicant was dishonest in 1998 and 2002 when providing information to the government concerning his history of problems with alcohol; and (b) the Judge discounted favorable evidence provided by Applicant and emphasized only the negative evidence.⁽¹⁾ The Board concludes that Applicant has failed to establish error on the part of the Administrative Judge. The Board reads the Judge's findings regarding Applicant's history of omissions and false statements as a fair interpretation of the record evidence. Additionally, Applicant has not met his burden of demonstrating that the Judge failed to consider record evidence or that he weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Applicant's ability to interpret the record differently does not demonstrate that the Judge erred.

(3) Whether the Administrative Judge considered "the full investigation" including interviews by character references. Applicant refers to items he alleges were part of the investigation of his case, and argues that the Judge failed to review those items. Applicant's argument is based on a mistaken premise that the Judge could properly consider matters outside the record evidence. The Judge only had access to the evidence submitted by the parties at the hearing. Item 6 of the Prehearing Guidance for DOHA Industrial Security Clearance Hearings notified Applicant that "Neither party should attempt to furnish any information relating to the case without giving the other party the opportunity to be present. Such actions constitute what are known as prohibited *ex parte* communications. Also, copies of any proposed exhibits must not be submitted to the Administrative Judge prior to the hearing. Any documents to be offered as evidence should be presented at the hearing itself during presentation of that party's case. . ." At the hearing itself the Judge said "I have before me both the Statement of Reasons and the applicant's answer. If either party wishes me to consider any other evidence in reaching this decision, it must be presented at this hearing." In this case neither party presented to the Judge the items from the investigation cited by Applicant on appeal. Applicant's argument mistakenly assumes that the Judge had the cited evidence before him. The Judge could not consider evidence that neither party presented to him during the proceedings.

(4) Whether certain actions by Department Counsel denied Applicant a fair and impartial hearing. On appeal, Applicant asserts: (a) at the hearing, Department Counsel introduced into evidence an evaluation by a Navy psychiatrist who had never examined Applicant and Applicant was not allowed to examine this document until his hearing; (b) Department Counsel failed to provide full and accurate evidence in this case; and (c) Department Counsel "stumbled over assertions in this case and seemed not to have a grasp on the situation." The Board construes these arguments as raising the issue of whether certain actions by Department Counsel denied Applicant a fair and impartial hearing.

Regarding the Navy psychiatrist's evaluation, Department Counsel offered it during the hearing as rebuttal evidence, and apparently had not shown the document to Applicant prior to the hearing. Applicant noted on the record that he had never seen the document before but the objection he subsequently raised to the admission of the document was based on his perception that it contained inaccuracies, rather than lack of prior notice. After a review of the record evidence and Department Counsel's representations as to why the document was being offered, the Board concludes that it was proper rebuttal evidence and was properly admitted. Its admission did not deprive Applicant of his right to a fair and impartial hearing. Concerning Applicant's contention that Department Counsel failed to provide full and accurate evidence in this case, a review of the record indicates that Applicant had an opportunity at the hearing to (i) object to any evidence proffered by Department Counsel; (ii) submit any and all evidence in his possession that refuted evidence submitted by Department Counsel or that otherwise had a bearing on the case; and (iii) testify and argue concerning factual errors in the evidence submitted by Department Counsel. Applicant again fails to establish any error or irregularity in the proceedings that prejudiced his right to a fair and impartial hearing. Lastly, Applicant fails to articulate how Department Counsel's stumbling over assertions or otherwise not having a "grasp on the situation" deprived him of a fair and impartial hearing. Applicant fails to articulate how any actions of Department Counsel affected the Judge's conduct of the hearing or the Judge's rendering of a fair decision based on evidence of record. Moreover, the Board does not have supervisory authority over Department Counsel.

(5) Whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law. Applicant's appeal brief read as a whole raises the issue of whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law. The Board has already concluded that the Administrative Judge's findings of fact were sustainable given the record

evidence. The Judge's adverse conclusions regarding Applicant's security eligibility followed rationally from his findings of fact. Therefore the Judge's decision was not arbitrary, capricious or contrary to law.

Conclusion

The Board affirms the Administrative Judge's April 7, 2005 decision because Applicant has failed to meet his burden of demonstrating error in that decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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

1. Applicant also asserts in his brief that Department Counsel erroneously claimed that his Navy security clearance was revoked in May, 1995 and he lost his clearance due to problems with alcohol. Applicant has failed to articulate how these claimed errors on the part of Department Counsel impacted upon the Administrative Judge's findings of fact. Moreover, the Judge made no specific finding as to when Applicant lost his military clearance, and the Judge cited alcohol as one of the reasons Applicant lost the clearance, a finding that is supported by the record evidence.