

DATE: January 12, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10959

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Michelle M. Benjamin, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 14, 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 Henry Lazzaro issued an unfavorable security clearance decision, dated August 23, 2004.

Applicant appealed the Administrative Judge's unfavorable security clearance 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 erred when he failed to instruct Applicant that a request for a closed hearing could be used by Department Counsel to argue that Applicant was vulnerable to blackmail or coercion; (2) whether the Administrative Judge's conclusion that Applicant was vulnerable to blackmail or coercion was supported by substantial record evidence; (3) whether the Administrative Judge erred in concluding that there was evidence indicating that rape charges brought against Applicant in 1988 were *nolle prossed* in contemplation that the victim would subsequently pursue a civil suit against Applicant for child support; (4) whether the Administrative Judge erred in not applying Sexual Behavior Mitigating Conditions 1, 2, and 3; (5) whether the Administrative Judge erred by concluding that Applicant engaged in deliberate falsification when answering questions on a March 2001 security clearance application; (6) whether the Administrative Judge erred by concluding Personal Conduct Mitigating Condition 3 did not apply to the case; (7) whether the Administrative Judge erred by concluding that Department Counsel met its burden of proof by establishing Applicant's ineligibility for access to classified information; and (8) whether the case should be remanded to allow Applicant an opportunity to submit additional evidence. 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 erred when he failed to instruct Applicant that a request for a closed hearing could be used by Department Counsel to argue that Applicant was vulnerable to blackmail or coercion. Applicant notes that, in closing argument, Department Counsel asserted that his decision to request a closed hearing was evidence that Applicant was vulnerable to blackmail or coercion. Applicant asserts that the Administrative Judge should have warned him that a request for a closed hearing could result in the type of argument made by Department Counsel in this case.

Department Counsel's comment in closing argument about Applicant's choice of a closed hearing was improper. The right to choose a closed hearing is one expressly granted to applicants under the Directive. ⁽¹⁾ Department Counsel's argument that Applicant's decision to ask for a closed hearing showed he was still vulnerable to blackmail or coercion is in direct contravention of the last sentence of Item E3.1.12 of the Directive, which states, "No inference shall be drawn as to the merits of a case on the basis of a request that the hearing be closed."

As a practical matter, an Administrative Judge cannot be expected to anticipate the arguments of the parties beforehand.

Accordingly, the Judge was not duty bound to inform Applicant as to the possibility that Department Counsel might make an argument about Applicant's decision to ask for a closed hearing. And, in any event, there is no indication that Applicant was prejudiced by Department Counsel's argument. Nothing in the decision below indicates that the Judge was influenced by Department Counsel's improper argument. There is no presumption of error below and Administrative Judges are presumed to know the law. After reviewing the Judge's decision and the record in this case, the Board is satisfied that Applicant's choice of a closed hearing had no bearing on the findings and conclusions reached by the Judge in this case. Applicant has failed to demonstrate error on the part of the Judge.

2. Whether the Administrative Judge's conclusion that Applicant was vulnerable to blackmail or coercion was supported by substantial evidence. The Administrative Judge found that Applicant was charged with rape and statutory burglary (the burglary was related to the rape) in 1990. He also found that Applicant's family is unaware of the charges and that Applicant expressed a desire to keep them unaware of the charges. Based on these findings, the Judge concluded that Disqualifying Condition 3-(2) of the Sexual Behavior Guideline (Guideline D) applied in the case. On appeal, Applicant asserts that Department Counsel presented no substantial evidence establishing that he was reasonably subject to blackmail or coercion. After a review of the Judge's decision and the record in this case, the Board concludes that the Judge's findings and conclusions with regard to Applicant's vulnerability to coercion or blackmail are sustainable. None of the facts cited by Applicant on appeal establish error on the part of the Administrative Judge.

3. Whether the Administrative Judge erred in concluding that there was evidence indicating that rape charges brought against Applicant in 1988 were *nolle prosequit* in contemplation that the victim would subsequently pursue a civil suit against Applicant for child support. In his findings of fact, the Administrative Judge noted that a 1988 rape charge against Applicant had been *nolle prosequit*. In his conclusions, the Administrative Judge noted that the record did not contain any explanation for the charge, but also noted that there was evidence that the disposition was done in contemplation that the victim would file a civil suit seeking child support. Applicant argues that such a conclusion was error and that the Judge's reliance on a statement in a Naval Investigative Service Report did not establish a specific reason for the non-prosecution.

The Board need not decide whether the Administrative Judge erred because the challenged finding is not material to the resolution of this case. *See Directive, Additional Procedural Guidance, Item E3.1.32 ("The Board shall address the material issues raised by the parties to determine whether harmful error occurred.")*(italics added).

4. Whether the Administrative Judge erred in not applying Sexual Behavior Mitigating Conditions 1, 2, and 3. The Administrative Judge found that Applicant was charged with crimes of a sexual nature in 1988 and 1990 and concluded that these charges met applicable disqualifying conditions under the Sexual Behavior Guideline. When discussing possible mitigation of the conduct, the Judge concluded that he could apply Sexual Behavior Mitigating Condition 2. (3) However, the Judge decided to not apply Sexual Behavior Mitigating Condition 1 (4) because Applicant was not an adolescent at the time of the sexual misconduct, and decided to not apply Sexual Behavior Mitigating Condition 3 (5) because subsequent to the 1988 and 1990 charges, Applicant was twice given nonjudicial punishment while in the military because of assaults committed against fellow sailors, was fined for driving on a revoked license in January 2000, and was charged with disorderly conduct in September 2001.

Applicant's arguments concerning the applicability of Sexual Conduct Mitigating Conditions 1, 2, and 3 are confusing and difficult to follow. To the extent Applicant appears to be arguing that the Administrative Judge should have applied Sexual Conduct Mitigating Condition 1, Applicant has failed to demonstrate error below because the Judge articulated a rational basis for concluding that Mitigating Condition 1 did not apply. To the extent Applicant appears to be arguing the Judge should have applied Sexual Conduct Mitigating Condition 2, Applicant's argument is moot because the Judge expressly stated that Mitigating Condition 2 applied. The Board need not decide what Applicant is arguing about with respect to Sexual Conduct Mitigating Condition 3, because -- even if the Board were to assume solely for purposes of deciding this appeal that Applicant's claim of error had merit -- it would not demonstrate harmful error. The application of Sexual Conduct Mitigating Condition 3 would be irrelevant to the Judge's findings and conclusions about Applicant's vulnerability to coercion or blackmail, and irrelevant to the Judge's findings and conclusions about Applicant's falsification.

5. Whether the Administrative Judge erred by concluding that Applicant engaged in deliberate falsification when answering questions on a arch 2001 security clearance application.

Applicant asserts that his actions in completing his security clearance application should not result in his being considered a security risk. On appeal, he offers numerous explanations for why a number of his arrests were not listed on the application, including: (i) he did not fully understand the questions on the application; (ii) he did not complete the application himself, but merely answered questions posed to him by his security manager, who completed the application; (iii) he did not consider himself a convicted felon; (iv) he knew the derogatory information was in the public record and could easily be discovered, therefore negating an intent to conceal; and (v) he was not thorough enough in his review of the application after completion. Applicant asserts that the Appeal Board should find from a totality of the circumstances that there was no deliberate omission, concealment or falsification.

Applicant's last assertion, in essence, asks the Board to engage in *de novo* review, which it has no authority to do under the Directive. Rather, in evaluating this claim of error, the Board need only determine whether the Administrative Judge's findings are supported by substantial record evidence and whether the Judge's conclusions are arbitrary, capricious, or contrary to law.

The Judge's analysis of Applicant's falsification conduct reflects a plausible, reasonable interpretation of the record evidence. Applicant's statements about his state of mind and intent when he completed the security clearance application in March 2001 are relevant and material evidence that the Judge had to consider. However, those statements were not binding on the Judge; rather, the Judge had to consider Applicant's statements in light of his assessment of his credibility and the record evidence as a whole. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Administrative Judge's findings of falsification are erroneous. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 4.

Applicant also asserts that a 2000 driving on a revoked license violation for which he paid a fine of \$50.00 should not be used as a basis to deny him his security clearance. In support of this assertion he cites Question 26 of a security clearance application that Applicant completed in March 2001. A portion of Question 26, quoted by Applicant, states, "Leave out traffic fines of less than \$150.00 unless the violation was alcohol or drug related." Applicant's failure to list the 2000 traffic violation for driving on a revoked license was not alleged in the SOR. The Judge considered the traffic violation for purposes unrelated to his findings and conclusions about Applicant's falsification of the security clearance application. The Judge's consideration of the traffic violation for purposes other than the falsification allegation was not arbitrary, capricious, or contrary to law.

6. Whether the Administrative Judge erred by concluding Personal Conduct Mitigating Condition 3 did not apply to the case. Applicant argues that he was forthcoming and acted promptly to correct the errors in his security clearance application and was truthful once he discovered that the answers to certain questions were incorrect. Such an assertion raises the issue of the applicability of Personal Conduct Mitigating Condition 3. (6) The mere making of this assertion, however, constitutes nothing more than Applicant's interpretation of the record evidence and fails to establish that the Judge erred by not applying Personal Conduct Mitigating Condition 3. Moreover, the Board concludes there is nothing in the record evidence that required the Judge to apply the mitigating condition.

7. Whether the Administrative Judge erred by concluding that Department Counsel met its burden of proof by establishing Applicant's ineligibility for access to classified information. Near the end of his brief, Applicant states generally that Department Counsel failed to meet its burden of proof by substantial evidence that conditions in Applicant's personal or professional history disqualified him from being eligible for access to classified information. Given the Administrative Judge's findings of fact, the Judge had a legally sufficient basis for concluding Department Counsel had met its burden of proof under the Directive.

8. Whether the case should be remanded to allow Applicant an opportunity to submit additional evidence. Applicant requests, as an alternative to a reversal of the Judge's decision or a waiver recommendation, (7) that the case be remanded to allow Applicant an opportunity to present further proof of his reputation for honesty, truthfulness and reliability, his exercise of good judgment, favorable job performance, and his family's current state of knowledge regarding his past criminal history. Applicant participated in a full hearing below, where he had a reasonable

opportunity to present evidence bearing on the issue of his eligibility for a security clearance. On appeal, he points to no procedural irregularities and offers no legal rationale as to why the case should be remanded to afford him a second chance to make his case. Accordingly, Applicant's request lacks merit.

Conclusion

Applicant has failed to satisfy his burden of demonstrating harmful error below. Therefore, the Board affirms the Administrative Judge's 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. *See* Directive, Additional Procedural Guidance, Item E3.1.12.
2. "Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.3).
3. "The behavior was not recent and there is no evidence of subsequent conduct of a similar nature" (Directive, Adjudicative Guidelines, Item E2.A4.1.3.2).
4. "The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature" (Directive, Adjudicative Guidelines, Item E2.A4.1.3.1).
5. "There is no other evidence of questionable judgment, irresponsibility, or emotional instability" (Directive, Adjudicative Guidelines, Item E2.A4.1.3.3).
6. "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).
7. Applicant asks the Board to recommend waiver, without further elaborating on what type of waiver he seeks. There is no authority under the Directive to grant Applicant a "waiver."