

DATE: November 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24988

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Neil A. Hourihan, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 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 H (Drug Involvement) and Guideline E (Personal Conduct). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated August 5, 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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant's falsifications were not extenuated or mitigated. 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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant's falsifications were not extenuated or mitigated. The Administrative Judge found that Applicant had a history of cocaine use (with varying frequency spanning the period 1986-1999), marijuana use (with varying frequency spanning the period 1978-2000), and experimental use of hashish and mescaline (1979-1980). The Judge concluded that Applicant's history of drug abuse was mitigated because he had not used illegal drugs since July or August 2000 and had participated in a treatment program that addressed the reasons for his use of those drugs. Based on those favorable conclusions the Judge entered formal findings in favor of Applicant under Guideline H (Drug Involvement).⁽¹⁾ The Judge found that Applicant falsified material facts about his drug abuse when he completed a security clearance application in November 1999, and in a written statement he gave an investigator in July 2000. The Judge concluded that Applicant's falsifications raised serious questions about his judgment, reliability, and trustworthiness, and further concluded Applicant had not successfully demonstrated extenuation or mitigation of those falsifications because: (1) Applicant's falsifications were not an isolated or aberrational incident; (2) Applicant did not promptly correct his falsifications; (3) Applicant has not been candid about his drug abuse history with his family, friends, and professional associates; (4) Applicant's cessation of his drug abuse did not address the security concerns raised by his deliberate falsifications; and (5) the favorable evidence of Applicant's military service, professional achievements, and community activities was not sufficient to mitigate the security concerns raised by his deliberate falsifications. Based on those conclusions, the Judge entered adverse formal findings under Guideline E (Personal Conduct).

On appeal, Applicant does not challenge the Administrative Judge's findings of fact. However, Applicant contends the Judge should have concluded his falsifications were extenuated or mitigated sufficiently to warrant a favorable security clearance decision because: (a) the Judge should have applied Personal Conduct Mitigating Conditions 5 and 7; (b) the Judge's favorable formal findings under Guideline H (Drug Involvement) should have carried over into her analysis of his falsifications; and (c) a whole person analysis of the facts and circumstances of Applicant's case should result in a

favorable decision. Applicant's contentions raise the issue of whether it was arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's falsifications were not extenuated or mitigated. For the reasons that follow, the Board concludes Applicant has not demonstrated the Judge's decision is arbitrary, capricious, or contrary to law.

As to Personal Conduct Mitigating Condition 5,⁽²⁾ Applicant does not present a persuasive reason or argument for why it was arbitrary or capricious for the Administrative Judge to not apply that mitigating condition. Given the Judge's unchallenged findings of fact about Applicant not being candid about his drug abuse history with his family, friends, and professional associates, the Board can discern a rational basis for the Judge's apparent choice to not apply Personal Conduct Mitigating Condition 5.

As to Personal Conduct Mitigating Condition 7,⁽³⁾ the Administrative Judge specifically concluded that it was applicable in this case but explained why it did not mitigate Applicant's falsifications (Decision at p. 9). Although Applicant asserts the Judge should have applied Personal Conduct Mitigating Condition 7 to his falsifications, Applicant has not shown that the Judge's reasoning is arbitrary or capricious.

Applicant's argument concerning the whole person concept⁽⁴⁾ does not demonstrate the Administrative Judge erred. Reading the decision below in its entirety, the Board concludes the Judge evaluated the facts and circumstances of Applicant's case in terms of the whole person concept, weighing both the favorable and unfavorable evidence, and articulated reasons for the unfavorable conclusions she reached under Guideline E (Personal Conduct). It was not arbitrary, capricious, or contrary to law for the Judge to conclude that her favorable conclusions under Guideline H (Drug Involvement) did not warrant favorable conclusions under Guideline E. As long as a Judge does not engage in reasoning that is arbitrary or capricious, it is legally permissible for a Judge to decide that findings of mitigation under one Guideline do not require findings of mitigation under another Guideline involved in the case. *See, e.g.*, ISCR Case No. 99-0228 (March 12, 2001) at p. 8. Considering the record evidence as a whole, the Judge had a rational, legally permissible basis for her conclusion that Applicant's deliberate falsifications were not extenuated or mitigated by the evidence of Applicant's drug reform and rehabilitation. Applicant's appeal argument has the practical effect of asking the Board to re-weigh the record evidence and reach its own conclusions with respect to Guideline E in this case. Under the Directive, the Board does not re-try cases on appeal.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's findings, conclusions, and favorable formal findings under Guideline H (Drug Involvement) are not at issue on appeal.
2. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress (Directive, Adjudicative Guidelines, Item E2.A5.1.3.5).
3. "Association with persons involved in criminal activities has ceased" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.7).
4. The whole person concept is set forth in Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.