

DATE: July 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09485

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., 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 23, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline D (Sexual Behavior) and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision dated March 26, 2003.

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 failed to consider all the record evidence; (2) whether the Administrative Judge erred by finding Applicant is vulnerable to coercion or blackmail; (3) whether the Administrative Judge erred by finding Applicant refused to cooperate with the investigator who interviewed him; and (4) whether the Administrative Judge's adverse decision is precluded by a prior favorable security clearance decision. 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 failed to consider all the record evidence. Applicant cites favorable evidence that he contends the Administrative Judge failed to consider in his case. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome by Applicant's ability to cite record evidence that he asserts should have been given more weight by the Judge.

2. Whether the Administrative Judge erred by finding Applicant is vulnerable to coercion or blackmail. Applicant does not challenge the Administrative Judge's findings about his sexual relationships with various women other than his wife. However, Applicant does challenge the Judge's finding that the facts and circumstances of Applicant's sexual conduct with other women leave him vulnerable to coercion or blackmail. In support of that challenge, Applicant makes various arguments as to why he believes he is not vulnerable to coercion or blackmail. The Judge's finding that Applicant is vulnerable to coercion or blackmail reflects a reasonable interpretation of the record evidence as a whole. Applicant's arguments to the contrary are not persuasive.

3. Whether the Administrative Judge erred by finding Applicant refused to cooperate with the investigator who interviewed him. The Administrative Judge found that Applicant refused to cooperate with the investigator who interviewed him in October 2002. Applicant persuasively challenges that finding. Given the record in this case, there is insufficient evidence to sustain the Judge's finding that Applicant refused to cooperate with the investigator. However, this error is harmless because the Judge's sustainable finding that Applicant is vulnerable to coercion or blackmail provides a sufficient basis for his unfavorable security clearance decision.

4. Whether the Administrative Judge's adverse decision is precluded by a prior favorable security clearance decision.

Applicant asserts that he received a favorable security clearance from the Navy after he was investigated in 1990-1991, and that the Navy was aware of his sexual relationships with women other than his wife when he made its favorable security clearance decision. The Board construes this argument as raising the issue of whether the Administrative Judge's adverse decision is precluded by a prior favorable security clearance decision made approximately 14 years ago.

There is no right to a security clearance, and a past decision to grant or continue a security clearance does not give rise to any right or vested interest in a security clearance. *See, e.g.*, ISCR Case No. 01-19823 (December 3, 2003) at p. 5. Furthermore, a favorable security clearance decision does not preclude the federal government from reassessing a person's security eligibility in light of current circumstances. Given the record evidence in this case -- including evidence of Applicant's conduct and circumstances after 1990-1991 -- the Administrative Judge was not precluded from evaluating Applicant's security eligibility and reaching an unfavorable decision.

Conclusion

Apart from one factual error that does not warrant remand or reversal, Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board