

DATE: October 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12361

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated August 10, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines H (Drug Involvement), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated ay 12, 2005.

Applicant appealed the Administrative Judge's unfavorable 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 was biased; (2) whether the Administrative Judge erred in concluding that the security concerns raised under Guideline H (Drug Involvement) had not been mitigated; (3) whether the Administrative Judge erred in concluding that the security concerns raised under Guideline G (Alcohol Consumption) had not been mitigated; and (4) whether the Administrative Judge erred in concluding that the security concerns raised under Guideline E (Personal Conduct) had not been mitigated. 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 was biased. Applicant asserts that the Judge was biased against her because he: (a) made multiple errors in his findings and conclusions, and (b) made findings of fact with respect to matters not alleged in the SOR. The Board finds nothing in the record below or the Judge's decision which supports Applicant's claim of bias.

There is a rebuttable presumption that quasi-judicial officials are unbiased and impartial, ⁽²⁾

and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. When the Board considers a claim of bias or lack of impartiality, the standard is not whether the appealing party personally believes that the Judge was biased and not impartial. Rather, the standard is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a disinterested person to question the fairness or impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 (March 27, 2003) at p. 3.

Bias or lack of impartiality is not demonstrated merely because the Administrative Judge made adverse findings or reached unfavorable conclusions in a case. *See, e.g.*, ISCR Case No. 94-0954 (October 16, 1995) at p. 4 (citing *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1047 (7th Cir. 1989)). Nor is bias or lack of impartiality shown by identifying legal error by the Judge. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5 (citing *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981)). Accordingly, the Judge's adverse findings and unfavorable conclusions in this case do not establish the Judge was biased or lacked impartiality. As will be discussed later in this

decision, the Board concludes Applicant has identified errors in the decision below. However, the Board's conclusion that the Judge committed legal errors does not establish the Judge was biased or lacked impartiality.

2. Whether the Administrative Judge erred in concluding that the security concerns raised under Guideline H (Drug Involvement) had not been mitigated. Applicant contends that the Administrative Judge erroneously found Applicant had been convicted of possession of paraphernalia and a drug charge in 2001--material errors which caused the Judge to overweigh the seriousness of Applicant's disqualifying conduct. Absent those errors, Applicant contends that a correct weighing of the disqualifying and mitigating evidence would have resulted in a favorable decision because Applicant does not now use drugs and her last use of drugs was in March 2003. Applicant's contention has some merit.

Applicant is correct in asserting that there is no record evidence of Applicant's being convicted of possession of paraphernalia and a drug charge in 2001. Thus, the Judge erred in making those findings. Where the Judge makes erroneous findings of disqualifying conduct, such findings could result in an erroneous relative balancing of the evidence. However, in this case, the Judge made sustainable findings that Applicant had used marijuana with varying frequency from about 1978 to March 2003 and that she used marijuana after obtaining an interim security clearance. (3)

The record evidence did not mandate a conclusion on the part of the Judge that this conduct was mitigated. Therefore, reversal of the Judge's adverse decision is not warranted. Because the Judge's ultimate adverse decision is sustainable on these grounds as well as others (Guideline E), remand to the Judge for a re-weighing of the Guideline H evidence has no significant chance of changing his conclusions under Guideline H or the outcome of the case, and is therefore inappropriate. *See* ISCR Case No. 02-17276 (March 15, 2005) at p.4.

3. Whether the Administrative Judge erred in concluding that the security concerns raised under Guideline G (Alcohol Consumption) had not been mitigated. Applicant contends the Administrative Judge should have concluded that the security concerns raised by her prior alcohol consumption had been mitigated. In support of that contention, Applicant asserts that: (a) her last alcohol-related offense occurred in April 2001; (b) since that last offense she only drinks a few drinks at social occasions; (c) her only other alcohol-related offense occurred 22 years ago, so there is no indication of a pattern; and (d) the Judge concluded her evidence had in fact established the requisite mitigating factors, but then declined to apply them.

Applicant's contentions are based upon the Administrative Judge's discussion of Applicant's Guideline G mitigating evidence. (4)

A reading of the Judge's decision in its entirety suggests that the Judge intended to state that "an insufficient" period of time had elapsed, rather than "a sufficient" one. However, even if this reading of the Judge's decision is the correct one, the Judge has failed to adequately explain why Applicant's alcohol consumption is unmitigated in the face of two mitigating conditions that he applied. Despite these errors which would ordinarily make a remand appropriate, remand of the Judge's adverse decision is not warranted. Again, because the Judge's ultimate adverse decision is sustainable on other grounds (*i.e.*, Guideline E and Guideline H), remand to the Judge for clarification of his conclusions with respect to the Guideline G evidence has no significant chance of changing the outcome of the case, and is therefore unnecessary. *See* ISCR Case No. 02-17276 (March 15, 2005) at p. 4.

4. Whether the Administrative Judge erred in concluding that the security concerns raised under Guideline E (Personal Conduct) had not been mitigated. Applicant argues that the Administrative Judge erred in concluding that the security concerns raised by her falsification of a security clearance application had not been mitigated because: (a) the Judge made a finding that Applicant falsified a security clearance application regarding her alcohol consumption and such a finding has no basis in the record evidence; (b) she made the omission on the advice of a "military friend"; (c) the omitted information had been fully disclosed to the government in a subsequent interview; (d) the falsification is not recent and was an isolated incident; and (e) Applicant cannot be subjected to coercion, exploitation, or duress. Other than assertion (a), Applicant essentially summarizes the favorable evidence of record, reargues her case, and asserts that the Judge should have applied the mitigating factors in her favor. For the reasons set forth below, the Applicant has not demonstrated the Judge erred.

Applicant asserts in her appeal that the Administrative Judge erred by finding that Applicant deliberately omitted and

concealed relevant and material facts about her drug and alcohol use on her security clearance application. Applicant does not contest the Judge's finding regarding the falsification about her drug use but argues there is no basis for the Judge's finding that Applicant falsified facts about her history of alcohol use. Applicant's contention has merit. There is nothing in the record evidence that supports the Judge's finding. This error is similar to the Judge's error with regard to his findings about Applicant's drug use in that it has the potential to adversely affect the Judge's weighing of the evidence regarding falsification and possible mitigation of same. However, after a review of the record and the Judge's decision, the Board concludes that the Judge's adverse conclusions under Guideline E are sustainable on the basis of Applicant's admitted falsification regarding her past drug use and that, absent the erroneous finding about falsification of alcohol use, there is not a significant chance that the Judge's resolution of the allegation under Guideline E would be different.

Based upon the record before him, the Administrative Judge's material findings and conclusions under Guideline E are sustainable. Applicant's statements about her intent and state of mind during the occurrence of the events alleged in the SOR were relevant evidence, but they were not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp.6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's rationale for providing false information did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's explanation.

This case involved the deliberate omission of information of obvious security significance. After reviewing the Judge's decision, it is the Board's view that it was not arbitrary or capricious for the Judge to conclude that the security concerns raised by Applicant's disqualifying conduct were not necessarily mitigated by her subsequent disclosures to the government. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (it was not arbitrary or capricious for Administrative Judge to conclude the government's security concerns were not mitigated by the fact that applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (it was not arbitrary or capricious for the Judge to conclude the government's security concerns were not mitigated by the fact applicant had "come clean" and "had nothing left to hide"). Additionally, Applicant has not shown that the Administrative Judge should have found her "military friend" was "authorized personnel" for the purposes of preparing her responses in her security clearance application. Finally, Applicant has not shown that the Judge's application of the relevant mitigating and "whole person" factors, and his weighing of the record evidence was arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980). Applicant's falsification of a security clearance application provided a sufficient rational basis for the Judge's unfavorable security clearance decision. Considering Applicant's burden of persuasion and the record as a whole, the Board finds that the Judge's adverse security clearance decision is sustainable.

Conclusion

Applicant has failed to demonstrate error below sufficient to change the outcome of the case. Therefore, the Board affirms the Administrative Judge's adverse 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. The Administrative Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 2.c. That favorable formal finding is not at issue on appeal.

2. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

3. The absence of an SOR allegation that Applicant used marijuana after being granted a security clearance did not preclude the Administrative Judge from finding that she used marijuana after being granted a security clearance. An SOR is not measured against the standard of a criminal indictment and need not allege every possible fact that may be relevant to a case. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p. 4; ISCR Case No. 99-0710 (March 19, 2001) at pp. 2-3. The SOR issued to Applicant put her on notice that her use of marijuana during the period from about 1978 to March 2003 was at issue. Record evidence about the facts and circumstances of her use of marijuana during that period could fairly be considered by the Judge in assessing her case under Guideline G without it being specifically alleged in the SOR. *See* Directive, Section 6.3 and Additional Procedural Guidance, Adjudicative Guidelines, Item E2.2.1.

4. The Administrative Judge stated: "Applicant established mitigating factors including the fact that the one event occurred a number of years ago and there is no current problem (E2.A7.1.3.2.), and that there have been positive changes in behavior supportive of sobriety. (E2.A7.1.3.3.) While Applicant stopped drinking in May 2004, that a sufficient period of time has elapsed to conclude that the conduct has changed and the mitigating condition is applicable. [sic] This is especially so since she testified at the hearing that she had consumed occasional beers at social events during the one year period to the hearing date." Decision at p. 4.