

DATE: February 20, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-29558

## 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 December 27, 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 Elizabeth M. Matchinski issued an unfavorable security clearance decision dated October 17, 2003. The Judge's decision was based in part on the application of 10 U.S.C. §986 to Applicant's case.

Applicant appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant raises the following issue on appeal: whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. For the reasons that follow the Board affirms the Judge's security clearance 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 Issue**

Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. Applicant's brief discusses several aspects of the case and her life in general, challenges the Administrative Judge's decision as she reads it and argues that she should be given an opportunity to start over. The Board construes her brief as arguing that the Judge's decision is arbitrary, capricious, or contrary to law.

On appeal, Applicant denies having deliberately falsified her security clearance application and alleges that the Administrative Judge erred by finding Applicant served 10 years in jail on one charge and 2 years on another. The Board concludes that the Judge's findings on falsification are reasonably based on the record evidence and are sustainable. Applicant's ability to argue for an alternate view of the evidence is insufficient to demonstrate error by the Judge. (*See, e.g.*, ISCR Case No. 02-04017, dated February 11, 2004, at p.4.) A close reading of the Judge's decision shows that she recognized and specified that Applicant actually served 45 days and 30 days respectively for each of the two criminal sentences to which Applicant refers. Applicant has not demonstrated error.

Applicant discusses lessons she has learned and her responsibilities as a mother and grandmother and her belief that she deserves an opportunity to start over. Applicant's arguments, at best, raise the possibility of an alternate view of the evidence which, as noted above, is insufficient to demonstrate any error by the Administrative Judge.

Applicant states that she has disposed of her bills "as of this day." The Board construes this statement as new evidence which it cannot consider (*See*, Directive E3.1.29).

Applicant does not discuss the Judge's conclusion that 10 U.S.C. § 986 applies to her case. Nor does she request that her case be considered for meritorious waiver by the Secretary of Defense. As noted in the Scope of Review, 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. By analogy the Board will not read into an appeal a request for

recommendation for waiver unless it is fairly raised.

### **Conclusion**

Applicant has failed to meet her burden on appeal of demonstrating error in the Administrative Judge's decision. The Judge's October 17, 2003 decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board