

DATE: May 5, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19002

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 August 3, 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) and Guideline J (Criminal Conduct). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated January 26, 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 the Administrative Judge's findings of falsification are supported by the record evidence as a whole; (2) whether the Administrative Judge erred by concluding that Applicant's conduct was not extenuated or mitigated; and (3) whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. 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's findings of falsification are supported by the record evidence as a whole. The Administrative Judge found that Applicant falsified a security clearance application in June 2001 by failing to disclose that: (a) he had been involved in a January 1998 driving incident involving drugs; (b) he had used marijuana in the past; and (c) had three delinquent debts. The Judge also found that Applicant falsified material facts during an October 2001 interview by stating he had received a general discharge from the military for medical reasons, when he had in fact received a discharge under other than honorable conditions. On appeal, Applicant challenges the Judge's findings of falsification.

The Administrative Judge had to consider the record evidence as a whole and make findings of fact about Applicant's intent or state of mind when Applicant omitted information from the security clearance application, and when he made a statement to an investigator during the October 2001 interview about the nature and circumstances of his discharge from the military. Applicant's denials of any intent to conceal facts or deceive or mislead the federal government had to be considered by the Judge, but those denials were not binding or conclusive on the Judge. Rather, the Judge had to consider Applicant's denials and explanations in light of the Judge's assessment of the credibility of Applicant's testimony and the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-26360 (June 23, 2004) at p. 3. Considering the record evidence 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's findings of falsification are sustainable. Applicant's disagreement with the Judge's findings of falsification is not sufficient to demonstrate the Judge's findings are erroneous and not supported by the record evidence.

2. Whether the Administrative Judge erred by concluding that Applicant's conduct was not extenuated or mitigated. Applicant asserts that he was truthful and forthcoming with the investigator about his past criminal conduct, that he felt he corrected any mistakes or omissions in his security clearance application through his disclosures to the investigator,

and he has regretted his mistakes and past misconduct. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge erred by concluding that Applicant's conduct was not extenuated or mitigated.

The Administrative Judge concluded that Applicant's past criminal conduct and past drug abuse had been mitigated, but that Applicant's falsifications were not extenuated or mitigated. It was not arbitrary or capricious for the Judge to distinguish between Applicant's past misconduct and Applicant's falsifications about that past misconduct. Deliberate falsifications have negative security implications that are independent from the security implications of the conduct that an applicant tries to conceal. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at pp. 3-4. Considering the record as a whole, the Judge's conclusion on this aspect of the case is not arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. Applicant also asserts that: (a) he cannot be blackmailed because of his past; (b) he is not a threat to the national security; and (c) he needs a security clearance for his career. The Board construes these statements as raising the issue of whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

The federal government does not have 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. 1039 (1970). Furthermore, Department Counsel does not have to prove that an applicant presents an imminent threat to national security before an Administrative Judge can make an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 7.

Serious security concerns would be raised if an applicant's conduct or circumstances placed the applicant in a position of vulnerability to blackmail or coercion. However, the federal government can deny or revoke access to classified information on grounds unrelated to vulnerability to blackmail or coercion. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 6. The Administrative Judge's findings and conclusions about Applicant's falsifications provide a sufficient basis for his adverse conclusions about Applicant's security eligibility, even without any finding that Applicant is vulnerable to blackmail or coercion. *See, e.g.*, ISCR Case No. 02-12329 (December 18, 2003) at p. 4 (discussing security significance of falsifications).

There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Furthermore, the possibility that an unfavorable security clearance decision could adversely affect Applicant's employment situation and career is not relevant to the Administrative Judge's evaluation of the security significance of Applicant's falsifications. *See, e.g.*, ISCR Case No. 01-21851 (April 18, 2003) at p. 4.

For all the foregoing reasons, the Board concludes Applicant has not shown that the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's unfavorable 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

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