

DATE: September 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08625

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated April 27, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement). At a later date, the SOR was amended to include Guideline G (Alcohol Consumption). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated April 6, 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 are raised on appeal: (1) whether the Administrative Judge erred by basing his unfavorable decision on conduct (dishonesty) and an Adjudicative Guideline (Guideline E) which were not alleged in the SOR; and (2) whether the Administrative Judge erred by finding Applicant was not fully candid with his character witnesses. For the reasons that follow, the Board reverses 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 the Administrative Judge erred by basing his unfavorable decision on conduct (dishonesty) and an Adjudicative Guideline (Guideline E) which were not alleged in the SOR. Applicant correctly notes that the Administrative Judge applied Guideline H (Drug Involvement) Mitigating Condition 1 and itigating Condition 3 in Applicant's favor. ⁽²⁾ Applicant challenges the remainder of the Administrative Judge's conclusions regarding Guideline H which address Applicant's honesty with his character witnesses (including his wife), his social worker, and a Defense Security Service (DSS) Agent. Applicant argues that the Judge's analysis amounts to an adverse conclusion under Guideline E (Personal Conduct) which was not alleged in the SOR. Applicant's argument is persuasive.

The Board reads the Judge's analysis of Applicant's drug involvement as concluding that Applicant has stopped using drugs, that he has demonstrated his intent not use them in the future, and that his prior drug use was not recent. Nevertheless, the Judge went on to conclude that Applicant should not be entrusted with secrets because of his dishonesty with the DSS Agent, his social worker, his wife and his other witnesses. The Judge's discussion of Applicant's lack of honesty and trustworthiness spans three paragraphs of his conclusions about Applicant's drug involvement and thus is not merely *obiter dicta* nor an isolated comment. The Board construes the Judge's conclusion as relying on conduct not charged, especially when considered against the Judge's decision that two Guideline H mitigating conditions are applicable. Issues involving lack of candor, dishonesty and untrustworthiness, especially in the context of a statement to a DSS Agent, are normally and properly raised under Guideline E (Personal Conduct). Guideline E was not cited in the SOR. Although the SOR was amended on the government's motion to include Guideline G, the amendment did not include Guideline E. The Directive permits the Judge or either of the parties to move to amend the SOR to conform to the evidence or for other good cause. *See* Directive, Additional Procedural Guidance, Item E3.1.17. Without such an amendment, it was not permissible to render an unfavorable decision relying on Guideline E or the

conduct normally covered by that Guideline. *See* Directive, Additional Procedural Guidance, Item E3.1.3 ("An unfavorable clearance decision shall not be made unless the applicant has been provided with a written SOR that shall be as detailed and comprehensive as the national security permits. . .").

Applicant has demonstrated harmful error warranting reversal.

2. Whether the Administrative Judge erred by finding Applicant was not fully candid with his character witnesses.

Discussion of Applicant's second issue is rendered superfluous in light of the Board's resolution of the first issue.

Conclusion

Applicant has met his burden on appeal of demonstrating reversible error in the Administrative Judge's April 6, 2005 decision. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Judge's decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic:

I agree with my colleagues' conclusion that the Administrative Judge's decision should be reversed.

There is no merit to Applicant's argument that the Administrative Judge could not consider his credibility or his candor with other people unless there were specific SOR allegations challenging his credibility or his candor with other people. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 4. The problem with the Judge's decision is not that the Judge made a credibility determination about Applicant or reached a conclusion about Applicant's candor with other people about his drug use. Rather, the problem with the Judge's decision is that he made findings and reached conclusions favorable to Applicant under Guideline G (Alcohol Consumption) and Guideline H (Drug Involvement), then proceeded to use his adverse conclusions about Applicant's credibility and candor with other people to reach an unfavorable decision based on conduct not alleged in the SOR. [\(3\)](#)

My colleagues correctly note that the Directive prohibits an unfavorable decision unless an applicant receives a written SOR that places the applicant on adequate notice of the grounds for the proposed denial or revocation of access to classified information. Apart from the right to receive adequate notice of the allegations being made, an applicant also has the right to a reasonable opportunity to respond to the SOR allegations, the right to challenge or rebut the evidence presented by Department Counsel in support of the SOR allegations, and the right to present evidence on his or her behalf for consideration by the Administrative Judge. There is a significant difference between: (1) using credibility determinations and conclusions about an applicant's candor (or lack thereof) to make findings of fact and reach conclusions about conduct alleged in an SOR, and an applicant's claims of reform and rehabilitation concerning conduct alleged in an SOR, and (2) using credibility determinations and conclusions about an applicant's candor (or lack thereof) to reach an unfavorable security clearance decision based on conduct not alleged in an SOR. Having made findings and reached conclusions favorable to Applicant with respect to the Guideline G (Alcohol Consumption) and Guideline H

(Drug Involvement) allegations in the SOR, the Judge acted in a manner that is arbitrary, capricious, and contrary to the Directive when he based his unfavorable decision on conduct not alleged in the SOR.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Administrative Judge made favorable formal findings under Guideline G. Those findings are not at issue on appeal.
2. In his decision, the Administrative Judge stated the following: "The negative hair screens strongly indicate he has not abused any controlled substance since August 2002, and his and his wife's testimonies provide a strong indication he will not resort to drug abuse in the future. Accordingly, Applicant is entitled to application of MC1: *The drug involvement is not recent*; and MC3: *A demonstrated intent not to abuse drugs in the future*." Decision at p. 7.
3. My colleagues correctly note that issues of dishonesty, lack of candor, and untrustworthiness are often alleged under Guideline E (Personal Conduct). However, I can envision situations where such issues could be reasonably alleged under Guidelines other than Guideline E. The absence of any reference to Guideline E in the SOR is not critical in this case. Rather, it is the absence of any allegation in the SOR that Applicant engaged in the conduct that forms the basis of the Judge's unfavorable decision.