

DATE: June 4, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-11231

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Nygina T. Mills, Esq., Department Counsel

Peregrine Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

Richard J. Pascal, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 19, 2003, 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), H (Drug Involvement), E (Personal Conduct), and G (Alcohol Consumption). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated February 11, 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's findings of fact are sustainable; (2) whether the government has an interest in Applicant's off-duty conduct; (3) whether Applicant's past conduct is a consideration in determining his current security eligibility; (4) whether the Administrative Judge gave sufficient weight to the evidence that tends to support Applicant's case. 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** [\(1\)](#)

1. Whether the Administrative Judge's findings of fact are sustainable. Applicant challenges the Administrative Judge's finding that Applicant last was involved with cocaine in November 2001. The Board concludes that the Administrative Judge's finding is based on substantial record evidence, namely Applicant's November 2001 arrest for cocaine possession. Applicant's argument is unpersuasive.

2. Whether the government has an interest in Applicant's off-duty conduct. Applicant alleges on appeal that the government has no interest in Applicant's off-duty conduct. Applicant's argument is unpersuasive. The Administrative Judge must adjudicate the case in accordance with the Directive. The Guidelines set forth in the Directive address a variety of examples of off-duty conduct and circumstances which are of security concern to the government. Furthermore, the Directive requires a whole person analysis to determine an applicant's security eligibility. A whole person analysis, by its very language, is not confined to conduct at the workplace. Finally, the Board has previously held that off duty conduct that raises security concerns can be considered in assessing an applicant's security eligibility. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at pp. 3-4.

3. Whether Applicant's past conduct is a consideration in determining his current security eligibility. Applicant's argument here is similar to his previous argument. The Directive sets forth a variety of situations in which an applicant's history may raise security concerns for the government. In the case before us, the Administrative Judge's findings are not inconsistent with the Directive. Applicant's argument is not persuasive.

4. Whether the Administrative Judge gave sufficient weight to the evidence that tends to support Applicant's case. (2) It is well settled that a party's mere disagreement with an Administrative Judge's weighing of the evidence is not sufficient to demonstrate error. *See, e.g.*, ISCR Case No. 02-23336 (May 10, 2004) at p. 5. Here Applicant has offered nothing more than disagreement with the Judge's weighing of the evidence. Applicant's argument fails to demonstrate error.

### **Conclusion**

Applicant has failed to meet his burden of demonstrating error by the Administrative Judge. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made favorable findings under SOR allegations 1.a, 3.b, and 4.e. Those favorable findings are not a subject of this appeal.

2. Applicant submitted new evidence on appeal. The Board is not permitted to consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.