

DATE: January 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22883

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

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 December 9, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline H (Drug Involvement), and Guideline E (Personal Conduct). Administrative Judge Martin H. Mogul issued a favorable security clearance decision on May 19, 2005. [\(1\)](#)

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 has been raised on appeal: (1) whether the Administrative Judge's failure to make a finding as to whether Applicant falsified question 24 of his Security Clearance Application with respect to omitting a drug-related citation, is arbitrary, capricious or contrary to law; (2) whether the Administrative Judge's application of Personal Conduct Mitigating Conditions to Applicant's falsification of his Security Clearance Application by omitting a DUI charge is arbitrary, capricious or contrary to law; and (3) whether certain portions of Department Counsel's appeal brief are unfairly prejudicial to Applicant. For the reasons that follow, the Board remands 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 ⁽²⁾

1. Whether the Administrative Judge's failure to make a finding as to whether Applicant falsified question 24 of his Security Clearance Application with respect to omitting a drug related citation, is arbitrary, capricious or contrary to law. Department Counsel contends that the Administrative Judge's decision with respect to SOR paragraph 3.a did not address the alleged falsification of the drug charge, but was limited solely to the alleged falsification of the DUI charge. The Judge's decision summarized Applicant's testimony, *i.e.*, at the time he completed the Security Clearance Application, the drug charge had not been resolved in court and that it was his plan to dispute the charge. The Administrative Judge found that the pipe containing the drug was not Applicant's property and that Applicant had no knowledge of it. But the relevant issue before the Judge was Applicant's omission of the citation for misdemeanor possession of marijuana from the Security Clearance Application, not whether Applicant was guilty of the underlying charge. The Judge concluded that Applicant "provided less than complete information . . . in response to Question 24," and that Applicant "knowingly provide untruthful information regarding his 1988 DUI." However, the Judge's decision contains no finding as to whether Applicant's omission of the drug charge was a falsification or not.

The parties and the Board have a right to know what findings the Judge is making with respect to all of the SOR allegations, not just some of them. The Judge is required to "make a written clearance decision . . . setting forth pertinent findings of fact, policies and conclusions as to the allegations in the SOR." Directive, Additional Procedural Guidance,

Item E3.1.25. The Judge's failure to do so with respect to the drug citation in SOR paragraph 3.a is material error.

2. Whether the Administrative Judge's application of Personal Conduct Mitigating Conditions to Applicant's DUI falsifications is arbitrary, capricious or contrary to law. Department Counsel also contends the Administrative Judge's application of Personal Conduct Mitigating Conditions 2 and 3 is arbitrary, capricious, and contrary to law. Because of the Board's resolution of the first issue, it would be premature for the Board to address the merits of this issue.

3. Whether certain portions of Department Counsel's appeal brief are unfairly prejudicial. Applicant contends that various portions of Department Counsel's appeal brief contains errors and omissions that are unfair and prejudicial to him. Because of the Board's resolution of the first issue, it would be premature for the Board to address the merits of this issue.

Conclusion

Department Counsel has demonstrated error that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with instructions to issue a new decision consistent with the requirements of Directive, Additional Procedural Guidance, Item E3.1.35 and Item E3.1.25.

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. The Decision cites May 19, 2004 as the date of issuance; however, considering the record, it is clear that "2004" was a typographical error and that the proper year of issuance was 2005.

2. The Administrative Judge's favorable formal findings under SOR paragraphs 1, 2 and 3b are not at issue in this appeal.