

DATE: March 23, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-18663

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

Faith A. Horowitz, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 20, 2002 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 James A. Young issued an unfavorable security clearance decision dated March 25, 2003. Applicant appealed the Judge's decision, and on August 7, 2003, the Board issued a Decision and Remand Order and sent the case back to the Judge for further proceedings.

The Administrative Judge issued a Decision on Remand ("Remand Decision") on November 5, 2003. Applicant appealed the Administrative Judge's unfavorable Remand Decision.

The Board has jurisdiction under Executive Order 10865 and the Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised in this appeal: (1) whether the Administrative Judge's rulings and conclusions are arbitrary, capricious or contrary to law because he did not apply the Directive in a reasonable, common sense manner; (2) whether the Judge's finding that Applicant's misconduct resulted in a loss of money to her former employer, is supported by substantial record evidence; (3) whether the Judge accorded proper weight to evidence favorable to Applicant under the "whole person" concept; and (4) whether the Administrative Judge properly weighed all of the evidence in reaching his overall security clearance decision. 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) are 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<sup>(1)</sup>

1. Whether the Administrative Judge's rulings and conclusions are arbitrary, capricious or contrary to law because he did not apply the Directive in a reasonable, common sense manner. Applicant contends that the Administrative Judge's rulings and conclusions with respect to Applicant's termination from her employment as a restaurant server in April 2000 (SOR subparagraph 2.a) are arbitrary, capricious or contrary to law because the Judge did not fully consider the facts and circumstances surrounding Applicant's termination and apply the Directive in a reasonable, common sense manner. Applicant argues that the Judge applied Personal Conduct Disqualifying Condition 5<sup>(2)</sup> without considering Applicant's belief, at the time of the misconduct, that she was merely providing good customer service when she gave away frequent diner points to friends who did not earn them. Applicant relies significantly on the hearing testimony of two former managers from the restaurant chain to support her belief (at the time of the misconduct), as well as other testimony and evidence to support her overall position.

There is a rebuttable presumption that the Administrative Judge considered all of the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 02-14950 (May 15, 2003) at p. 6. Applicant's disagreement with the Judge's findings and conclusions, standing alone, is not sufficient to overcome the rebuttable presumption that the

Judge considered all record evidence. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3. The Administrative Judge is required to weigh the evidence of record, both favorable and unfavorable, before reaching his ultimate security clearance decision. Absent a showing by Applicant that the Administrative Judge weighed the evidence in a manner that was arbitrary, capricious or contrary to law, the Judge's evaluation will not be disturbed on appeal. *See, e.g.*, ISCR Case No. 02-14950 (May 15, 2003) at p. 4. Furthermore, Applicant's disagreement with the Judge's findings and conclusions is not sufficient to show the Judge failed to evaluate the case in a reasonable, common sense manner.

2. Whether the Judge's finding that Applicant's misconduct resulted in a loss of money to her former employer is supported by substantial record evidence. Applicant challenges the Administrative Judge's finding that her conduct resulted in loss of money to the restaurant where she worked, arguing that there was record evidence contrary to the Judge's finding. The Board does not have to agree with the Judge's finding to conclude it reflects a plausible, permissible interpretation of the conflicting record evidence. Applicant's ability to argue for an alternate interpretation of the record evidence is insufficient to demonstrate the Judge's finding is erroneous. *See, e.g.*, ISCR Case No. 97-0676 (September 29, 1998) at p. 2. In any event, the Judge reasonably concluded that the gravamen of Applicant's conduct was her refusal to follow the restaurant's policies, not whether the restaurant lost money. Accordingly, even if the Board were to conclude Applicant's claim had merit, it would only show harmless error.

3. Whether the Judge accorded proper weight to evidence favorable to Applicant under the "whole person" concept. Applicant suggests that the Judge would have made a favorable security clearance decision if he had properly weighed the evidence she offered under the whole person concept, particularly Directive, Enclosure 2, Item E2.2.1. The Judge found that Applicant, who was 33 years old at the time, may have improperly given away points on 24 occasions, but Applicant argues that this conduct may not be as serious as the number suggests because Applicant estimates that the total value of these points may only be \$200-\$300, and possibly less if some were not redeemed. Also, the Judge concluded that Applicant had the opportunity to reflect on her misconduct after each of the several times she acted, but Applicant argues the circumstances surrounding the conduct are extenuating for the reasons indicated in the testimony of the two former managers. Applicant argues that the conduct is not recent because it last occurred in April 2000, almost four years before the hearing. Applicant contends that the Judge gave no weight to Applicant's rehabilitation and other pertinent behavioral changes (*e.g.*, turning in gift certificates left by customers in her current part-time restaurant service position). Finally, Applicant argues there is little likelihood of any recurrence because her restaurant server activities are now part-time and limited to exceptionally busy periods. She has refocused her career toward being a security specialist for the contractor and is highly regarded by her current supervisor and others and has demonstrated her honesty when she works as a server.

As stated above, there is a rebuttable presumption that the Judge considered all of the record evidence, and nothing here indicates that he did not do so. Essentially, Applicant argues that there is evidence in her favor under the whole person concept, but the mere presence of some favorable evidence does not compel an Administrative Judge to issue a favorable security clearance decision. Rather a Judge must consider the record evidence both favorable and unfavorable and decide whether the favorable evidence outweighs the unfavorable or *vice versa*, and whether in light of the totality of the facts and circumstances of an applicant's case it is clearly consistent with the national interest to grant or continue access to classified information. Applicant's ability to argue for a more favorable weighing of the evidence is not sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 00-0525 (November 15, 2001) at p.3. The Board need not agree with the Judge in order to conclude that the Judge's findings and conclusions in this case reflect a reasonable interpretation of the record evidence and are consistent with pertinent provisions of the Directive.

4. Whether the Administrative Judge properly weighed all of the evidence in reaching his overall security clearance decision. Applicant argues that the Administrative Judge's decision is contrary to the weight of the evidence as a whole because she provided "substantial evidence" that the circumstances surrounding her conduct nearly four years ago are not predictive of her conduct, integrity and honesty today. She refers the Board to the positive recommendations of managers who would recommend her for employment despite her termination in April 2000, plus other evidence that, in the whole, result in a "compelling" weight of evidence in her favor.

There is no presumption in favor of granting or continuing access to classified information. *See, e.g.*, ISCR Case No. 02-

12329 (December 18, 2003) at p. 4. Indeed, the Directive clearly places on the applicant the ultimate burden of persuasion as to obtaining a favorable security clearance. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Administrative Judge was faced with proven past misconduct by Applicant and evidence of changed circumstances and reform. The Judge concluded that the evidence of changed circumstances and reform presented by Applicant was not strong enough or persuasive enough to overcome the security concerns raised by her past misconduct. The Board does not have to agree with the Judge's ultimate resolution of the case to conclude Applicant has not shown the Judge's decision is arbitrary, capricious or contrary to law.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate substantial 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.a through 1.e. Those favorable formal findings are not in issue in this appeal.

2. "A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency." Directive, Enclosure 2, Item E2.A5.1.2.5.