

DATE: August 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15308

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 July 16, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct). Administrative Judge Thomas M. Crean 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 certain factual findings by the Administrative Judge are erroneous; and (2) whether the Administrative Judge's unfavorable conclusions are arbitrary or capricious. 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 certain factual findings by the Administrative Judge are erroneous. Applicant does not challenge the Administrative Judge's finding that he downloaded pornographic images from the Internet, over a two-month period, using his company's computer network. Applicant does challenge the Judge's findings that: (a) Applicant's current employer does only "some work" for the Department of Defense; (b) Applicant was aware of his former employer's policy that its employees should not use its computers to access or download information not related to company business; and (c) Applicant knowingly acted in violation of his former employer's policy when he accessed and downloaded pornographic images from the Internet.

The amount of work that Applicant's current employer performs for the Department of Defense is not material to the issues of Applicant's security clearance case. Applicant's claim of error on this point fails to raise a material appeal issue. The Board need not address the merits of claims that do not raise any material issue of fact or law. *See* Directive, Additional Procedural Guidance, Item E3.1.32 ("The Appeal Board shall address the *material* issues raised by the parties to determine whether harmful error occurred.")(italics added).

Applicant's statements about what he knew or didn't know about the policy of his former employer concerning the use of its computer network were relevant evidence that the Administrative Judge had to consider. However, the Judge was not compelled to accept Applicant's statements at face value. As the trier of fact, the Judge had to consider Applicant's statements in light of his assessment of the credibility of Applicant's hearing testimony, and the record evidence as a whole. Considering the record as a whole, and giving due deference to the Judge's assessment of the credibility of Applicant's testimony, ⁽¹⁾ the Board concludes that the Judge had a sufficient basis to discount Applicant's disclaimers and find that Applicant was aware of his former employer's policy that its employees should not use its computers to access or download information not related to company business. Similarly, the Board concludes the Judge had a sufficient basis to find that Applicant knowingly acted in violation of his former employer's policy when he accessed

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and downloaded pornographic images from the Internet.

2. Whether the Administrative Judge's unfavorable conclusions are arbitrary or capricious. The Administrative Judge concluded Applicant had not presented evidence that extenuated or mitigated his use of his former employer's computer network to download pornographic images from the Internet over a two-month period because: (a) Applicant's conduct over a period of approximately two months demonstrated a pattern of dishonesty or rules violation; (b) it "is disingenuous" for Applicant to claim he was not aware of his former employer's policy that its employees should not use its computers to access or download information not related to company business; and (c) Applicant's defense that he was terminated by his former employer because of a personality conflict with a human resources director is not relevant to his conduct in misusing the former employer's computer network.

On appeal, Applicant challenges the Administrative Judge's conclusions, arguing: (a) he did not knowingly violate the policy of his former employer; (b) the Judge failed to take into account the evidence that he was terminated by his former employer because of a personality conflict with a human resources director; (c) the Judge failed to take into account favorable evidence concerning Applicant's employment record, which shows he has the character, judgment, trustworthiness, and ability to comply with rules and regulations; and (d) no periodic reinvestigation or polygraph exam has ever given any reason to question his judgment and responsibility.

As discussed earlier in this decision, the Administrative Judge had sufficient evidence to find that Applicant was aware of his former employer's policy that its employees should not use its computers to access or download information not related to company business, and that Applicant knowingly acted in violation of his former employer's policy when he accessed and downloaded pornographic images from the Internet.

The Board does not find persuasive Applicant's contention that the Administrative Judge failed to take into account evidence favorable to him. There is a rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Apart from that presumption, the Judge specifically noted Applicant's claim that he was terminated by his former employer because of a personality conflict with a human resources director. It was not arbitrary or capricious for the Judge to conclude that Applicant's claim was not relevant to evaluating the security significance of his conduct in misusing his former employer's computer network. The gravamen of this case is Applicant's misuse of the computer network of his former employer, not how his former employer chose to deal with his misconduct. Moreover, the Judge specifically noted the record evidence of Applicant's employment record and his history of holding security clearances for more than 30 years. The Judge was not compelled, as a matter of law, to give controlling or dispositive weight to that favorable evidence. The Judge's choice to give that evidence less weight than Applicant would have liked him to is not proof that the Judge simply ignored that evidence or failed to take it into account.

Applicant's last argument also is not persuasive. The absence of record evidence of other misconduct by Applicant does not render the Administrative Judge's decision in this case arbitrary, capricious, or contrary to law. Even if Applicant did not engage in other acts of misconduct, it was proper for the Judge to evaluate Applicant's security eligibility in light of the misconduct that formed the basis of the SOR in this case. The Judge's findings and conclusions about Applicant's misuse of the computer network of his former employer provide a sufficient basis for the Judge's adverse conclusions under Guideline E (Personal Conduct) and his overall unfavorable security clearance decision.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Applicant's argument that he knew he was accessing pornographic images, but did not knowingly download those pornographic images onto his former employer's computer network raises a distinction that is not material to this case.