

DATE: March 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-25571

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 October 23, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations), and Guideline E (Personal Conduct). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision dated November 28, 2003.

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 inference that the Administrative Judge drew that Applicant was not a credible witness is supported by substantial record evidence; (2) whether the Administrative Judge erred in finding that it was not clear from the record that the past due debt in SOR subparagraph 1.a, which the Applicant eventually satisfied, involved the same debt as the underlying debt in the judgment in SOR subparagraph 1.j.; and (3) whether the Administrative Judge erred in finding that Applicant falsified her 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 ⁽¹⁾

1. Whether the inference that the Administrative Judge drew that Applicant was not a credible witness is supported by substantial record evidence. Each of the Administrative Judge's adverse formal findings against Applicant under Guideline F (SOR subparagraph 1.j) and Guideline E (SOR subparagraph 2.a) are predicated, in part, on the Judge's conclusion that Applicant was not a credible witness. The Judge drew this inference based on a perceived "irreconcilable conflict" between Applicant's sworn statement to the Defense Security Service (DSS) agent on August 13, 2001 and her hearing testimony. At the hearing, Applicant testified that she had a child in 1998, and "[r]ight after her [birth]," Applicant worked several temporary jobs with no health insurance and lower income than her present income. Department Counsel then asked Applicant: "Did your daughter's father help out?" In response, Applicant simply responded: "No," without qualification or explanation (Hearing Transcript at p. 25). But, in her sworn statement to the DSS agent, Applicant noted that she was receiving \$275 per month for child support from the daughter's father as other income (Government Exhibit 3 at p. 4). Considering Applicant's *pro se* status, we view Applicant's argument on appeal to be that her statement to DSS is consistent with her hearing testimony because the hearing testimony relates to the period immediately after her child's birth while the statement to DSS relates to a later period of time. Based on this Applicant believes that the Judge erred in drawing the inference that she lacked credibility.

Applicant's additional explanation on appeal of these events is new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to present testimony and documentary evidence for the Administrative Judge to consider. Applicant cannot fairly challenge the Judge's findings based on a proffer of evidence that she did not present for the Judge's consideration.

Comparing Applicant's hearing testimony with her DSS statement, and giving due deference to the Judge's assessment

of the credibility of Applicant's hearing testimony, the Board concludes that the Judge could reasonably find a conflict between Applicant's two statements that impeaches her credibility. Whenever an Administrative Judge conducts a hearing, the Judge is expected to personally observe the demeanor of the witnesses and draw conclusions about their credibility based on the witnesses' demeanor and other factors. *See, e.g.*, ISCR Case No. 02-15358 (July 22, 2003) at p. 4. Additionally, Applicant's sweeping denial that she received any support from her child's father, without qualification, supports the Judge's decision. Even if Applicant could plausibly argue that her "No" response pertained only to the period she had addressed in her previous response, *i.e.*, the period immediately after her daughter's birth, such an alternate interpretation of the record evidence is not sufficient to demonstrate error in the Judge's finding. *See, e.g.*, ISCR Case No. 98-0614 (July 12, 1999) at pp. 3-4.

2. Whether the Administrative Judge erred in finding that it was not clear from the record that the past due debt in SOR subparagraph 1.a, which the Applicant eventually satisfied, involved the same debt as the underlying debt in the judgment in SOR subparagraph 1.j. In her brief Applicant argues that the debt under SOR subparagraph 1.a involves the same debt as the underlying debt in the judgment in subparagraph 1.j. Applicant also states that "[s]ince the court hearing, everything has been paid off and the judgment has been released."

The Judge found that based on Applicant's credit report, the balance on the debt in SOR subparagraph 1.a was \$1,072 in February 1999, but that same month the judgment creditor obtained a \$1,325.44 judgment against Applicant, after filing a claim for \$1,437.57 against her on the previous month. Therefore, the Judge was not convinced that there was record evidence that the debt in subparagraph 1.a was the same as the underlying debt in subparagraph 1.j. While the Judge noted that Applicant provided evidence that an additional debt of the judgment creditor was deleted from her credit report, he found that Applicant could not demonstrate that the debt in subparagraph 1.a and the underlying debt in the judgment were the same. The Judge's conclusion was also supported, in part, by his negative credibility determination regarding Applicant (Decision, at pp. 5-6).

As noted in paragraph 1 above, the Board cannot consider the additional evidence that the judgment was released. Moreover, an applicant is responsible for presenting witnesses and other evidence to rebut or explain facts that are properly in evidence and has the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. The record contained evidence from which the Judge reasonably could find that the Applicant did not maintain her burden of proving that the debt in SOR subparagraph 1.a was the same as the underlying debt in subparagraph 1.j. Applicant's disagreement with the Judge's assessment is not sufficient to persuade the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 01-24306 (September 30, 2003) at p. 4.

3. Whether the Administrative Judge erred in finding that Applicant falsified her security clearance application. In her brief, Applicant does not deny that she failed to list the five debts noted in SOR subparagraph 2.a in responding to question 38 of the security clearance application ("In the last 7 years, have you been over 180 days delinquent on any debt(s)?"). However, she contends that: "I think I knew about these debts but **was not** certain"(emphasis by Applicant). She states that she thought that her daughter's hospital emergency room visits "were covered." Concerning the 180-day delinquency, she says that "I only thought of the necessity bills I **had** to pay. Everything else was secondary so after awhile you completely dismiss those bills as if they aren't late and don't even exist" (emphasis by Applicant).

The Judge did not find Applicant's assertions that she was unaware of these debts to be credible. He noted that at the time she submitted her security clearance application, two of debts were more than two years delinquent, and two of the remaining three were over a year delinquent. The Judge also found that Applicant's statements with respect to the child support matter demonstrated that her falsification of the security clearance application "was not an isolated incident."

Applicant's statements denying any intent to falsify were relevant and material evidence that the Administrative Judge had to consider. However, the Judge was not bound to accept Applicant's denials; rather, the Judge had to consider those denials in light of the record evidence as a whole and decide whether to accept them or reject them. Considering the record evidence as a whole, the Judge's finding that Applicant falsified the security clearance application is sustainable. Directive, Additional Procedural Guidance, Item E3.1.32.1. *See, e.g.*, ISCR Case No. 01-23922 (October 2, 2003) at p. 3.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Separate Opinion of Chairman Emilio Jaksetic, concurring:

I agree with my colleagues that: (a) Applicant's appeal brief contains many factual assertions that constitute new evidence, which the Board cannot consider on appeal; and (b) Applicant cannot fairly challenge the Judge's findings of fact based on a proffer of evidence that she could have presented for the Judge's consideration during the proceedings below.

My colleagues go further than necessary to address the merits of this appeal. Applicant's appeal arguments that do not rely on new evidence raise two issues that overlap: (a) whether the Administrative Judge erred by not finding Applicant's explanations credible; and (b) whether the Judge's findings concerning SOR paragraphs 1.j and 2.a are supported by substantial record evidence.

The Administrative Judge had the opportunity to observe Applicant's demeanor during her hearing testimony, and considered her testimony in light of the record evidence as a whole. The Judge formed a negative impression of Applicant's credibility, and based on that negative impression, the Judge did not accept Applicant's explanations about the matters covered by SOR paragraphs 1.j and 2.a. Applicant clearly is disappointed that the Judge did not find her explanations credible. However, nothing in Applicant's appeal brief persuades me that the Judge assessed her credibility in a manner that was arbitrary, capricious, or contrary to law.

Given the record evidence in this case, the Administrative Judge could have accepted or rejected Applicant's explanation about the debt covered by SOR paragraph 1.j, as well as Applicant's explanation about the security clearance application omission covered by SOR paragraph 2.a. Based on the Judge's negative assessment of Applicant's credibility, the Judge had a legally permissible basis for not accepting Applicant's explanations. Accordingly, the Judge's findings about the matters covered by SOR paragraphs 1.j and 2.a are sustainable. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.* Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's findings are erroneous.

Accordingly, I conclude that Applicant has failed to demonstrate the Administrative Judge erred.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Administrative Judge found in Applicant's favor with respect to all subparagraphs of the SOR except for 1.j and 2.a. The Judge's favorable formal findings are not in issue.