

DATE: April 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13853

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 to Applicant a Statement of Reasons (SOR), dated March 29, 2004, 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), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). Administrative Judge Kathryn Moen Braeman issued an unfavorable security clearance decision, dated January 11, 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 issue has been raised on appeal: whether the Board should reverse the Administrative Judge's unfavorable security clearance decision based on the information presented by Applicant on appeal. 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 Issue

The Administrative Judge made findings of fact and reached conclusions about each of the SOR allegations under Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct), and concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#)

On appeal, Applicant does not challenge the Administrative Judge's findings of fact or conclusions. However, Applicant does offer some new evidence and copies of some record evidence pertaining to the matters covered by SOR paragraphs 1.a, 1.b, 2.a, 2.b, 2.g, and 3, as well as a recent letter from his supervisor. Applicant's appeal submission raises the issue of whether the Board should reverse the Administrative Judge's unfavorable security clearance decision based on the information presented by Applicant on appeal.

The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to submit documentary evidence for the Administrative Judge to consider in his case, and he took advantage of that opportunity by submitting documentation in response to the File of Relevant Material. There is no right to have the record kept open continuously so that a party can offer additional evidence for consideration in the case. *See, e.g.*, ISCR Case No. 01-21274 (January 8, 2004) at p. 3 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)).

Applicant has failed to raise any identifiable claim of factual or legal error by the Administrative Judge. Rather, Applicant is asking the Board to make a decision of its own concerning the merits of his case. The Board does not re-try a case on appeal, but rather reviews a Judge's decision to determine whether an appeal party has identified factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32.

As discussed earlier in this decision, there is no presumption of error below and the appealing party must raise claims of error with specificity. Because Applicant has failed to raise any identifiable claim of error by the Administrative Judge, the Board need not review the Judge's factual findings, conclusions, or legal rulings to determine whether they are sustainable under the appeal standards set forth in the Directive.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not raised any identifiable claim of error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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 formal findings in favor of Applicant with respect to 13 subparagraphs of the SOR. Those favorable formal findings are not at issue on appeal.