

DATE: May 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 03-22843

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 7, 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 James A. Young issued an unfavorable security clearance decision, dated March 14, 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 issue has been raised on appeal: whether Applicant was denied the right to prepare and present his case for the Administrative Judge to consider. 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 Issue

Whether Applicant was denied the right to prepare and present his case for the Administrative Judge to consider. On appeal, Applicant asserts he was unable to prepare and present his case because the agent who interviewed him gave him (a) "incorrect information regarding the submittal of evidence before judgment" and "[i]naccurate information regarding my clearance." The Board construes Applicant's assertions as raising the issue of whether he was denied the right to prepare and present his case for the Administrative Judge to consider before the Judge issued a security clearance decision in his case.

A review of the record evidence shows that Applicant was interviewed by a Special Agent of the Defense Security Service in June 2003 and by another Special Agent in August 2003. There is no indication in the record evidence as to what, if anything, either Special Agent told Applicant about the adjudication of his security clearance case.

A review of the procedural history of Applicant's case shows the following:

(1) The May 7, 2004 letter accompanying the SOR issued to Applicant provided him with detailed information about the adjudication of his security clearance case by the DOHA, including: his right to respond to the SOR allegations and provide information to explain, refute, extenuate or mitigate the allegations in the SOR; the consequences if he did not respond to the SOR; his right to ask for a hearing before a DOHA Administrative Judge; and what would happen if he asked for a hearing or requested a determination without a hearing. Furthermore, a copy of the Directive was sent to Applicant with the May 7, 2004 letter.

(2) Applicant submitted an answer to the SOR, in which he admitted all the SOR allegations and stated "I am requesting an Administrative Determination without a hearing."

(3) Department Counsel prepared a File of Relevant Material (FORM). A copy of the FORM was sent to Applicant

under cover of a letter dated July 21, 2004. The July 21, 2004 letter advised Applicant that he had the opportunity to respond to the FORM and submit additional information for the Judge to consider in his case. The July 21, 2004 letter also informed Applicant that if he did not submit a response to the FORM, his case would be assigned to an Administrative Judge for consideration based solely on the FORM.

(4) Applicant did not submit any response to the FORM.

Considering the procedural history of Applicant's case, the Board concludes that: (a) DOHA placed Applicant on adequate notice of his rights under the Directive; (b) Applicant waived his right to a hearing; (c) Applicant waived his right to respond to the FORM and provide additional information for the Administrative Judge to consider in his case; and (d) there is nothing in the record below that provides any basis for Applicant's claim that he was denied the right to prepare his case for presentation before a DOHA Administrative Judge.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate any error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board