

DATE: October 6, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02877

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 August 4, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Arthur E. Marshall, Jr. issued an unfavorable security clearance decision, dated June 22, 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 Applicant was prejudiced by the manner in which the Defense Security Service investigated her case and reported the results of its investigation; and (2) whether Applicant was denied the opportunity to have favorable evidence considered by the Administrative Judge in her case. 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 Applicant was prejudiced by the manner in which the Defense Security Service investigated her case and reported the results of its investigation. On appeal, Applicant contends: (a) the Defense Security Service (DSS) failed to conduct a proper investigation in her case; and (b) the DSS's failure to conduct a proper investigation prejudiced her right to have her security eligibility decided based on a complete record. Applicant's claim of error fails for three reasons.

First, Applicant's claim of error is predicated on assertions about her personal belief concerning the purported actions or inactions of DSS personnel who investigated her case, which assertions have no basis in the record evidence. Apart from the speculative nature of Applicant's assertions about the actions or inactions of DSS personnel, they constitute a proffer of new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Second, neither Hearing Office Administrative Judges nor the Board have jurisdiction over DSS personnel or how they conduct investigations. DOHA proceedings are not a proper forum for litigating or evaluating the performance of DSS personnel or the quality of their investigations. *See, e.g.*, ISCR Case No. 02-07191 (March 25, 2004) at p. 3.

Third, even if the quality of the DSS investigation of Applicant were a proper subject for review in these proceedings, Applicant has failed to raise a colorable claim that the DSS investigation prejudiced her right to have her security eligibility decided based on a complete record. As will be discussed in the resolution of Applicant's second appeal issue, Applicant: (a) was not denied the opportunity to object to the evidence presented by Department Counsel in support of the SOR allegations, (b) was not denied the opportunity to respond or comment on the evidence presented by Department Counsel in support of the SOR allegations; and (c) was not denied the opportunity to present additional information for the Judge to consider in her case. Regardless of what DSS personnel did or did not do with respect to

Applicant's investigation, the procedural history of this case shows the following: Applicant had the opportunity to assess the completeness and accuracy of the evidence that Department Counsel was presenting in support of the SOR allegations. Applicant has the opportunity to object and otherwise comment on the completeness and accuracy of the evidence presented by Department Counsel. Applicant had the opportunity to present additional evidence for the Administrative Judge to consider in her case. Applicant responded to the File of Relevant Material and presented additional evidence for the Judge to consider in her case. The actions or inactions of DSS personnel investigating Applicant had no effect on Applicant's ability to exercise her rights in the proceedings below.

2. Whether Applicant was denied the opportunity to have favorable evidence considered by the Administrative Judge in her case. Applicant offers new evidence on appeal and asks the Board to reverse the Administrative Judge's decision based on that new evidence, arguing that she was denied an opportunity to have that evidence considered in her case. As noted earlier in this decision, the Board cannot consider new evidence on appeal. What is left of Applicant's argument is her claim that she was denied an opportunity to have favorable evidence considered in her case. A review of the case file leads the Board to conclude that Applicant's claim lacks merit.

Applicant responded to the SOR by notarized letter, dated August 23, 2004. In that letter, Applicant did not indicate whether she wanted to have a hearing in her case. By letter dated September 9, 2004, the Chief, Personnel Security Division asked Applicant to inform DOHA whether she wanted to have a hearing in her case. Applicant submitted a notarized letter, dated September 21, 2004, in which she stated "I request a determination without a hearing."

Department Counsel provided Applicant with a copy of the File of Relevant Material (FORM). A November 10, 2004 letter from Department Counsel to Applicant informed her that: (a) the FORM would be submitted to an Administrative Judge to make a decision in her case; (b) before the FORM would be sent to an Administrative Judge, she would have an opportunity to review the FORM and to submit objections to it, and an opportunity to submit additional information for consideration in her case; and (c) if she did not object to the FORM or submit additional information for consideration in her case, then her case would be assigned to an Administrative Judge for determination based solely on the FORM. In addition, the FORM itself contained a section prepared by Department Counsel that placed Applicant on adequate notice that Department Counsel was basing its case against Applicant on the documents contained in the FORM, not anything else.

Applicant submitted a response to the FORM. Applicant's response, dated November 18, 2004, included various documents that Applicant asked the Administrative Judge to consider in her case. Significantly, Applicant's response to the FORM contains the following statement: "These documents and those submitted by the Department Counsel sufficiently detail the necessary facts for a judicial decision."

To the extent Applicant asserts that she believed that the Administrative Judge had before him evidence from the DSS investigation identical or similar to the new evidence she offers on appeal, such an assertion is inconsistent with the record evidence. As noted above, both Department Counsel's November 10, 2004 letter and Applicant's own response to the FORM contained language which specified that the evidence before the Judge was limited to that evidence which was provided by the parties in the context of the FORM.

In view of all the foregoing, the Board concludes that there is no basis for Applicant's claim that she was denied the opportunity to have favorable evidence considered in her case.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate any 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board