

DATE: November 14, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22685

**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 30, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision dated May 16, 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.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse decision below is arbitrary, capricious, or contrary to law. 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**

In her appeal brief, Applicant disagrees with the Administrative Judge's findings of fact and the conclusions he drew from them. She restates her contentions that she did not knowingly violate the law in 1987 and 1989 and did not knowingly give false information to a Defense Security Service agent in 2002. In support of her arguments, she repeats portions of her testimony. She also contends that the Judge's adverse decision should be reversed because her criminal conduct occurred ten years ago and she has been responsible and productive since that time. The Board interprets Applicant's arguments as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

There is conflicting record evidence concerning (a) whether Applicant knew about the illegality of her conduct in connection with the welfare fraud that resulted in her conviction in 1992; and (b) whether Applicant falsified material facts, in 2002, about her involvement in the welfare fraud incident. Applicant's written and testimonial statements about those matters are relevant and material evidence, but they were not binding on the Administrative Judge. Rather, the Judge had to weigh the conflicting record evidence in light of his assessment of Applicant's credibility and make findings of fact and reach reasonable conclusions. Given the record evidence in this case, the Judge's adverse conclusion about Applicant's credibility is not arbitrary, capricious, or contrary to law. Furthermore, given the record evidence in this case and the Judge's adverse conclusion about Applicant's credibility, the Judge's findings of fact and conclusions about Applicant's past criminal conduct (in the late 1980s and early 1990s) and her falsification of material facts (in 2002) are sustainable.

In her appeal brief, Applicant points out that the criminal behavior discussed at the hearing occurred over ten years ago and that she has been a responsible citizen since then. She presented evidence to that effect at the hearing. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See* ISCR Case No. 00-0621 (January 30, 2002) at p. 3. Here, the Judge clearly considered those facts and stated them in his decision. The fact that the Judge did not rule in Applicant's favor on the basis of those facts is not indicative of error. The Judge gave a rational explanation for why he did not give more weight to the favorable evidence cited by Applicant on appeal.

The Board views the Judge's findings and conclusions as sustainable in view of the record below. Therefore, the decision below is not arbitrary, capricious, or contrary to law.

### **Conclusion**

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

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board