

DATE: January 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04345

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 January 21, 2004, 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) and Guideline F (Financial Considerations). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated September 8, 2004.

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 issue has been raised on appeal: whether the Administrative Judge's unfavorable conclusions were arbitrary, capricious and contrary to law.

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⁽¹⁾

Whether the Administrative Judge's unfavorable conclusions were arbitrary, capricious and contrary to law. Applicant's brief discusses her situation at length and specifically claims at one point that the whole person concept was not used to adjudicate her case. Construing her brief as a whole, the Board believes she is asserting that the Administrative Judge's conclusions were arbitrary, capricious and contrary to law.

Applicant presents new evidence which the Board cannot consider on appeal. *See*, Directive, Additional Procedural Guidance, E3.1.29.

Applicant's main argument is that her false answers on her security clearance application were not the product of an intent to lie to the government but rather an attempt to keep her financial problems secret from her subordinates. (At that time Applicant, a Security Manager, would have had her security clearance application processed by junior facility security personnel.) Applicant asserts she always intended to tell the government the truth.

Applicant's arguments do not demonstrate that the Administrative Judge erred. The Judge discussed Applicant's predicament and was not persuaded by her arguments. The Judge's decision mentions facts and considerations, including the time gap between the submission of the false answers and Applicant's correction of the falsifications (two years), as well as the responsibilities incumbent on a Security Manager to be aware of the government's requirements and model appropriate conduct for other employees.

Applicant's argument amounts to a disagreement about what weight to give Applicant's justification for her false answers. Absent a showing that the Judge weighed the record evidence in a manner that was arbitrary, capricious or contrary to law, the Board will not disturb that weighing. Applicant has not shown that the Judge's weighing of her justification was arbitrary, capricious, or contrary to law.⁽²⁾

Applicant's claim about the whole person concept is not persuasive. A reading of the Judge's decision as a whole shows that the Judge gave meaningful weight to Applicant's evidence and arguments and ultimately made several favorable formal findings. As noted earlier in this decision, the Judge discussed Applicant's justification for her false answers; she just was not persuaded by that justification. The fact that she was not persuaded by Applicant's argument is not sufficient ground on which to base a conclusion that the Judge failed to do a whole person analysis of Applicant.

Conclusion

Applicant has failed to meet her burden on appeal of demonstrating error that warrants remand or reversal. Therefore, the Judge's September 8, 2004 decision is affirmed.

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. On page of 7 of the Judge's decision there is a Formal Finding against Applicant under Guideline F. Reading the decision as a whole, the Board concludes that that formal finding is a typographical error and that the Judge actually found for Applicant under Guideline F. The Judge's finding for Applicant under Guideline F is not at issue on appeal.

2. *See, e.g.* ISCR Case No. 02-17219, (January 7, 2005) at p. 5.