

DATE: December 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04008

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 6, 2005, 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) and Guideline E (Personal Conduct). Administrative Judge Shari Dam issued an unfavorable security clearance decision, dated October 31, 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 served in the military reserves from 1961 to 1983; and (2) whether the Administrative Judge failed to take into account information that was favorable to Applicant. 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

The Administrative Judge found that Applicant was involved in an alcohol-related incident in December 2000 that resulted in a conviction for driving while impaired, that Applicant falsified a security clearance application by failing to disclose that conviction, and that Applicant's falsification of the security clearance application was a violation of 10 U.S.C. 1001. The Judge concluded that Applicant's conduct raised security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), and that Applicant had failed to present evidence sufficient to mitigate those security concerns.

1. Whether the Administrative Judge erred by finding Applicant served in the military reserves from 1961 to 1983. Applicant does not challenge the Administrative Judge's findings of fact about the December 2000 alcohol-related incident, his conviction for driving while impaired, or his falsification of the security clearance application. Because there is no presumption of error below, the Judge's unchallenged findings of fact stand and do not have to be reviewed by the Board.

Applicant does challenge the Administrative Judge's finding that he served in the military reserves from 1961 to 1983 (Decision at p. 2). The Judge's finding that Applicant served in the military reserves from 1961 to 1983 is a plausible interpretation of the record evidence in this case. *See* File of Relevant Material, Item 4 (Security Clearance Application, Standard Form 86, answer to Question 11).

2. Whether the Administrative Judge failed to take into account information that was favorable to Applicant. Applicant contends the Administrative Judge failed to take into account his past military service (including various awards and honors he received while in the military), the personal references listed on his security clearance application, and remorse for his past misconduct.

Applicant's statements about his past military service go significantly beyond the record evidence that was before the Administrative Judge and seek to supplement the evidentiary record on appeal. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

The listing of personal references on Applicant's security clearance application contains no substantive information that would permit the Administrative Judge to make any meaningful findings of fact about Applicant's conduct or character. Furthermore, a review of the case record shows that Applicant received a copy of the File of Relevant Material and was given the opportunity to respond to it and submit additional information for the Judge to consider in his case. In addition, the July 14, 2005 cover letter that accompanied the File of Relevant Material sent to Applicant put him on notice that if he did not respond to the File of Relevant Material or send additional information for the Judge to consider, his case would be assigned to a Judge for determination based solely on the File of Relevant Material. Given the absence of any response to the File of Relevant Material from Applicant, the Judge properly made her findings of fact and reached her conclusions based on the File of Relevant Material.

Applicant cannot fairly challenge the decision below based on a claim that the Administrative Judge did not consider evidence that was not provided by Applicant for consideration in his case.

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: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board