

DATE: August 24, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21220

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

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 G (Alcohol Consumption), Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued a favorable security clearance decision dated February 3, 2005.

Department Counsel appealed the Administrative Judge's favorable 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's 2001 drug use was an isolated incident, and (2) whether the Administrative Judge's findings and conclusions with respect to Applicant's failure to report his 2001 drug use on his security clearance application were arbitrary, capricious or contrary to law.

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⁾

Before addressing the main appeal issues, the Board will discuss a threshold issue raised by portions of both parties' briefs, which sets forth proposed "additions" to the Administrative Judge's Findings of Fact. Although the parties are free--within the bounds of zealous advocacy--to argue about what the record evidence shows, it is the Judge, not the parties, that makes the findings of fact in a case. Moreover, the Directive authorizes the Board to review a Judge's findings of fact, not engage in *de novo* fact-finding on appeal. Accordingly, the Board will consider the proffered "additions" only to the extent they constitute argument about the record evidence in support of any specific appeal issues raised by Department Counsel. ⁽²⁾

(1) Whether the Administrative Judge erred by concluding that Applicant's 2001 drug use was an isolated incident. Department Counsel's premise for raising this issue involves reliance on allegations of drug use from the 1970's and 1980's which were known to the government prior to issuance of the SOR but which were not alleged in that document or at the hearing. For the Board to reverse the Administrative Judge's decision on this basis would be contrary to the plain language of Executive Order 10865 and the Directive and have the practical effect of asking the Board to amend the SOR on appeal in violation of the terms of the Directive, Additional Procedural Guidance Item E3.1.17. Department Counsel did not move to amend the SOR to include these allegations in Applicant's case. Therefore, the allegations were not before the Judge. Having failed to raise the allegations below, Department Counsel is precluded from raising them for the first time on appeal. *See, e.g.*, ISCR Case No. 03-12882 (July 20, 2005) at pp. 3-4.

(2) Whether the Administrative Judge's findings and conclusions with respect to Applicant's failure to report his 2001 drug use on his security clearance application were arbitrary, capricious or contrary to law. Department Counsel challenges the Administrative Judge's findings and conclusions with respect to Applicant's failure to report his 2001

drug use for the following reasons: (a) no mitigating condition is applicable in Applicant's case; (b) Applicant's claim of his understanding of the word "use" is not credible; and (c) the Judge's whole person analysis is unsustainable given the weight of the evidence.

Department Counsel's first argument is not persuasive. The Board has previously held both that the mere presence or absence of an Adjudicative Guidelines disqualifying condition or mitigating condition is not solely dispositive of a case and that the absence of a specific Adjudicative Guidelines mitigating condition that is applicable to the facts of a case does not preclude a Judge from making a favorable decision. *See, e.g.*, ISCR Case No. 03-12882 (July 20, 2005) at pp. 5-6. Applicant is correct that an Administrative Judge is obliged to consider the whole person of an Applicant in the Judge's analysis of the record evidence regardless of which party benefits from such consideration.

Department Counsel's second and third arguments overlap and are persuasive. The Administrative Judge's favorable whole person analysis relies in part on his explicit acceptance of Applicant's explanation that he did not believe that two puffs on a marijuana cigarette in 2001 constituted use of the drug and that therefore "the omissions were not deliberate and are thus mitigated."

The Administrative Judge in his whole person analysis did not analyze Applicant's omission or the credibility of Applicant's explanation for the omission in the context of: (a) Applicant's acknowledgment that he would not accept such an explanation from his son⁽³⁾ or (b) the fact that Applicant had previously prepared security clearance applications and then had to issue personal statements clarifying omissions from those applications. Nor did the Judge analyze Applicant's omission from the current security clearance application in the context of Applicant's previous statement to the government that he had no intention of using drugs in the future.

Although an Administrative Judge's credibility determination is entitled to deference on appeal, that deference is not unfettered. In this case, the Judge's credibility determination is sufficiently undercut by Applicant's own testimony and by relevant aspects of Applicant's prior history, so as to make the Judge's credibility determination unsustainable. Furthermore, the Judge's favorable whole person analysis of Applicant is also unsustainable for the same reasons.

Applicant's argument that Department Counsel's failure to appeal other favorable findings regarding alleged falsifications undercuts the appeal, is not persuasive. The Board need not speculate on the basis for a party's decision as to what to appeal. Applicant is correct that not every mistaken answer is the basis for denying a clearance. In this case, however, the Judge's finding that Applicant's explanation of misunderstanding of the word "use" for his omission was credible, is not sustainable in light of all the record evidence.

Conclusion

Department Counsel has met its burden of demonstrating harmful error in the Administrative Judge's decision. The Judge's February 3, 2005 decision is reversed.

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Department Counsel did not appeal the Administrative Judge's favorable formal findings under SOR paragraph 1 and subparagraph 3.a. Those favorable findings are not at issue on appeal.
2. If a party believes the Administrative Judge's decision does not set forth pertinent findings of fact, then the party can consider whether to raise a claim that the Judge failed to comply with the requirements of the Directive, Additional Procedural Guidance, Item E3.1.25. If a party believes the Judge reached conclusions that do not rationally follow from, or are not adequately supported by, the Judge's findings of fact, then the party can consider whether to raise a claim that the Judge's conclusions are arbitrary or capricious.
3. At the hearing, Applicant said that if his son told him that he had taken two puffs he would consider his son to have used it and that he would have been very angry with any association with marijuana on the part of any of his sons. See Hearing Transcript, pp. 166, 168-9.