

DATE: May 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12528

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

Kenneth P. Davie, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 25, 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), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated October 18, 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 issue raised on appeal is whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it ignores the "whole person" concept. 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

Whether the Judge's decision is arbitrary, capricious, or contrary to law because it ignores the "whole person" concept. In his appeal brief, Applicant challenges the Administrative Judge's decision by raising the following arguments: (1) He cites numerous decisions by Administrative Judges and compares Applicant's drug use to that of applicants in the other decisions. (2) He cites four decisions by the Appeal Board and argues that the facts and circumstances in them require a favorable security clearance determination. (3) He contends that the Judge erred by looking only at negative evidence and failing to apply the whole person concept. (4) He notes that he has only limited access to classified material. (5) He points out the negative effects that an adverse security decision will have on Applicant. (6) He states that he is willing to undergo random drug testing and that the Administrative Judge ignored the option of granting the clearance with a warning under Directive, Adjudicative Guidelines, Item E2.2.6. The Board considers these arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

As to the first argument, a decision by an Administrative Judge is not legally binding precedent on other Judges or the Board. Just as the decision of one trial-level judge is not legally binding precedent on a fellow trial-level judge, the decision of one Hearing Office Judge is not legally binding precedent on another Hearing Office Judge. Similarly, just as the decision of a trial-level tribunal is not legally binding precedent on an appellate tribunal, the decisions of Hearing Office Judges are not legally binding precedent on the Board. Accordingly, Applicant's ability to cite Hearing Office decisions in other cases that appear to support his position does not demonstrate the Judge's decision in this case is arbitrary, capricious, or contrary to law. Furthermore, the Board has no obligation to follow the Hearing Office decisions cited by Applicant, and no obligation to reconcile the Judge's decision below with the Hearing Office decisions cited by Applicant. *See, e.g.*, ISCR Case No. 02-02116 (September 25, 2003) at p. 5.

Applicant cites four Board decisions in cases involving applicants with a history of marijuana use,⁽¹⁾

and argues that they show: (a) the Board "considered the totality of all the facts and circumstances and concluded the favorable evidence outweighed the unfavorable evidence," and (b) the Judge did not engage in a whole person analysis in this case. Applicant's contention is not persuasive for several reasons.

First, under the Directive, the Board does not re-try a case on appeal. Rather, the Board reviews a Judge's decision to determine whether a party has identified factual or legal error on appeal. None of the Board decisions cited by Applicant exhibit the kind of review Applicant asks the Board to conduct in this appeal. Second, a Board decision affirming a Hearing Office decision is not an endorsement of the Hearing Office decision, and no one should assume that a Board decision affirming a Hearing Office decision is proof that the Hearing Office decision was correct or error-free. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at p. 4 (discussing examples where the Board could affirm Hearing Office decisions despite the presence of errors). Third, the four cases cited by Applicant are factually distinguishable from this one. This case involves a finding that Applicant falsified a security clearance application. None of the four cases cited by Applicant involved a finding of falsification. Fourth, none of the four Board decisions cited by Applicant supports his claim that the Judge ignored or failed to consider record evidence in this case. There is a rebuttable presumption that a Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. There is no factual or logical basis for Applicant to assert that a Board decision in another case demonstrates that the Judge in this case ignored or failed to consider the record evidence. Fifth, as discussed earlier in this decision, there is no presumption of error below. Applicant's citation of Board decisions in four other cases, standing alone, does not satisfy Applicant's burden of identifying how the Judge's decision in this case fails to reflect a whole person analysis.

In his third argument, Applicant contends that the Judge reached his decision by looking only at negative evidence and did not apply the whole person concept, as required by the Directive, Adjudicative Guidelines, Item E2.2.1. Specifically, he argues that the Judge failed to consider a character reference by Applicant's employer which Applicant submitted as an exhibit. As stated earlier, there is a rebuttable presumption that the Judge considered all the record evidence unless the Judge states otherwise. The Judge need not discuss every piece of evidence. *See, e.g.*, ISCR Case No. 01-23156 (September 24, 2003) at p. 3. Applicant has not overcome the presumption.

Under the whole person concept cited above, the Judge is to weigh the record evidence as a whole, rather than look at it in a piecemeal fashion. *See* ISCR Case No. 01-12452 (January 27, 2003) at pp. 4-5. The Judge was not required to accept Applicant's attorney's characterizations of Applicant's actions or weigh the significance of Applicant's behavior as Applicant would.

Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security eligibility in light of the person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). It was a proper application of the whole person concept for the Administrative Judge to consider the negative security implications of Applicant's long history of drug use which ended relatively recently and included a period of time when Applicant held an interim security clearance, as well as Applicant's falsification of his security clearance application and a sworn statement to an investigator. The federal government must be able to repose a high degree of trust and confidence in a person granted a security clearance. *Snepp v. United States*, 444 U.S. 507 511 n. 6. (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Apart from Applicant's admitted recent marijuana use, his falsification of a security clearance application, as well as a subsequent written statement, raises serious questions about Applicant's judgment, reliability, and trustworthiness. *See, e.g.*, ISCR Case No. 03-12329 (December 18, 2003) at p. 4. The Judge's findings about Applicant's history of marijuana use and falsifications provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility. *See, e.g.*, ISCR Case No. 01-08390 (February 12, 2002) at pp. 4-5.

Arguments (4) and (5), concerning Applicant's limited access to classified material and personal situation, are not relevant. As long as Applicant's job requires a security clearance, he is subject to the security clearance process, and his personal access to classified materials is irrelevant. The fact that Applicant works in a secure area, and by the nature of his job is in part responsible for that security, implicates the national security and requires a finding that it is clearly

consistent with the national security to grant or continue a security clearance for Applicant. *See, e.g.*, ISCR Case No. 98-0257 (January 22, 1999) at p. 3. Under the Directive, an applicant's security eligibility is evaluated under the same standard regardless of whether the applicant needs a security clearance for access to classified information or for access to a secure area. *See, e.g.*, ISCR Case No. 03-28502 (March 26, 2004) at p. 4. Since the purpose of the security clearance process is to protect national security, the adverse effect that an unfavorable security clearance decision might have on Applicant's employment is not relevant. *See, e.g.*, ISCR Case No. 00-0593 (May 14, 2001) at p. 4.

Applicant's willingness to undergo random drug testing is irrelevant. Neither the Judge nor the Board has the authority to order drug tests or to monitor the results. *See, e.g.*, ISCR Case No. 99-0109 (March 1, 2000) at p. 3.

Finally, the Judge's adverse findings and conclusions under all three guidelines are sustainable. Accordingly, it was not arbitrary or capricious for the Judge to render an adverse security clearance without a warning under Directive, Adjudicative Guidelines, Item E2.2.6.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. ISCR Case No. 02-08032 (May 14, 2004); ISCR Case No. 98-0657 (November 16, 1999); ISCR Case No. 98-0611 (November 1, 1999); ISCR Case No. 97-0803 (June 19, 1998).