

DATE: October 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-05414

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 January 28, 2005, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated July 26, 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 the Administrative Judge erred by finding that Applicant was terminated by a particular employer in 2000. 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

Applicant does not challenge the Administrative Judge's findings that (1) he was terminated by a defense contractor in 1999 for using his company computer to access pornographic sites on the Internet; and (2) he intentionally sought to conceal the reason for that termination when he completed a security clearance application in 2003. However, Applicant does challenge the Judge's finding that he was terminated by another employer in 2000 for misuse of office equipment, asserting that he was never terminated by another employer after his termination by a defense contractor in 1999.

Applicant's claim of error is based -- in part -- on factual assertions that go beyond, and seek to supplement, the record that was before the Administrative Judge. Such factual assertions constitute a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will consider Applicant's claim of error only to the extent it is based on argument that has some basis in the record evidence that was before the Judge.

A review of the procedural history of this case shows that Applicant was provided with a copy of the File of Relevant Material (FORM) and given the opportunity to respond to the FORM and submit additional evidence for the Judge to consider in his case. Applicant submitted a written response to the FORM for the Judge to consider in his case.

In the FORM, Applicant's security clearance application indicated that he had been fired from a named company ("Company X") in August 2000 and "WAS ACCUSED (INCORRECTLY AND WRONGLY) OF MISUSING OFFICE EQUIPMENT." That entry in Applicant's security clearance application appears to be the basis for the Administrative Judge's challenged finding of fact. In Applicant's written response to the FORM, he stated that he left employment with Company X "not of my own volition but due to the company closing its doors." Applicant's written response to the FORM did not object to the entry about Company X that appears in the security clearance application and did not indicate that the entry about Company X was incorrect.

The Administrative Judge had to consider the record evidence as a whole (including Applicant's written response to the FORM) and make pertinent findings of fact. Applicant's statement about Company X in his written response to the FORM was not consistent with the entry about Company X that appears in the security clearance application. Faced with that inconsistency, the Judge had to weigh the evidence and make her findings of fact. Considering the record as a whole, the Board concludes it was not unreasonable for the Judge to make her challenged finding about Company X. Her challenged finding about Company X reflects a reasonable interpretation of the record evidence that was available to her.

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