

DATE: June 8, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08512

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 April 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 B (Foreign Influence). Administrative Judge Martin H. Mogul issued an unfavorable security clearance decision, dated December 28, 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 issues have been raised on appeal: (1) whether the case should be remanded to allow Applicant to have a hearing in her case; (2) whether the Administrative Judge failed to take into account information submitted by Applicant for consideration in her case; and (3) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. 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⁾

1. Whether the case should be remanded to allow Applicant to have a hearing in her case. On appeal, Applicant asks the Board to reverse the Administrative Judge's decision or allow her the opportunity to have a hearing to have her case reconsidered. For the reasons discussed later in this decision, the Board concludes Applicant is not entitled to have the Judge's decision reversed. And, for the reasons that follow, Applicant is not entitled to have her case remanded for a hearing.

When Applicant responded to the SOR, she stated "I do not wish to have a hearing." The August 2, 2004 cover letter that was sent to Applicant with the File of Relevant Material (FORM) noted that she had asked for a determination to be made in her case without a hearing, and informed her that she had the opportunity to respond to the FORM and submit additional information for an Administrative Judge to consider in her case. Applicant submitted a one-page document in response to the FORM. When responding to the FORM, Applicant: (a) did not object to her case being decided without a hearing; (b) did not indicate that she had changed her mind about asking for a determination without a hearing; and (c) did not make any statement that indicated or suggested that her decision to waive a hearing in her case was based on confusion, mistake, or misunderstanding on her part.

Considering all the circumstances, the Board concludes Applicant waived her right to have a hearing before an Administrative Judge. Because there is no indication in the case file that Applicant was denied her right to ask for a hearing, she is not entitled to have her case remanded so that she can now have the hearing that she decided to forego.

2. Whether the Administrative Judge failed to take into account information submitted by Applicant for consideration in her case. Applicant asserts the Administrative Judge's decision "did not accurately reflect the information that I provided." The Board construes this assertion as raising the issue of whether the Judge failed to take into account the information submitted by Applicant for consideration in her case.

There is a rebuttable presumption that an Administrative 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. Applicant's general claim that the Judge did not consider the information she submitted is not sufficient to rebut or overcome that presumption.

Applicant's appeal brief also contains an offer to provide additional information for the Department of Defense if that is necessary to grant or continue a security clearance for her. As noted earlier in this decision, Applicant had the opportunity to respond to the FORM and submit additional information in her case. Applicant took advantage of the opportunity to respond to the FORM. She is not entitled to have an open-ended opportunity to continually present additional information for consideration in her case. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4 (relying on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)).

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) her ties and contacts with her three brothers and one sister in Laos would never make her a security risk; (b) she has performed her duties without incident for 14 years; and (c) she needs a security clearance to perform her duties. The Board construes these arguments raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

The Administrative Judge concluded that the record evidence concerning the Laotian citizenship of her mother and two brothers (currently residing in the United States) and her three other brothers and one sister (currently residing in Laos) raised security concerns under Guideline B (Foreign Influence), and that Applicant failed to submit information sufficient to refute, extenuate or mitigate those security concerns. Given the record evidence set forth in the FORM, it was not arbitrary or capricious for the Judge to conclude Applicant had the burden of presenting evidence sufficient to refute, extenuate, or mitigate the security concerns raised under Guideline B. *See* Directive, Additional Procedural Guidance, Item E3.1.15. ⁽²⁾ Furthermore, considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had not satisfied her burden of persuasion. Applicant's disagreement with the Judge's conclusions, standing alone, is not sufficient to demonstrate those conclusions are arbitrary, capricious, or contrary to law.

The absence of any evidence that Applicant has had any incidents on the job does not render the Administrative Judge's decision arbitrary, capricious, or contrary to law. Security clearance determinations are not limited to consideration of an applicant's job performance. *See, e.g.*, ISCR Case No. 01-20579 (April 14, 2004) at p. 5. To the extent that Applicant's argument could be construed as raising the absence of any security violations by her, it also does not demonstrate the Judge's decision is erroneous. The federal government does not have to wait until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir, 1969), *cert. denied*, 397 U.S. 1039 (1970).

Finally, the likelihood that an unfavorable security clearance decision will adversely affect Applicant's job situation does not render the Administrative Judge's decision arbitrary, capricious, or contrary to law. The security concerns raised under Guideline B (Foreign Influence) by Applicant's ties and contacts with immediate family members who are citizens of Laos are not refuted, extenuated, or mitigated by the adverse consequences that an unfavorable security clearance decision may have on Applicant's job situation.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains factual assertions about her personal situation and her family members. Some of those assertion reflect record evidence that was before the Administrative Judge, and some of those assertions go beyond the record evidence. To the extent Applicant's factual assertions go beyond the record evidence, they constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to respond to the FORM and submit additional information for the Judge to consider in her case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence on appeal.

2. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."