

DATE: May 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20005

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 8, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption). Administrative Judge Robert Robinson Gales issued an unfavorable security clearance decision, dated February 25, 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 suffered any substantial harm to his rights under the Directive because the Administrative Judge did not issue his decision sooner; and (2) whether the Administrative Judge failed to take into account evidence favorable to Applicant. 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 Applicant suffered any substantial harm to his rights under the Directive because the Administrative Judge did not issue his decision sooner. Applicant asserts that at the hearing (held in October 7, 2004) he was told he would receive a decision in his case within 30 days, and points out that the Administrative Judge's decision was not issued until February 25, 2005. The Board construes Applicant's statements as raising the issue of whether Applicant suffered any substantial harm to his rights under the Directive because the Administrative Judge did not issue his decision sooner.

Nothing in the case file indicates that Applicant was told that a decision would be issued in his case within 30 days of the hearing. The prehearing guidance sent to Applicant does not contain any statement indicating when a decision would be issued by the Administrative Judge. At the hearing, the Judge told Applicant that he would issue a decision (Hearing Transcript at p. 10), and that his decision would be issued "[w]ithin a reasonable period after receipt of the transcript" (Hearing Transcript at p. 65).

Even if the Board were to assume -- solely for purposes of deciding this appeal -- that either the Administrative Judge or Department Counsel made a statement to him, off the record, about when he could expect a decision to be issued, Applicant has failed to show that any substantial right of his under the Directive that was infringed or harmed. Absent a showing that Applicant was prejudiced in any meaningful way, he cannot rely on the passage of time between the hearing and issuance of the Judge's decision as a basis for claiming the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-08565 (March 7, 2003) at p. 4. Although Applicant believes the Judge's decision should have been issued sooner, Applicant has not identified any way that his rights under the Directive were violated or prejudiced by the passage of time between the hearing and the issuance of the Judge's decision.

2. Whether the Administrative Judge failed to take into account evidence favorable to Applicant. Applicant also: (a) notes that he presented three letters of recommendation for the Administrative Judge to consider in his case, and states

that he believes those letters should have been taken into consideration; (b) refers to the evidence that he attended counseling and alcohol education programs; and (c) states that he does not handle classified information in his position. The Board construes Applicant's statements as raising the issue of whether the Judge failed to take into account evidence favorable to Applicant.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's belief that the Judge should have given more weight to evidence that he feels is favorable to him is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence. A Judge's decision to weigh the evidence differently than a party would like does not mean that the Judge simply ignored or failed to consider the evidence.

Applicant's statement about not handling classified information does not demonstrate the Administrative Judge erred. Under the Directive, an applicant's security eligibility is adjudicated under the same standards regardless of whether the applicant's position requires a security clearance for access to classified information or access to a secure area. *See, e.g.*, ISCR Case No. 02-28502 (March 26, 2004) at p. 4. The particular reason Applicant was required to apply for, or possess, a security clearance is irrelevant to the Judge's adjudication of Applicant's security eligibility under Guideline G.

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 D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean S. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board