

DATE: September 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 03-08475

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

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 May 6, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Michael J. Breslin issued an unfavorable security clearance decision, dated March 2, 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 issue has been raised on appeal: whether the Administrative Judge's adverse security decision is arbitrary, capricious, or contrary to law.

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 ⁽¹⁾

Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. The conduct alleged in the SOR under Guideline E (Personal Conduct) included falsification (for failure to answer in his security clearance application that he had been arrested for an alcohol-related offense) and a series of traffic violations. The Judge found against Applicant on Guideline E. Applicant argues that he did not intentionally falsify his security clearance application. He argues that he answered an investigator and the Administrative Judge truthfully. He cites an ISCR decision by another Administrative Judge in which the Judge accepted an applicant's testimony on falsification as truthful. He restates character evidence he submitted at the hearing.

At the hearing, Applicant testified as to why his omission of an alcohol-related offense from his security clearance application was unintentional. Applicant's testimony was relevant and material evidence, but the Administrative Judge was not bound by it. Rather, the Judge had to consider that evidence in light of the record as a whole. In this case, the Judge made a finding adverse to Applicant on falsification. Considering the record as a whole, the Judge's finding of falsification is sustainable.

In his Brief, Applicant cites a Hearing Office decision, ISCR Case No. 02-13427 (July 30, 2004), correctly noting that a Hearing Office decision is not precedent in other cases. In that decision, the Judge stated that he concluded, based on the applicant's testimony, that the applicant omitted information from his security clearance application inadvertently. The Judge's conclusion in that case involved a credibility determination on the part of the Judge. The Board gives deference to an Administrative Judge's credibility determinations. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. The fact that one Judge made a credibility determination in favor of an applicant in one ISCR decision, while another Judge made a negative credibility determination in another decision, is not indicative of error in either case. Because of the case-specific nature of credibility determinations, a credibility determination in one case has no precedential value in other cases.

Applicant had explained the reasons for the series of traffic violations in SOR paragraphs 2.b through 2.h. The Administrative Judge stated that while each individual offense might be minor, the pattern of offenses suggested an unwillingness to comply with rules and regulations. The government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n. 6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union Local 473 v. cElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *cert. denied*, 367 U.S. 886 (1961). Considering the record as a whole, it was not arbitrary or capricious for the Judge to consider the totality of Applicant's conduct rather than consider each incident separately. *See, e.g.*, ISCR Case No. 02-01093 (December 11, 2003) at p. 4.

Regarding Applicant's character evidence, there is a presumption that the Judge considered all the record evidence. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. The fact that an applicant would have weighed the evidence differently is not indicative of error by the Judge.

In his decision, the Judge found that Applicant had failed to mitigate security concerns under Guideline E, specifically Mitigating Conditions 2 [\(2\)](#)

and 3. [\(3\)](#)

The Judge's conclusions regarding Mitigating Conditions 2 and 3 reflect a sustainable interpretation of the record, and Applicant's arguments to the contrary are not persuasive.

The Administrative Judge gave reasonable explanations for his conclusions about Applicant's personal conduct, including rational connections between the facts found and the decision made. Applicant has not shown that the Judge's conclusions were arbitrary, capricious, or contrary to law.

Conclusion

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

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

1. Since the Administrative Judge found in Applicant's favor as to Guideline G (Alcohol Consumption), the Board need not discuss that guideline.
2. Directive, Adjudicative Guidelines, Item E2.A5.1.3.2. ("The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.")
3. Directive, Adjudicative Guidelines, Item E2.A5.1.3.3. ("The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.")