

DATE: January 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06409

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Rebecca L. Saitta, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 29, 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), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated April 21, 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 that Applicant deliberately falsified a security clearance application; and (2) in the alternative, whether the Administrative Judge erred by concluding Applicant had not successfully mitigated his falsification of the security clearance application. 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 falsified a security clearance application by not disclosing that he had used marijuana in the past.⁽¹⁾ The Judge concluded Applicant's falsification of the security clearance application raised serious questions about his judgment, reliability, and trustworthiness, and further concluded that Applicant had not mitigated the security concerns raised under Guideline E (Personal Conduct). Because the Judge's findings and conclusions under Guideline H (Drug Involvement) and Guideline F (Financial Considerations) are not at issue on appeal, the Board need not discuss them in order to decide this appeal.

1. Whether the Administrative Judge erred by finding that Applicant deliberately falsified a security clearance application. Applicant challenges the Administrative Judge's finding that he falsified a security clearance application. In support of this claim of error, Applicant argues the record evidence does not support the Judge's finding of falsification, but rather shows his omission was not a deliberate or intentional falsification. Applicant's claim of error is not persuasive.

Applicant correctly notes that not every omission or incorrect answer is a falsification. Indeed, when an applicant controverts a falsification allegation, an Administrative Judge must consider whether there is record evidence, direct or circumstantial, that is probative of an applicant's intent or state of mind at the time of the alleged falsification. *See, e.g.*, ISCR Case No. 02-23133 (June 9, 2004) at p. 5. An applicant's statements about his or her intent or state of mind are relevant and material evidence, but such statements are not conclusive or binding on a Judge. Rather, a Judge has to consider and weigh such statements in light of the record evidence as a whole. It is legally permissible for a Judge to make a finding of falsification that runs contrary to an applicant's denial of any intent to falsify, as long as there is sufficient record evidence to make such a finding. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3.

In this case, there is sufficient record evidence to permit the Administrative Judge to find that Applicant's omission about his past marijuana use was a deliberate falsification. Applicant's ability to argue for an alternate interpretation of the record evidence does not demonstrate the Judge's finding of falsification is erroneous. The Judge's finding of falsification reflects a plausible interpretation of the record evidence as a whole, and therefore, is sustainable.

2. In the alternative, whether the Administrative Judge erred by concluding Applicant had not successfully mitigated his falsification of the security clearance application. Applicant argues, in the alternative, that if the Board concludes the Administrative Judge's finding of falsification is sustainable, then the Judge erred by concluding that Applicant had failed to successfully mitigate that falsification. In support of this claim of error, Applicant argues: (a) the Judge should have concluded Applicant's falsification was mitigated under Personal Conduct Mitigating Conditions 1, 2, and 3; and (b) independent of the Adjudicative Guidelines, a review of the evidence in this case under the "whole person" concept should have led the Judge to conclude Applicant's falsification was mitigated by the evidence of his trustworthiness and reliability.

(a) Applicant's argument concerning Personal Conduct Mitigating Condition 1 ⁽²⁾ is not persuasive. Federal officials, not individual applicants, are responsible for deciding what information is pertinent to a security clearance investigation and adjudication. *See, e.g.*, ISCR Case No. 02-10113 (March 25, 2005) at p. 4. Question 27 of the security clearance application asked whether Applicant had ever used illegal drugs since the age of 16 or the last seven years, whichever is shorter. Question 27 did not ask Applicant to disclose only that use of illegal drugs that he thought was significant. Given the wording of Question 27, the Judge did not err by concluding Personal Conduct Mitigating Condition 1 was not applicable.

Applicant's argument concerning Personal Conduct Mitigating Condition 2 ⁽³⁾ does not demonstrate the Administrative Judge committed harmful error. The Judge's explanation for not applying Personal Conduct Mitigating Condition 2 is somewhat problematic because it relies on a finding of falsification not alleged in the SOR. However, even if the Board were to conclude -- solely for purposes of deciding this appeal -- that the Judge's explanation for not applying Personal Conduct Mitigating Condition 2 could not be sustained, such an error would be harmless. When a case involves a claim that an applicant has corrected a falsification by making subsequent disclosures to the government, then Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2, is the relevant mitigating condition to be considered. *See, e.g.*, ISCR Case No. 99-0557 (July 10, 2000) at p. 4 (discussing differences between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3). Accordingly, even if the Board were to conclude that the Judge's explanation for not applying Personal Conduct Mitigating Condition 2 was not sustainable, Applicant would not be prejudiced in any meaningful way because Personal Conduct Mitigating Condition 2 would not be applicable to the record evidence in this case.

Applicant's argument concerning Personal Conduct Mitigating Condition 3 ⁽⁴⁾ does not persuade the Board that the Administrative Judge erred. The Judge found that Applicant did not disclose his past marijuana use to the investigator until the investigator raised the issue of illegal drug use. That finding reflects a reasonable interpretation of the record evidence and provides a sufficient basis for the Judge's choice to not apply Personal Conduct Mitigating Condition 3. Applicant's argument is predicated on an alternate interpretation of the record evidence, but fails to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

(b) Applicant is correct that an Administrative Judge also must evaluate an applicant's security eligibility in terms of the "whole person" concept. *See* Directive, Adjudicative Guidelines, Item E2.2.1. However, a reading of the decision below persuades the Board that the Judge did consider Applicant's case in terms of the "whole person" concept. Applicant's argument under the "whole person" concept demonstrates a disagreement with the Judge's evaluation of his security eligibility in light of the record evidence as a whole, but does not demonstrate the Judge's analysis is arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error that warrants remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge also found that Applicant did not commit another falsification (as alleged in SOR paragraph 2.b). That favorable finding is not at issue on appeal.
2. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.1).
3. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).
4. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.3).