

DATE: March 5, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0193

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Barry M. Sax issued a decision, dated September 30, 1997, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by concluding Applicant demonstrated a lack of integrity and good judgment required by persons seeking access to classified information; and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 7, 1997 to Applicant. The SOR was based on Criterion J (Criminal Conduct).

A hearing was held on July 22, 1997. The Administrative Judge subsequently issued a written decision, dated September 30, 1997, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from that adverse decision.

Appeal Issues

1. Whether the Administrative Judge erred by concluding Applicant demonstrated a lack of integrity and good judgment required by persons seeking access to classified information. In the decision, the Administrative Judge concluded Applicant's criminal conduct "demonstrates a lack of integrity and good judgment required of anyone seeking access to classified information." On appeal, Applicant challenges that conclusion, arguing: (a) the Judge erroneously concluded that Applicant purposely withheld information about her criminal record from her security clearance application; and (b) the Judge made erroneous findings about the testimony of one of Applicant's witnesses. The Board will address each of these arguments in turn.

(a) In support of the first argument, Applicant: cites to pages 41 through 45 of the hearing transcript; attaches a document labeled Form 707; offers an explanation about the facts and circumstances concerning completion of her Standard Form 86 (Government Exhibit 1); and argues the Administrative Judge failed to understand the significance of Applicant Exhibit E. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

The pages from the hearing transcript cited by Applicant shows Department Counsel questioned her about the fact that her Standard Form 86, executed in September 1996, did not list her arrest in December 1993 and her later conviction for misuse of a credit card. However, those pages show nothing that indicates or suggests the Administrative Judge made any finding or expressed any opinion about the matter.

The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. The Form 707 attached to Applicant's brief was not part of the record before the Administrative Judge. Accordingly, that document constitutes new evidence that the Board cannot consider. In addition, the Board cannot consider the explanations in Applicant's appeal brief about the Form 707 and the preparation of Government Exhibit 1 because those explanations go beyond the record evidence and are offered to supplement the evidence that was before the Judge. Such supplementation of the record evidence is another form of new evidence, which the Board cannot consider.

In the decision, the Administrative Judge explained why he gave limited weight to Applicant Exhibit E. That explanation is not arbitrary or capricious. Furthermore, the explanation about Applicant Exhibit E offered by Applicant on appeal is based on new evidence, which the Board cannot consider.

Finally, the Administrative Judge's conclusions about Applicant's credibility are entitled to deference on appeal. Directive, Additional Procedural Guidance, Item 32.a. Apart from the Judge's opportunity to observe Applicant's testimony and assess her credibility, the Judge gave reasons based on record evidence for why he found Applicant's explanations about her criminal conduct to be unpersuasive. Significantly, none of those explanations was based on any finding by the Judge that Applicant intentionally withheld information about her criminal record from her security clearance application. [\(1\)](#)

(b) At the hearing, Applicant's sister testified on her behalf. On appeal, Applicant contends the Administrative Judge made some errors with respect to his findings about her sister's testimony. Although Applicant persuasively shows the Judge made some errors with respect to his findings about the testimony of Applicant's sister, those errors are minor. In addition, a reading of the decision as a whole persuades the Board that the Judge's findings about the testimony of Applicant's sister were not crucial or central to his negative assessment of Applicant's credibility or to his overall analysis of Applicant's conduct. Therefore, the errors identified by Applicant are harmless and do not warrant remand or reversal. *See, e.g.*, ISCR Case No. 96-0608 (August 28, 1997) at p. 4 (discussing harmless error doctrine).

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant also argues: (a) she is loyal to her job and can make good judgments; (b) she has been with her current employer since 1971, except for a period when she was laid-off; (c) she has been law-abiding most of her life and will be law-abiding in the future; (d) she has learned from her past mistakes and will not repeat them; (e) she no longer has a felony on her record; and (f) she would like another chance. The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

The Administrative Judge's findings about Applicant's criminal conduct --- misuse of a credit card in 1993 and welfare fraud in 1995 --- are supported by the record evidence and provide a rational basis for the Judge's adverse conclusions about Applicant's judgment, reliability and trustworthiness. Those findings and conclusions about Applicant's criminal conduct provide a rational basis for the Judge's conclusion that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Applicant's employment record, however favorable, did not preclude the Administrative Judge from making an adverse security clearance decision based on Applicant's criminal conduct. The Judge's adverse decision is not rendered arbitrary or capricious because Applicant's felony conviction for welfare fraud was reduced to a misdemeanor after she satisfied the conditions of her probation. The Judge acted reasonably by evaluating Applicant's security eligibility based on the

facts and circumstances of Applicant's overall criminal conduct, rather than the post-probation change made to the label of her welfare fraud conviction. *See* DISCR Case No. 91-0148 (April 24, 1992) at p. 4 (dismissal of criminal charges after completion of probation is not dispositive of security significance of applicant's criminal conduct).

Finally, the Administrative Judge stated it was not possible at this time to conclude that Applicant was not likely to repeat her past criminal conduct. The Judge gave an explanation for that conclusion that reflects a reasonable and plausible interpretation of the record evidence. Applicant's appeal arguments to the contrary fail to demonstrate the Judge's conclusion on this point is arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet her burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's September 30, 1997 decision.

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. In addition, Applicant's brief contains a proffer of information about her financial situation in an effort to persuade the Board that she is being honest and forthcoming with the government in connection with these proceedings. That proffer of information constitutes new evidence, which the Board cannot consider. Moreover, even if the Board were not barred by the Directive from considering Applicant's proffer, it does not demonstrate the Administrative Judge erred in connection with his assessment of Applicant's credibility.