

DATE: December 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09915

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Jessica L. West, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 20, 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), Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated August 18, 2004.

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 take into account evidence favorable to Applicant; and (2) whether the Administrative Judge erred by concluding Applicant had not presented evidence sufficient to extenuate or mitigate his conduct. 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

The Administrative Judge made findings of fact about Applicant's history of episodic alcohol abuse during the period 1997-January 2003, drug abuse during the period January 1997 to January 2002, and falsification of a security clearance in June 2002. The Board construes Applicant's brief as not challenging those findings of fact on appeal. Accordingly, the Board need not review those findings of fact to determine whether they are supported by the record evidence.

1. Whether the Administrative Judge failed to take into account evidence favorable to Applicant. Applicant contends the Administrative Judge failed to take into account evidence favorable to him that shows his history of misconduct has been extenuated or mitigated. This contention is not persuasive.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 01-15891 (May 16, 2003) at pp. 6-7. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 02-33256 (October 21, 2004) at p. 4. Accordingly, Applicant's ability to point to record evidence favorable to him is not sufficient to rebut the presumption that the Judge considered all the record evidence. Moreover, merely because the Judge did not conclude Applicant's evidence was sufficient to demonstrate reform or rehabilitation that warranted a favorable security clearance decision, it does not follow that the Judge simply ignored Applicant's evidence. *See, e.g.*, ISCR Case No. 02-18093 (July 15, 2004) at p. 4.

2. Whether the Administrative Judge erred by concluding Applicant had not presented evidence sufficient to extenuate or mitigate his conduct. Applicant contends the Administrative Judge should have concluded that he presented evidence sufficient to extenuate or mitigate his episodic alcohol abuse, his drug abuse, and his falsification of the security clearance application. In support of this contention, Applicant argues the Judge should have concluded his conduct was

extenuated or mitigated under various Adjudicative Guidelines mitigating conditions. Specifically, Applicant contends the Administrative Judge should have concluded: (a) Applicant's history of episodic alcohol abuse was mitigated under Alcohol Consumption Mitigating Conditions 1, 2, and 3; (b) Applicant's history of drug abuse was mitigated under Drug Involvement Mitigating Conditions 1, 2, and 3; (c) Applicant's falsification was mitigated under Personal Conduct Mitigating Conditions 2, 3, and 5; and (d) Applicant's criminal conduct was mitigated under Criminal Conduct Mitigating Conditions 1 and 4. For the reasons that follow, the Board concludes that with the exception of one possible error (which would be harmless under the particular facts of this case), Applicant has not demonstrated the Judge erred.

When a party challenges an Administrative Judge's application of the Adjudicative Guidelines, the Board has to decide whether the party has shown the Judge: (i) reached conclusions not supported by substantial record evidence; (ii) acted in a manner that is arbitrary or capricious; or (iii) acted contrary to law. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4.

Considering the record as a whole, the Board concludes the record evidence does not support the application of Alcohol Consumption Mitigating Condition 1⁽¹⁾ or Drug Involvement Mitigating Condition 2.⁽²⁾ Applicant is not entitled to have the Administrative Judge apply Adjudicative Guidelines mitigating conditions when the record evidence does not support their application.

Considering the record as a whole, it was not arbitrary or capricious for the Administrative Judge to conclude the record evidence did not warrant application of Alcohol Consumption Mitigating Condition 2,⁽³⁾ Alcohol Consumption Mitigating Condition 3,⁽⁴⁾ Drug Involvement Mitigating Condition 1,⁽⁵⁾ or Drug Involvement Mitigating Condition 3.⁽⁶⁾ Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred by deciding that application of these four mitigating conditions was not warranted in light of the record evidence in this case.

Given the record evidence in this case, Applicant's correction of his falsification does not warrant consideration of Personal Conduct Mitigating Condition 2.⁽⁷⁾ *See, e.g.*, ISCR Case No. 01-19513 (January 22, 2004) at pp. 4-5 (noting Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2, should be considered in cases involving a correction of a falsification). Rather, given the record evidence in this case, the Administrative Judge had to consider whether Applicant's disclosures to the Special Agent during a January 2003 interview warranted application of Personal Conduct Mitigating Condition 3.⁽⁸⁾ Considering the record as a whole, the Judge had a rational basis for concluding that Applicant's disclosures to the Special Agent were not sufficient to warrant application of Personal Conduct Mitigating Condition 3 to his falsification of a security clearance application in June 2002.

The Board need not decide whether the Administrative Judge should have applied Personal Conduct Mitigating Condition 5⁽⁹⁾ in this case. Even if the Board assumes, solely for purposes of deciding this appeal, that the Judge erred by not applying this mitigating condition, such an error would not warrant a remand or reversal because there is not a significant chance that application of this mitigating condition would have resulted in a different outcome. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Applicant also contends the Administrative Judge should have applied Criminal Conduct Mitigating Conditions 1⁽¹⁰⁾ and 4.⁽¹¹⁾ The Judge correctly concluded that Applicant's falsification of the security clearance application constituted a violation of 18 U.S.C. 1001, a federal felony. That criminal conduct is part of Applicant's history of criminal conduct, not just the 1997 and 2001 matters referred to in Applicant's appeal argument. Moreover, unlike Applicant's drug abuse, Applicant's falsification of the security clearance application cannot be fairly attributed to his college environment. Considering the record as a whole, Applicant has not demonstrated the Judge erred by not applying these two mitigating conditions.

Conclusion

The Board affirms the Administrative Judge's decision because -- with one possible exception that would constitute harmless error -- Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. "The alcohol related incidents do not indicate a pattern" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.1).
2. "The drug involvement was an isolated or aberrational event" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.2).
3. "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).
4. "Positive changes in behavior supportive of sobriety" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.3).
5. "The drug involvement was not recent" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.1).
6. "A demonstrated intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).
7. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).
8. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.3).
9. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.5).
10. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).
11. "The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.4).