

DATE: June 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19136

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 September 4, 2003, 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 Robert J. Tuider issued an unfavorable security clearance decision, dated January 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 in concluding that Applicant had knowingly harbored an illegal alien in violation of Federal law; (2) whether Applicant received a fair hearing; and (3) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law because he should have concluded that Applicant had demonstrated sufficient record evidence to mitigate or extenuate security concerns. 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. Whether the Administrative Judge erred in concluding that Applicant had knowingly harbored an illegal alien in violation of Federal law. Applicant argues that she did not know that the man, with whom she lived in a spouse-like relationship between 1999 and 2002 (the ex-boyfriend), was not a U.S. citizen until late in their relationship. She also claimed the same with respect to an immediate prior relationship with her former husband, who also was an illegal alien. Applicant contends that both were employed by U.S. employers and therefore, she believed each was properly admitted. She denies that she was harboring either man and that neither were hiding. Applicant claims that once she learned the status of each, she terminated the relationship and sought guidance from her company because she "was not fully aware of the seriousness of the matter . . . and did not want to jeopardize" her position with her company.

Federal statute provides for a fine and imprisonment of not more than 5 years in non-aggravated circumstances where any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien . . ." *See* 8 U.S.C. §§ 1324 (a)(1)(A)(iii) and 1324(a)(1)(B)(ii). For purposes of this statute, knowledge may be the actual knowledge that a person has come to, entered, or remains in the United States illegally, or a reckless disregard of facts that would indicate this.

Based on the record evidence as a whole, including, in part, on Applicant's own testimony at the hearing (*see, e.g.*, H.T. at pp. 41-43), the Administrative Judge found that by 2001 Applicant was aware of facts that indicated her ex-boyfriend was an illegal alien and, nevertheless, in February 2003 Applicant rented an apartment with him. Decision at p. 3. The Applicant has not challenged these specific factual findings on appeal. The Judge considered Applicant's explanation that she did not know that her ex-boyfriend was an illegal alien. The Judge then concluded that, taken as a whole,

Applicant's actions, with regard to her ex-boyfriend, constituted a knowing harboring. Decision at p. 5. This conclusion reasonably follows from the factual findings and is plausible interpretation of the record evidence.

2. Whether Applicant received a fair hearing. Applicant claims that she was not sufficiently prepared for the hearing and "felt very intimidated by the proceedings." She represented herself with the assistance of a personal representative from her union but feels that the representative did not afford her the degree of guidance she needed to defend herself. She also feels that the Administrative Judge already had his mind made up regardless of what she had to say. We construe Applicant's claims as raising the issue of whether she received a fair hearing because she was inadequately represented and because the Judge was biased.

Applicant's claim that she did not adequately represent herself does not show that the Administrative Judge erred. There is a rebuttable presumption that Applicant, as an adult, is legally competent and capable of making rational decisions to protect her interests. *See, e.g.*, ISCR Case No. 01-20579 (April 14, 2004) at p. 3. Prior to this appeal, nothing in the record suggests that Applicant had expressed any concern about her ability to represent herself or her need for a continuance to retain counsel, and nothing indicates in any way that she failed to understand or appreciate of the nature of the proceedings. *See, e.g.*, ISCR Case No. 02-09220 (September 28, 2004) at pp. 3-4. Her personal representative specifically stated at the outset of the hearing that he was not an attorney. *See* H.T. at p. 14. The record indicates that Applicant received a copy of the Directive, which advised her, among other things, that she shall appear in person with or without counsel or a personal representative at the time and place designated by the notice of hearing. Directive, Additional Procedural Guidance, Item E3.1.8. The record shows that Applicant appeared as directed with her personal representative and four witnesses who testified on her behalf, and she introduced ten exhibits. Having decided to have a personal representative, as she did, she cannot fairly complain about the quality of that representation or seek to be relieved of the consequences of it. *See, e.g.*, ISCR Case No. 02-09220 (September 28, 2004) at p. 4; and *see, e.g.*, DISCR Case No. 91-1255 (April 19, 1993) (which likewise involved personal representation provided by a union representative).

Applicant's claim of bias also lacks merit. There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at

p. 3. Furthermore, there is a rebuttable presumption that agency officials carry out their duties in good faith, and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See* ISCR Case No. 02-17609 (May 19, 2004) at p. 3; *see also National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004). Applicant's speculation about the Administrative Judge is so lacking in substance that it does not even begin to raise a colorable question about the Judge's good faith.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law because he should have concluded that Applicant had demonstrated sufficient record evidence to mitigate or extenuate security concerns. Applicant contends that she has demonstrated her trustworthiness and reliability through her work history as a personnel security specialist with her employer. She argues that this history shows that she follows all rules and regulations, and she claims that she has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress⁽¹⁾

by taking judicial action against both men. She adds that her association with persons involved in criminal activities (illegal aliens) has ceased⁽²⁾

except for activity approved by court order for child visitation and that "the courts are aware that both of the individuals that I associated with were illegal aliens . . . [yet] . . . allowed them to remain in the United States." She asks the Board to reverse the Administrative Judge's decision and issue her a security clearance with a warning against future incidents of a similar nature.

There is a rebuttable presumption that an Administrative Judge considered all of the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. In this case, the Judge specifically considered Applicant's evidence demonstrating her value as an employee as well as evidence supporting Applicant's

arguments on the two mitigating conditions referenced in Applicant's brief. However, when he weighed such evidence against the unfavorable record evidence, the Judge concluded that the favorable record evidence was not outcome determinative. A Judge's decision to weigh the evidence differently than a party would like does not mean that the Judge ignored the evidence or weighed it in a manner that was arbitrary, capricious or contrary to law. Given the record evidence here, the Judge's decision is sustainable. *See, e.g.*, ISCR Case No. 02-17863 (April 26, 2005) at pp. 3-4.

Moreover, security clearance decisions are not limited to considering an applicant's job performance or conduct during duty hours, but rather can be based on consideration of an applicant's conduct separate from the work place. An applicant with good or exemplary job performance may engage in conduct that has negative security implications. Here, Applicant's conduct with respect to entering into a relationship with an illegal alien, and the circumstances in which she finds herself as a result of that relationship, are appropriate for consideration in terms of her judgment, reliability and trustworthiness. *See, e.g.*, ISCR Case No. 01-25466 (July 22, 2004) at pp.3-4.

The Administrative Judge reasonably concluded that Applicant was not eligible for a favorable security clearance determination. Accordingly, it is not necessary to consider Applicant's request for the issuance of a security clearance with a warning in accordance with Directive, Adjudicative Guidelines, Item E2.2.6.

Conclusion

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

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Personal Conduct Mitigating Condition 5: "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive, Adjudicative Guidelines, Item E2.A5.1.3.5.

2. Personal Conduct Mitigating Condition 7: "Association with persons involved in criminal activities has ceased." Directive, Adjudicative Guidelines, Items E2.A5.1.3.7.