

DATE: July 19, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11906

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 8, 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) and Guideline J (Criminal Conduct). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision, dated March 4, 2005.

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 decision was arbitrary, capricious, or contrary to law because some of the criminal charges against Applicant had been dropped; and (2) whether the Administrative Judge should have concluded Applicant's conduct was mitigated due to the passage of time. 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's decision is arbitrary, capricious, or contrary to law because some of the criminal charges against Applicant had been dropped. In his appeal, Applicant states that all criminal charges against him except the DUI were dropped. In his Findings of Fact, the Judge indicated that at least some of the criminal charges were dropped. However, the fact that criminal charges were dropped or dismissed does not preclude an Administrative Judge from finding that an applicant engaged in the conduct underlying the criminal charges. *See, e.g.*, ISCR Case No. 01-25941 (May 7, 2004) at pp. 3-4. Applicant's argument fails to demonstrate the Judge erred.

2. Whether the Administrative Judge should have concluded Applicant's conduct was mitigated due to the passage of time. In his appeal, Applicant argues that all the incidents listed in the SOR occurred at least three years before the Judge's decision was rendered⁽¹⁾ and that the Administrative Judge should therefore have rendered a favorable security decision.

Applicant is responsible for presenting witnesses or other evidence to rebut, explain, extenuate, or mitigate facts that the Department Counsel proves or that Applicant admits, and Applicant also has the ultimate burden of persuasion to obtain a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. The Judge had to consider the record evidence as a whole and evaluate the facts and circumstances of Applicant's past conduct and current circumstances in light of pertinent provisions of the Directive. In deciding whether Applicant met his burden of persuasion, the Judge reasonably could consider whether Applicant presented evidence that was indicative of extenuation, mitigation, changed circumstances, or reform and rehabilitation. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 6. The favorable evidence cited by Applicant did not compel the Administrative Judge to make a favorable security decision. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence or *vice versa* and whether Applicant had sufficiently rebutted, extenuated, or mitigated the security concerns raised under Guideline G and Guideline J to warrant a favorable security

clearance decision. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6. Here, the Judge stated in his decision that he considered Applicant's improved circumstances, but did not consider the improvement sufficient to mitigate the government's security concerns under Guideline G and Guideline J. Given the record evidence in this case, the Judge had a rational basis for his conclusion that Applicant had not demonstrated sufficient improvement to mitigate the security concerns raised under Guideline G and Guideline J.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate any 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The most recent incident occurred February 3, 2002.