

DATE: August 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11448

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 15, 2003, 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) and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued a favorable security clearance decision, dated March 31, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 erred by concluding Applicant's conduct was mitigated, even though no Personal Conduct mitigating conditions applied; (2) whether the Administrative Judge's favorable credibility determination cannot be sustained; and (3) whether the Administrative Judge's favorable conclusions under Guideline E are arbitrary, capricious, or contrary to law. 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 concluded Applicant's past use of marijuana had been extenuated or mitigated sufficiently to warrant favorable formal findings and conclusions under Guideline H (Drug Involvement). The Judge's findings and conclusions about Applicant's past use of marijuana are not at issue on appeal.

The Administrative Judge found that Applicant falsified material facts about his past use of marijuana (which included two drug-related incidents, one in 1990 and the other in 1998) when he completed a security clearance application in September 2001. The Judge concluded Applicant's falsification of the security clearance application was serious and raised security concerns, but that Applicant presented credible evidence of extenuation and mitigation sufficient to overcome those security concerns and warrant a favorable security clearance decision. The Judge's favorable conclusions about Applicant's falsification are the focus of Department Counsel's appeal.

1. Whether the Administrative Judge erred by concluding Applicant's conduct was mitigated, even though no Personal Conduct mitigating conditions applied. Department Counsel challenges the Administrative Judge's conclusion that Applicant's conduct was mitigated even though the Judge concluded that no Personal Conduct mitigating conditions applied. This claim of error lacks merit.

Although an Administrative Judge must apply pertinent Adjudicative Guidelines disqualifying and mitigating conditions, the Judge is not required to apply them in a rigid, mechanical manner.⁽¹⁾ Furthermore, because the Adjudicative Guidelines disqualifying and mitigating conditions do not exhaust the realm of human experience or the kinds of conduct or circumstances that are pertinent to evaluating an applicant's security eligibility, the mere presence or absence of any particular Adjudicative Guidelines disqualifying or mitigating condition is not dispositive of a case.⁽²⁾

Finally, a Judge acts properly by evaluating an applicant's case under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. (3) Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to evaluate Applicant's security eligibility under the general factors of the Directive, despite the Judge's conclusion that none of the Personal Conduct mitigating conditions applied.

2. Whether the Administrative Judge's favorable credibility determination cannot be sustained. Department Counsel claims the Administrative Judge's favorable assessment of Applicant's credibility cannot be sustained because it fails to take into account record evidence that fairly detracts from his conclusions. This claim of error is not persuasive.

An Administrative Judge's credibility determination is entitled to deference on appeal because of the Judge's ability to personally observe and assess the demeanor of a witness while the witness is testifying. Although such a credibility determination can be challenged on appeal, the party seeking to do so has a heavy burden of persuasion. In this case, Department Counsel has failed to meet that heavy burden of persuasion. Furthermore, Department Counsel does not articulate a cogent argument that links the Judge's favorable credibility determination with any identifiable factual or legal error by the Judge. Department Counsel's strong disagreement with the Judge's conclusions is not a substitute for a cogent demonstration of error by the Judge.

3. Whether the Administrative Judge's favorable conclusions under Guideline E are arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable conclusions under Guideline E are arbitrary, capricious, or contrary to law because: (a) Applicant's falsification was material; (b) the Judge failed to give sufficient weight to Applicant's falsification; (c) the Judge's conclusions are based on arbitrary and capricious reasoning and reflect a clear error of judgment; (d) the record evidence as a whole does not support the Judge's favorable conclusions; and (e) Applicant failed to satisfy his burden of persuasion.

Nothing in the decision below indicates or suggests that the Administrative Judge concluded Applicant's falsification was not material, or that the Judge viewed Applicant's falsification as not being a serious matter.

Department Counsel does not articulate any persuasive argument as to how the Administrative Judge's favorable conclusions are based on arbitrary and capricious reasoning or reflect a clear error of judgment.

Although Department Counsel asserts the Administrative Judge's favorable conclusions are not supported by the record evidence as a whole, its arguments are little more than an articulation of its disagreement with the Judge's weighing of the record evidence and the conclusions he reached. The Board does not have to agree with the Judge's weighing of the record evidence or the conclusions he drew to determine Department Counsel has not demonstrated that: (i) the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law; or (ii) the Judge's conclusions do not reflect a legally permissible interpretation of the record evidence as a whole.

The Administrative Judge concluded that Department Counsel met its burden of establishing a *prima facie* case under Guideline E, and that the burden of persuasion had shifted to Applicant. That conclusion did not preclude the Judge from considering whether Applicant presented credible evidence sufficient to demonstrate extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. Merely because Department Counsel met its burden of establishing a *prima facie* case under Guideline E, it does not follow that the Judge was precluded, as a matter of law or logic, from considering the record evidence as a whole and deciding that Applicant has presented sufficient credible evidence to satisfy his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Under the constraints of the Directive, the Board does not have to agree with the Judge's analysis or ultimate conclusion to decide that Department Counsel has failed to demonstrate the Judge's evaluation of the record evidence in this case was arbitrary, capricious, or contrary to law.

Conclusion

The Board does not review cases *de novo*. There is no presumption of error below and the appealing party has the burden of demonstrating error by an Administrative Judge. Because Department Counsel has not met its burden of demonstrating error below, the Board affirms the Judge's favorable 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, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7.

2. *See, e.g.*, ISCR Case No. 01-20908 (November 26, 2003) at p. 6.

3. *See, e.g.*, ISCR Case No. 01-24358 (April 13, 2004) at p.7 n. 13; ISCR Case No. 02-05110 (March 22, 2004) at p. 5 n.7.