

DATE: July 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06083

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 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 F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated March 14, 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 wrongly accused of falsifying a security clearance application; and (2) whether the Board should reverse the Administrative Judge's unfavorable security clearance decision. 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 wrongly accused of falsifying a security clearance application. On appeal, Applicant contends she was wrongly accused of falsifying a security clearance application.

The SOR alleged that Applicant falsified a security clearance application in June 2002. In responding to the SOR, Applicant denied that SOR allegation. At the hearing, Applicant presented evidence in support of her claim that she did not falsify the security clearance application. The Administrative Judge found Applicant's explanation about the security clearance application to be credible (Decision at pp. 4 and 6) and entered a formal finding in favor of Applicant with respect to the SOR allegation pertaining to the alleged falsification (Decision at pp. 6 and 7). Because the Judge found in Applicant's favor with respect to the falsification allegation, Applicant's appeal argument about this aspect of the case is moot.

2. Whether the Board should reverse the Administrative Judge's unfavorable security clearance decision. On appeal, Applicant also challenges the Administrative Judge's findings and conclusions about her financial situation. However, in support of those challenges, Applicant offers new evidence about her finances. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. During the proceedings below, Applicant had the opportunity to present evidence about her finances for the Judge to consider in her case. Applicant is not entitled to have the record in her case kept open beyond the proceedings below to submit additional evidence about her finances. *See, e.g.*, ISCR Case No. 01-21274 (January 8, 2004) at p. 3.

Also attached to Applicant's appeal brief are copies of some character letters and letters of recommendation that were submitted to the Administrative Judge during the proceedings below. The Board does not re-try a case on appeal. Rather, the Board review a Judge's decision that has been appealed to determine whether the appealing party has demonstrated factual or legal error below. There is a rebuttable presumption that a Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Apart

from that presumption, a reading of the decision below shows that the Judge specifically took the letters into account and found them to be credible and favorable to Applicant (Decision at pp. 2-3). The contents of the character letters and letters of recommendation submitted by Applicant did not compel the Judge, as a matter of law or logic, to conclude that Applicant had met her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15 to rebut, explain, extenuate or mitigate the security concerns raised by the record evidence of her history of financial difficulties.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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