DATE: February 13, 2001

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 00-0250

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

----------, Personal Representative

Administrative Judge Richard A. Cefola issued a decision, dated December 8, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

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

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by failing to consider Applicant's response to the File of Relevant Material; and (2) whether the Board should remand the case with instructions to grant Applicant a hearing.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated June 28, 2000. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Applicant submitted an answer to the SOR. In the answer, Applicant did not ask for a hearing and indicated "I believe an administrative determination will be fine." A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, who submitted a response to the FORM, dated November 20, 2000. By memorandum dated November 27, 2000, Department Counsel indicated it did not object to Applicant's response to the FORM.

The Administrative Judge issued a written decision, dated December 8, 2000, 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 the Judge's adverse security clearance decision.

Appeal Issues

Applicant has offered new evidence in support of her appeal. The Directive specifically prohibits the Board from considering new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the

new evidence presented by Applicant cannot be considered in deciding this appeal.

1. Whether the Administrative Judge erred by failing to consider Applicant's response to the File of Relevant Material. The Administrative Judge's decision contains the following statement: "Applicant received her copy [of the FORM] on October 23, 2000, and submitted nothing in reply." Applicant points to that statement and contends her response to the FORM was not reviewed by the Judge. Department Counsel concedes Applicant submitted a timely response to the FORM and indicates that it does not oppose a remand of the case to the Administrative Judge for clarification or reconsideration as appropriate.

A review of the case file shows Applicant's response to the FORM was received and later forwarded to the Administrative Judge under cover of a memorandum dated November 27, 2000. Furthermore, the November 27, 2000 memorandum states "The Applicant submitted information within the specified time period of 30 days after receiving a copy of the File of Relevant aterial." Accordingly, there is no rational basis for the Judge to conclude Applicant "submitted nothing in reply" to the FORM.

In its reply brief, Department Counsel suggests it is possible that the Administrative Judge's quoted statement "was the result of a typographical error." A mere typographical error in a Judge's decision does not warrant remand or reversal. *See, e.g.*, ISCR Case No. 99-0500 (May 19, 2000) at 3. However, in this case, a review of the Judge's decision in its entirety leaves us unable to conclude that the quoted statement is merely a typographical error. Nothing in the Judge's decision indicates or otherwise provides a rational basis for the Board to conclude the Judge considered Applicant's response to the FORM.

There is a rebuttable presumption that an Administrative Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 3. In this case, the Judge's decision makes clear he did not consider Applicant's response to the FORM. An applicant's right to present evidence in response to a FORM is an important one. It was arbitrary, capricious, and contrary to law for the Judge to fail to consider Applicant's response to the FORM.

2. Whether the Board should remand the case with instructions to grant Applicant a hearing. Applicant asks the Board to remand the case with instructions to allow her to have "a hearing *de novo* to review all the evidence submitted to date and other relevant evidence that should have been included in the applicant's and the government's case files. In addition, we request a hearing vice administrative determination to reduce the risk of further procedural errors." Department Counsel opposes this aspect of Applicant's appeal, arguing that: (a) Applicant elected to have her case decision on a written record without a hearing; (b) Applicant's request for a hearing at this time is too late; and (c) granting a hearing now would prejudice the government because it would allow Applicant to offer evidence beyond that presented in her response to the FORM. For the reasons that follow, the Board concludes Applicant's request to be allowed the opportunity to submit new evidence on remand is a form of relief to which she is not entitled.

The June 28, 2000 letter that was sent to Applicant with the SOR issued to her specifically informed Applicant that she had to "**State whether or not you wish to have a hearing or a decision without a hearing**" (bold in original). The June 28, 2000 letter also had a paragraph explaining what would happen if Applicant asked for a hearing, and another paragraph explaining what would happen if Applicant asked for an administrative determination. When Applicant submitted her answer to the SOR, she did not ask for a hearing, but rather indicated "I believe an administrative determination will be fine." Applicant's *pro se* status did not relieve her of the obligation to take timely, reasonable steps to protect her rights under Executive Order 10865 and the Directive. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at p. 2. Applicant was notified of her right to ask for a hearing and was given the opportunity to exercise that right. Applicant elected to have her case decided without a hearing. Considering the record as a whole, the Board concludes Applicant waived her right to a hearing. *See, e.g.*, ISCR Case No. 95-0818 (January 31, 1997) at pp. 2-3.

Absent a showing of harmful error that affects a party's right to present evidence in the proceedings below, a party does not have any right to have a second chance at presenting its case before an Administrative Judge. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3; ISCR Case No. 98-0252 (September 15, 1999) at p. 9. To the extent a party fails to present evidence for consideration by the Judge, the party waives the opportunity to have such evidence considered. *See, e.g.*, ISCR Case No. 98-0617 (July 14, 1999) at p. 2; ISCR Case No. 98-0257 (January 22, 1999) at p. 2

n1. [(1)] The right to present evidence for consideration by a Judge does not mean that a party has multiple chances to present evidence regardless of the provisions of the Directive governing the orderly handling of these cases. And, a party is not entitled to have the case reopened to allow the introduction of evidence that comes into existence after the close of the record. Neither the passage of time nor purported changes in Applicant's situation since the close of the record below give her a right to have a hearing now. As the Supreme Court as noted:

"' Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] . . . . If upon the coming down of the order the litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.'" *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)(quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)).

Because there must be some reasonable degree of administrative finality in DOHA adjudications, the Board has followed that reasoning. *See* DISCR Case No. 86-1802 (September 23, 1988) at p. 4.

Applicants are entitled to receive their full measure of due process under Executive Order 10865 and the Directive. Applicants are not entitled to get relief that ignores or circumvents the pertinent provisions of Executive Order 10865 or the Directive. Applicants are not entitled to be relieved of the consequences of decisions and choices they make on how to proceed with their case if they are not satisfied with the results. Furthermore, applicants are entitled have the provisions of Executive Order 10865 and the Directive applied in a fair, impartial and even-handed manner. Ignoring the pertinent provisions of Executive Order 10865 or the Directive to give an applicant "a break" would have the practical effect of depriving other, similarly situated applicants of the fair, impartial and even-handed application of the law to which they are entitled. If the Board were to grant Applicant's request for a new hearing or allow her to submit new evidence in this case, then the Board would be giving her special treatment and denying other, similarly-situated applicants of their right to receive the fair, impartial, and even-handed application of Executive Order 10865 and the Directive.

The Administrative Judge's error in this case deprived Applicant of her right to have her response to the FORM considered. The Judge's error did not affect Applicant's right to ask for a hearing. The Judge's error did not relieve Applicant of the consequences of her decision to ask for an administrative determination instead of a hearing. Nor did it relieve Applicant of the consequences of her decisions about what materials to submit in response to the FORM. Applicant is entitled only to that relief which remedies the Judge's error and provides her with the full measure of due process to which she is entitled under Executive Order 10865 and the Directive.

Conclusion

Pursuant to Item E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the Administrative Judge with instructions to issue a new decision (pursuant to Item E3.1.25 of the Additional Procedural Guidance) after the Judge considers the case file (including Applicant's response to the FORM) that was compiled before the Judge was assigned the case. The new evidence submitted by Applicant on appeal is not part of the record to be considered by the Judge on remand. Applicant is not entitled to have a hearing. Because Applicant is not entitled to submit additional evidence and because Applicant's response to the FORM is contained in the case file that was before the Judge in the proceedings below, the Judge should not reopen the record to receive any further submissions from the parties. *See* DISCR Case No. 86-1802 (September 23, 1988) at p. 3 (Board has authority to limit scope of proceedings on remand).

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 suggestion that Department Counsel had information in its files that should have been submitted as part of the FORM does not have any support in the record.