

DATE: January 12, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15817

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 May 10, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge LeRoy F. Foreman issued an unfavorable security clearance decision, dated September 13, 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 following issues have been raised on appeal: (1) whether the Administrative Judge erred by concluding that Applicant had not demonstrated that his financial difficulties were resolved; and (2) whether the Administrative Judge erred by finding that Applicant falsified a security clearance application by failing to disclose all of his criminal record. 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 erred by concluding that Applicant had not demonstrated that his financial difficulties were resolved. The Administrative Judge made findings of fact about Applicant's history of financial difficulties, which resulted in delinquent debts worth approximately \$15,300, some of which had been delinquent for several years. The Judge concluded that Applicant had not resolved the security concerns raised by his history of financial difficulties because the record evidence showed that Applicant was working with a consumer credit counseling agency, but Applicant had not presented any evidence to show what progress had been made on resolving his delinquent debts.

On appeal, Applicant: (a) offers an explanation concerning the status of the debt covered by SOR paragraph 1.q; (b) asserts that he completed the consumer credit counseling program in early 2004 and cleared his delinquent debts; and (c) states he has been free from alcohol since July 2002.

Applicant's statements go beyond the record evidence that was before the Administrative Judge. As such, Applicant's statements constitute new evidence that the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to respond to the File of Relevant Material and offer evidence for the Judge to consider in his case. Applicant did not submit a response to the File of Relevant Material or offer evidence for the Judge to consider. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence on appeal. ⁽¹⁾

2. Whether the Administrative Judge erred by finding that Applicant falsified a security clearance application by failing to disclose all of his criminal record. The Administrative Judge found that Applicant falsified a security clearance application by failing to disclose all of his criminal record, as alleged by SOR paragraph 2.b. ⁽²⁾ On appeal, Applicant

challenges the Judge's finding of falsification, arguing that his failure to fully disclose his criminal record was "no more than an oversight" and not deliberate.

The Administrative Judge correctly stated that a finding of falsification requires evidence that the applicant acted with an intent to mislead or deceive the government (Decision at p. 5), but the Judge incorrectly cited a June 2004 Board decision for the proposition that proof that an applicant omitted information from a security clearance application shifts the burden of proof to the applicant to negate a finding of falsification (Decision at p. 6). In another case, the Board has explained why proof of an omission, standing alone, is not sufficient to shift the burden of proof to an applicant. *See, e.g.*, ISCR Case No. 03-09483 (November 17, 2004) at pp. 3-4. However, the Judge's erroneous reading of the Board's June 2004 decision is harmless error under the particular facts and circumstances of this case. The Judge correctly noted that a finding of falsification requires evidence that an applicant acted with an intent to mislead or deceive the government. Given the record evidence in this case, the Judge had a sufficient basis for finding that Applicant's failure to fully disclose his criminal record was deliberate or intentional, and not just a mere oversight. Accordingly, the Judge's finding of falsification is sustainable.

Conclusion

Applicant has failed to demonstrate error below. Therefore, 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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. Apart from the Directive's prohibition against new evidence on appeal, Applicant's statement about his drinking is irrelevant to this case. The SOR did not make any allegation about Applicant's drinking, and the Administrative Judge did not make any finding of fact about Applicant's drinking or rely on Applicant's drinking to reach his conclusions under Guideline E (Personal Conduct) or Guideline F (Financial Considerations).

2. The Administrative Judge found that Applicant did not falsify the security clearance application as alleged in SOR paragraph 2.a. That favorable finding is not at issue on appeal.