

DATE: January 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23765

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 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 F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated November 30, 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 erred by finding Applicant falsified a security clearance application by not disclosing a driving under the influence charge that was dismissed; and (2) whether the Administrative Judge failed to apply the "whole person" concept when deciding Applicant's case. 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 erred by finding Applicant falsified a security clearance application by not disclosing a driving under the influence charge that was dismissed. SOR paragraph 3.a alleged that Applicant falsified a security clearance application by not disclosing his criminal record. Making allowances for Applicant's *pro se* status, the Board construes Applicant's appeal brief as asserting that he did not falsify the security clearance application because a driving under the influence charge was not listed because it had been dismissed.

The Administrative Judge found that the record evidence did not support the falsification allegation set forth in SOR paragraph 3.a (Decision at p. 5). ⁽¹⁾ Based on that finding, the Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 3.a (Decision at p. 6). Therefore, Applicant's appeal argument about why the driving under the influence charge was not listed in his security clearance application is moot.

2. Whether the Administrative Judge failed to apply the "whole person" concept when deciding Applicant's case. Applicant also contends the Administrative Judge failed to evaluate his case under the "whole person" concept. In support of this contention, Applicant argues: (a) his filing for a Chapter 13 bankruptcy shows "a strong sense of personal responsibility" and a commitment to repay his debts; and (b) the non-judicial punishment that he received under Article 15 of the Uniform Code of Military Justice happened more than twenty years ago was not criminal in nature. For the reasons that follow, this claim of error is not persuasive.

The Administrative Judge noted Applicant's efforts to deal with his overdue debts, including his receiving debt management credit counseling and his filing for Chapter 13 bankruptcy (Decision at p. 3). The Judge found that Applicant had satisfied some of his overdue debts (Decision at p. 3) and entered formal findings in favor of Applicant with respect to the debts covered by SOR paragraphs 1.b, 1.f, and 1.i (Decision at p. 6). Also, the Judge evaluated the

facts and circumstances of Applicant's history of financial difficulties (Decision at pp. 3, 4) and explained why he concluded that Applicant "has not fully mitigated the security concerns raised by his financial situation" (Decision at p. 4). The Judge's evaluation of Applicant's overall history of financial difficulties in light of Applicant's efforts to address and resolve his overdue debts reflects a reasonable analysis that is consistent with the "whole person" concept (Directive, Adjudicative Guidelines, Item E2.2.1). Applicant's disagreement with the Judge's adverse conclusions under Guideline F, standing alone, is not sufficient to demonstrate the Judge erred.

Although Article 15 nonjudicial punishment is imposed under the Uniform Code of Military Justice administratively and not as a result of a court-martial, the manner in which an Article 15 is imposed does not preclude an Administrative Judge from finding that imposition of Article 15 nonjudicial punishment is evidence that an applicant's conduct constitutes criminal conduct under Guideline J. In this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's conduct which was the basis for imposition of an Article 15 in 1979 (*i.e.*, possession of marijuana) constituted criminal conduct under Guideline J. Furthermore, in evaluating Applicant's case under Guideline J, the Judge did not consider Applicant's dated Article 15 in isolation, but rather considered it in conjunction with Applicant's other criminal conduct (Decision at pp. 5-6). The Judge was not required to consider each incident of criminal conduct in a piecemeal manner. It was not arbitrary, capricious, or contrary to law for the Judge to consider the totality of Applicant's incidents of criminal conduct under Guideline J.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge also found that Applicant falsified the security clearance application by failing to disclose he had delinquent debts. Applicant does not challenge that finding on appeal.