

DATE: July 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08444

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 May 3, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption). Administrative Judge Michael H. Leonard issued an unfavorable security clearance decision, dated February 24, 2005.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge weighed the evidence properly; (2) whether the Administrative Judge erred in his findings of fact, and (3) whether the Administrative Judge erred in his application of several Mitigating Conditions under Guideline G and Guideline J. For the reasons set forth below, 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 weighed the evidence properly. Applicant argues on appeal that the Administrative Judge gave too much weight to three incidents in 2001 and 2002 in which Applicant was arrested. Applicant argues that the fact that some of the charges were later "dropped, reduced, nolle prossed, or dismissed and expunged" should have diminished the significance of those arrests in the Judge's analysis. The Board does not find Applicant's argument persuasive.

It is well settled that the Administrative Judge is responsible for weighing the evidence of record, both favorable and unfavorable, before making his ultimate security clearance determination. Absent a showing that the Judge did so in a manner that was arbitrary, capricious or contrary to law, the Board will not disturb the Judge's weighing of the evidence. *See, e.g.*, ISCR Case No. 02-06723 (September 15, 2003) at p. 4. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious or contrary to law.

(2) Whether the Administrative Judge erred in his findings of fact. Applicant argues that the Administrative Judge erred in his findings of fact regarding the time frame for Applicant's consumption of 12 to 16 beers leading up to Applicant's arrest for assault and battery and drunk in public in September 2002. Applicant's argument does not demonstrate that the Judge's finding was erroneous. The Judge's challenged findings are plausible and sustainable in light of the record evidence. Furthermore, even if the Judge's findings had conformed to Applicant's interpretation, it is unlikely that the Judge's conclusions regarding the incident would have been substantially different.

(3) Whether the Administrative Judge erred in his application of several Mitigating Conditions under Guideline G and Guideline J. Applicant argues on appeal that the Administrative Judge failed to apply several Mitigating Conditions (MC) under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) which Applicant believes were

pertinent to his case. Specifically, Applicant argues the Judge should have applied Guideline G MC 1⁽¹⁾, MC 2⁽²⁾ and C 3⁽³⁾ and Guideline J MC 1⁽⁴⁾, MC 2⁽⁵⁾, MC 5⁽⁶⁾ and MC 6⁽⁷⁾.

Considering the record as a whole, the Board concludes that the record evidence does not support the application of Guideline G MC1 and MC 2 nor does it support the application of Guideline J MC 1, MC 2 and MC5.

The Administrative Judge did give Applicant some benefit from Guideline G MC 3 and Guideline J MC 6. However, given the totality of the facts and circumstances the Judge concluded that Applicant's mitigation was insufficient to overcome the government's legitimate security concerns raised by Applicant's disqualifying conduct. Applicant's arguments on appeal do not demonstrate that the Judge's conclusions were erroneous.

Applicant also argues that the Administrative Judge's Formal Findings against Applicant were in error. In light of the Board's earlier conclusions sustaining the Judge's findings of fact and his conclusions, there is no basis to conclude that the Judge's Formal Findings against Applicant were in error.

Conclusions

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's decision. Therefore, the Judge's February 24, 2005 decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The alcohol related incidents do not indicate a pattern" Directive, Adjudicative Guidelines, Item E2.A7.1.3.1.
2. "The problem occurred a number of years ago and there is no indication of a recent problem" Directive, Adjudicative Guidelines, Item E2.A7.1.3.2.
3. "Positive changes in behavior supportive of sobriety" Directive, Adjudicative Guidelines, Item E2.A7.1.3.3.
4. "The criminal behavior was not recent" Directive, Adjudicative Guidelines, Item E2.A10.1.3.1.
5. "The crime was an isolated incident" Directive, Adjudicative Guidelines, Item E2.A10.1.3.2.
6. "Acquittal" Directive, Adjudicative Guidelines, Item E2.A10.1.3.5.
7. "There is clear evidence of successful rehabilitation" Directive, Adjudicative Guidelines, Item E2.A10.1.3.6.