

DATE: April 12, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17410

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 June 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 H (Drug Involvement) and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated January 24, 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 Applicant was denied "fair justice in this case"; (2) whether the Administrative Judge should have granted Applicant a conditional security clearance; and (3) whether Applicant is entitled to have the Board override Executive Order 10865 in order to reach a decision favorable to him. 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

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of marijuana use (which covered the period from high school to May or June 2003, when Applicant was 44 years old), or the Judge's findings of fact about his falsifications of security clearance applications in April 1997 and April 1999. However, Applicant does makes several arguments that the Board construes as raising the following issues: (1) whether Applicant was denied "fair justice in this case"; (2) whether the Administrative Judge should have granted Applicant a conditional security clearance; and (3) whether Applicant is entitled to have the Board override Executive Order 10865 in order to reach a decision favorable to him.

1. Whether Applicant was denied "fair justice in this case." Applicant asserts that: (a) he is aware of misconduct by other people that have kept their security clearance; (b) that misconduct by other people is more serious than his misconduct; (c) he is disappointed in the Administrative Judge's unfavorable decision because Applicant could never do anything to harm the country; and (d) he believes he has not received "fair justice in this case."

Applicant's assertion about unspecified misconduct by unidentified persons does not demonstrate the Administrative Judge erred. First, Applicant's assertions go beyond the record evidence and constitute a proffer of new evidence on appeal. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Second, the Administrative Judge's unchallenged findings of fact about Applicant's overall history of marijuana use and his falsification of two security clearance applications provide a rational, legally sufficient basis for the Judge's adverse conclusions about Applicant's security eligibility. Third, there is a rebuttable presumption that governmental employees and officials act in good faith, and a person seeking to rebut or overcome that presumption has a heavy burden of presenting clear evidence to the contrary. *See, e.g., National Archives and Records Administration v. Favish*, 541 U.S. --, slip op. at 16 (March 30, 2004). Applicant's personal belief that he is being unfairly treated falls far short of rebutting that presumption in this case.

2. Whether the Administrative Judge should have granted Applicant a conditional security clearance. Applicant states that he does not understand why the Administrative Judge made an unfavorable security clearance decision despite his offer to undergo random drug testing and a polygraph test. The Board construes Applicant's statement as raising the issue of whether the Judge should have granted him a security clearance on condition that he undergo random drug testing and pass a polygraph test. Under the Directive, there is no authority to grant a conditional security clearance. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 7. Accordingly, neither the Judge nor the Board can grant Applicant a security clearance conditioned on his offer to undergo random drug testing and pass a polygraph test.

3. Whether Applicant is entitled to have the Board override Executive Order 10865 in order to reach a decision favorable to him. Applicant's appeal brief also asks what purpose is served in having an appeals process which cannot override an Executive Order. Applicant seeks relief to which he is not entitled. It is a fundamental principle of American jurisprudence that government officials must act within the bounds of the law. No subordinate Executive Branch official has the authority or discretion to change an applicable Executive Order. No party is entitled to expect an Administrative Judge or the Board to usurp the authority of the President of the United States.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board