

DATE: July 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19011

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 12, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline K (Security Violations). Administrative Judge Martin H. Mogul 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 denied a fair adjudication of her case; and (2) whether the Administrative Judge erred by concluding Applicant had not presented evidence sufficient to mitigate her security violations. 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 denied a fair adjudication of her case. Applicant expresses regret that she asked for a determination to be made in her case without a hearing, and asks for a hearing because "I'm not being heard." The Board construes these statements as raising the issue of whether Applicant was denied a fair adjudication of her case.

Applicant had the opportunity to ask for a hearing in her case. Applicant's answer to the SOR contains the statement "Requesting a determination made without a hearing." Having decided to forego a hearing, Applicant is not entitled to have her case remanded to the Administrative Judge for a hearing simply because Applicant regrets her decision to ask for a determination without a hearing. Furthermore, as will be discussed later in this decision, Applicant has not rebutted the presumption that the Judge considered all the record evidence. Nothing in the record below or the Judge's decision indicates or suggests that Applicant was denied a fair adjudication of her case.

2. Whether the Administrative Judge erred by concluding Applicant had not presented evidence sufficient to mitigate her security violations. On appeal, Applicant submitted an appeal brief that largely tracks her answer to the SOR. ⁽¹⁾ The Board does not re-try a case on appeal. Rather, the Board reviews an Administrative Judge's decision to determine whether the appealing party has demonstrate the Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Making allowances for Applicant's *pro se* status, the Board construes Applicant's appeal brief as raising the issue of whether the Judge erred by concluding Applicant had not presented evidence sufficient to mitigate her security violations. ⁽²⁾

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. Apart from that presumption, a review of the decision below shows that the Judge specifically took into account Applicant's explanation about the facts and circumstances surrounding the three security violations Applicant committed in 2003, including the stress that

Applicant was facing at home at the time.

Absent a showing that an Administrative Judge weighed the record in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's findings of fact. Applicant's disagreement with the Judge's weighing of the record evidence in her case is not sufficient to demonstrate the Judge weighed the evidence improperly. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5. The Judge was not compelled, as a matter of law, to conclude that Applicant's explanation about the facts and circumstances surrounding the three security violations was sufficient to mitigate the security concerns raised by those security violations.

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 Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains some factual assertions that go beyond the record below. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to respond to the File of Relevant Material and submit additional evidence for the Administrative Judge to consider in her case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence.

2. Applicant's brief can be construed as also challenging the Administrative Judge's finding that she was responsible for the security violation alleged in SOR paragraph 1.b. Considering the record as a whole, there is sufficient record evidence to sustain the Judge's finding that Applicant committed a security violation on that occasion.