

DATE: February 9, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18181

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 E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated December 17, 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 finding Applicant falsified a written statement he gave to a federal investigator; and (2) whether the Administrative Judge's unfavorable decision lacks a rational basis. 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 finding Applicant falsified a written statement he gave to a federal investigator. The Administrative Judge found that Applicant: (a) falsified three applications for employment by claiming he had a college degree that he did not actually receive; and (b) falsified a written statement he gave to a federal investigator in March 2003 by claiming that he had only falsified a single application. Applicant does not challenge the Judge's finding that he falsified three applications for employment.⁽¹⁾ However, Applicant asserts that he was truthful with the federal government about not having a college degree. The Board construes Applicant's assertion as raising the issue of whether the Judge erred by finding Applicant falsified a written statement he gave to a federal investigator.

Applicant's assertion about not falsely claiming a college degree when he completed a security clearance application in October 2002 is irrelevant to whether the Administrative Judge could find that he falsified a written statement he gave to a federal investigator in March 2003. The SOR did not allege that Applicant falsified the security clearance application. The Judge did not find Applicant falsified the security clearance application. It is legally and logically possible for the Judge to find Applicant was untruthful when he gave the written statement to an investigator in March 2003 despite the absence of any evidence that he falsified the security clearance application. Moreover, the Judge did not find that Applicant falsified the written statement by claiming he had a college degree. Rather, the Judge found that Applicant falsified the written statement by claiming that he had falsified only one employment application, when he had falsified three employment applications.

Considering the record as a whole, the Administrative Judge had sufficient record evidence to find that Applicant falsified a written statement in March 2003 by claiming that he had only falsified one employment application.

2. Whether the Administrative Judge's unfavorable decision lacks a rational basis. On appeal, Applicant argues: (a) he has not had a security violation; (b) he is not vulnerable to blackmail or coercion; (c) his employment history shows that he exhibits good judgment, reliability, and trustworthiness; (d) he has the respect of his professional colleagues; (e) a

favorable decision would allow him to keep his job and support his family; and (f) he would like to be allowed to retain a Secret clearance. (2) The Board construes these arguments as raising the issue of whether the Administrative Judge's unfavorable decision lacks a rational basis.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). The federal government is not required to wait until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 139 (1970). Nor is the federal government required to wait until there is evidence that an applicant is vulnerable to coercion or blackmail before it can deny or revoke access to classified information. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 10. All that is required is proof of conduct or circumstances that indicate an applicant does not exhibit the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 02-17007 (June 16, 2004) at p. 4. Accordingly, the absence of security violations by Applicant, and the absence of any finding by the Administrative Judge that Applicant is vulnerable to coercion or blackmail, did not preclude the Judge from making an unfavorable security clearance decision. The Judge's findings of Applicant's dishonesty and falsification provide a rational and legally sufficient basis for the Judge's adverse conclusions about Applicant's security eligibility.

Applicant's ability to cite to favorable record evidence does not demonstrate the Administrative Judge erred. The Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a reasoned conclusion as to whether Applicant satisfied his burden of persuasion that a favorable security clearance decision is warranted in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-20947 (June 18, 2004) at p. 5. Considering the record as a whole, Applicant has not demonstrated that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law, or that the Judge reached conclusions that are arbitrary, capricious, or contrary to law.

The possible adverse effect that an unfavorable security clearance decision might have on Applicant is not relevant to the Administrative Judge's determination as to Applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8. The security significance of Applicant's acts of dishonesty and falsification do not turn on whether an unfavorable security clearance decision will have an adverse effect on his personal situation.

Applicant's request that he be allowed to retain a Secret clearance cannot be granted. An unfavorable security clearance decision means that Applicant is not eligible to hold a security clearance at any level. *See* Directive, Section 3.2. *See also* ISCR Case No. 99-0260 (April 12, 2000) at p. 4.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Because there is no presumption of error below, the Board need not review an Administrative Judge's unchallenged findings of fact.
2. Along with his appeal brief, the Applicant provided the Board with additional documentary evidence in the form of his college transcript. The Board may not consider this new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.