

DATE: July 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ADP Case No. 03-24546

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 22, 2004, which stated the reasons why DOHA proposed to deny or revoke access to unclassified automated systems in ADP-I and ADP-II sensitivity positions for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Michael J. Breslin issued an unfavorable trustworthiness decision, dated March 28, 2005. Applicant appealed that unfavorable decision.

The Composite Health Care System Program Office, the Directorate for Industrial Security Clearance Review (now Defense Office of Hearings and Appeals), and the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence entered into a memorandum of agreement (MOA), effective April 9, 1993, under which the Defense Office of Hearings and Appeals (DOHA) is authorized to adjudicate trustworthiness cases involving personnel working on unclassified automated systems in ADP-I and ADP-II sensitivity positions as defined in DoD Regulation 5200.2-R. This Board has jurisdiction on appeal by virtue of the MOA, Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended), and DoD Regulation 5200.2-R, dated January 1987 (as amended).

The issues raised on appeal are: (1) whether the Administrative Judge erred by finding that Applicant falsified a Public Trust Position Application by not disclosing all of her criminal record; and (2) whether the Administrative Judge should have made a favorable trustworthiness decision conditioned on further investigation to confirm Applicant is trustworthy and not dishonest. For the reasons that follow, the Board affirms the Judge's unfavorable trustworthiness 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).⁽¹⁾

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 trustworthiness cases involving personnel working on unclassified, sensitive ADP positions 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⁽²⁾

1. Whether the Administrative Judge erred by finding that Applicant falsified a Public Trust Position Application by not disclosing all of her criminal record. The Administrative Judge found that Applicant's past criminal conduct was mitigated and entered formal findings in her favor under Guideline J (Criminal Conduct). However, the Judge found that Applicant falsified a Public Trust Position Application by not disclosing all of her criminal record. On appeal, Applicant challenges the Judge's finding of falsification.⁽³⁾

Considering the record as a whole, there is enough evidence to allow the Administrative Judge to conclude that Department Counsel had satisfied its burden of presenting evidence in support of the SOR paragraph 2.a falsification allegation that was sufficient to shift the burden to Applicant to rebut or refute the allegation that she falsified the Public Trust Position Application.⁽⁴⁾ Applicant's explanation for why she did not disclose all of her criminal record when she completed the Public Trust Position Application was relevant evidence that the Judge had to consider, but Applicant's explanation was not binding on the Judge. Rather, the Judge had to weigh Applicant's explanation in light of the Judge's assessment of the credibility of Applicant's testimony about the omissions and the record evidence as a whole, and make a finding of fact about whether the omissions were deliberate or inadvertent. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record evidence as whole, and giving due deference to the Judge's

assessment of the credibility of Applicant's testimony, ⁽⁵⁾ the Board concludes the Judge's finding of falsification is sustainable.

2. Whether the Administrative Judge should have made a favorable trustworthiness decision conditioned on further investigation to confirm Applicant is trustworthy and not dishonest. Applicant asserts that the Department of Defense would learn that she is not a dishonest person if it would interview her family, friends, boss, and co-workers. Applicant also asserts that "I feel that putting me on a probationary period [would be] a fair decision" so that she could continue to work while the Department of Defense considers her current situation in assessing her trustworthiness for a sensitive ADP position. The Board construes Applicant's assertions as raising the issue of whether the Administrative Judge should have made a favorable trustworthiness decision conditioned on further investigation to confirm Applicant is trustworthy and not dishonest.

A review of the proceedings below persuades the Board of the following: (a) Applicant was placed on adequate notice that DOHA proposed to deny or revoke access to unclassified, sensitive ADP positions for her based on her falsification of a Public Trust Position Application; (b) Applicant was placed on reasonable notice that the hearing was her opportunity to present testimony and documentary evidence on her behalf, including testimony or written statements by persons other than herself; and (c) Applicant was given a reasonable opportunity to prepare for the hearing and to present evidence on her behalf. If Applicant believed that testimony or written statements from other persons would be helpful to her case, she could have presented such evidence at the hearing for the Administrative Judge to consider in her case. Indeed, at the hearing Applicant took the opportunity to present written statements prepared by other persons on her behalf.

Nothing in the Directive or DoD Regulation 5200.2-R authorizes the Administrative Judge to make a favorable trustworthiness decision conditioned on further investigation of Applicant. Applicant requests relief that she is not entitled to.

Conclusion

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

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. This case involves an adjudication (under DoD Regulation 5200.2-R) of Applicant's eligibility to occupy a sensitive ADP position, not an adjudication (under DoD Directive 5220.6) of Applicant's eligibility for a security clearance. However, the Board can cite and rely on its decisions in security clearance cases when those decisions support legal propositions and principles that are pertinent to the adjudication of an ADP trustworthiness case. *See, e.g.*, ADP Case No. 00-0131 (May 3, 2001) at p. 2 n.2.
2. Applicant's appeal brief contains factual assertions that go beyond the record evidence that was before the Administrative Judge. Such assertions constitute a proffer of new evidence, which the Board cannot consider on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29.*
3. The Administrative Judge's formal findings in favor of Applicant with respect to Guideline J (Criminal Conduct) are not at issue on appeal. Accordingly, Applicant's appeal arguments about her past criminal record are moot.
4. *See Directive, Additional Procedural Guidance, Item E3.1.14* (Department Counsel has burden of presenting evidence to prove controverted facts); and *Directive, Additional Procedural Guidance, Item E3.1.15* (the burden shifts to the applicant to present evidence to rebut, refute, explain, extenuate or mitigate SOR allegations that have been admitted by the applicant or proven by Department Counsel).
5. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.*