

DATE: June 6, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-00740

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel

#### FOR APPLICANT

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 29, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline K (Security Violations) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 8, 2005, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge was biased; whether the Administrative Judge's adverse clearance decision under Guideline K is arbitrary, capricious or contrary to law; and whether the Administrative Judge's adverse clearance decision under Guideline B is sustainable.

(1) Applicant argues that, although the Administrative Judge's conduct at the hearing was cordial, her decision displayed a bias against the Applicant. In support of that argument, Applicant cites to various portions of the transcript which she asserts demonstrate the Judge sought to demean her security attitude and her affinity for the United States. The Board does not find this argument persuasive.

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. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased. *See, e.g.*, ISCR Case No. 98-0515 at 5 (App. Bd. Mar. 23, 1999). After reviewing the record and the Judge's decision, the Board concludes that Applicant has not met her heavy burden of persuasion on the issue of bias. Applicant fails to identify anything in the record that indicates or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge.

(2) Applicant argues that the Administrative Judge erred in applying Guideline K Disqualifying Condition 2. [\(1\)](#) In the

alternative, Applicant argues that the Judge erred when she concluded that the government's security concerns had not been mitigated under Guideline K Mitigating Conditions 1, (2) 2, (3) 3 (4) and 4, (5) and the "whole person" concept. (6) The Board does not find Applicant's arguments persuasive.

The Administrative Judge's conclusions that Applicant's two security violations--one in May/June 2002 and the other in January/February 2003--constituted multiple violations or were due to negligence is sustainable, and her application of Guideline K Disqualifying Condition 2 was not erroneous. The Judge's conclusions that the two violations were not inadvertent, isolated or infrequent, or due to improper or inadequate training, and that Applicant had not presented sufficient evidence to demonstrate a positive attitude towards the discharge of her security responsibilities are likewise sustainable. Given the record in this case, the Judge was not required to conclude, as a matter of law, that the government's security concerns had been mitigated by application of Guideline K Mitigating Conditions 1, 2, 3, and 4. Accordingly, the Judge's unfavorable clearance decision under Guideline K is not arbitrary, capricious or contrary to law.

(3) Applicant's argument that the Administrative Judge erred with respect to her adverse clearance decision under Guideline B has some merit. As the Judge points out in her decision, Applicant has lived in the U.S. since 1970 and has been a U.S. citizen since at least 1984. Her immediate family members--mother, children, and sister--are all U.S. citizens. Applicant's only familial contacts are the widow of Applicant's first cousin once removed and the woman's son, who is Applicant's second cousin. Applicant calls the widow only once a year. Given those facts, remand for reconsideration under the "whole person" factors would have been appropriate had the Judge's adverse clearance decision not been sustainable on other grounds. *See, e.g.*, ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006).

### Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Directive ¶ E2.A11.1.2.2 ("Violations that are deliberate or multiple or due to negligence").

2. Directive ¶ E2.A11.1.3.1 ("Were inadvertent").

3. Directive ¶ E2.A11.1.3.2 ("Were isolated or infrequent").

4. Directive ¶ E2.A11.1.3.3 ("Were due to improper or inadequate training").
5. Directive ¶ E2.A11.1.3.4 ("Demonstrate a positive attitude toward the discharge of security responsibilities").
6. Directive ¶¶ E2.2.1.1 through E2.2.1.9.