

DATE: April 10, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0055

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Richard A. Cefola issued a remand decision dated December 6, 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. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

The 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 issue of whether the Administrative Judge's remand decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) dated February 10, 2000. Applicant declined a hearing. The Administrative Judge issued an adverse decision dated July 21, 2000. Applicant appealed.

On November 7, 2000, the Appeal Board issued a decision and remand order in order to clarify the status of certain statements allegedly made by Applicant's wife to the Defense Security Service (DSS) and to determine whether Applicant's wife ever gave written statements to the DSS. On remand the Administrative Judge issued two orders and ultimately decided to admit three documents submitted by Applicant not previously admitted in to the record. Some of the documents were statements by Applicant's wife but none of the statements were given to the DSS. The Administrative Judge further declined to admit two documents that were already in the record. There was a sixth document (a September 2000 letter from Applicant's wife that Applicant had first attempted to introduce as an attachment to his appeal brief) that the Administrative Judge found was inadmissible because the Board had previously ruled that the Board could not consider it since the Directive prohibits the Board from considering new evidence on appeal. The Administrative Judge also noted that the September letter postdated his original decision.

The Appeal Board instructed the Administrative Judge to address seven questions on remand. Although the Administrative Judge failed to address directly and explicitly the seven questions, the Board is able to discern from the

Judge's decision and the file in combination that our underlying concerns are no longer warranted. Applicant's wife's statement were not submitted to the DSS or to DOHA. Therefore, the other questions are no longer pertinent.

The Administrative Judge issued a Remand Decision dated December 6, 2000, in which he concluded it is not clearly consistent with national security to grant or continue a security clearance for Applicant. Applicant appealed.

Appeal Issue

Applicant makes several arguments that, taken together, the Board construes as asserting the Administrative Judge's remand decision is arbitrary, capricious and contrary to law. The Board does not agree.

Applicant asserts that the Administrative Judge's conclusion that Applicant had offered little in the way of mitigation on either Guideline E or Guideline J was linked to a police report (which Applicant claims is unreliable, embellished and contains facts taken out of context). Applicant's argument is not persuasive because: 1) other evidence is cited by the Administrative Judge and supports his findings and 2) questions about the credibility of the police report have nothing to do with an evaluation of the case that Applicant presented in mitigation.

Applicant notes that not all his exhibits were admitted into evidence. As discussed above, the Administrative Judge declined in the remand decision to admit the September 2000 letter from Applicant's wife which was prepared after the close of the record in first Hearing Office adjudication. That decision was within his discretion. However, the Board does not agree with the part of his explanation which cites a provision of the Directive prohibiting the Appeal Board from accepting new evidence on appeal. To the extent the Judge relied on that provision, his reasoning was clearly error, even if ultimately harmless.

The rest of Applicant's arguments attack the Administrative Judge's findings and conclusions on the merits of the case claiming that the Judge considered only "one side of the story." The record evidence is more than sufficient to support the conclusion that the Judge's findings and conclusions are sustainable on appeal. The federal government must be able to repose a high degree of trust and confidence in persons granted security clearances. *Snepp v. United States*, 444 U.S., 507, 511 n.6 (1980). Given the record evidence of Applicant's assault and falsification it was proper for the Administrative Judge to resolve doubts about suitability in favor of the national security. See Directive, Item E2.2.2 ("Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security.")

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating harmful error below. Therefore the Administrative Judge's remand decision of December 6, 2000 is affirmed.

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

Separate opinion of Chairman Emilio Jaksetic, concurring:

For the reasons that follow, I concur with my colleagues' decision to affirm the Administrative Judge's December 6, 2000 remand decision.

Applicant's appeal presents the following issues: (1) whether Applicant was denied the opportunity to present relevant evidence on his behalf; (2) whether the Administrative Judge failed to consider all the record evidence; and (3) whether the Administrative Judge's findings and conclusions are arbitrary, capricious, or contrary to law.

(1) Whether Applicant was denied the opportunity to present relevant evidence on his behalf. Applicant argues that several letters he submitted were ignored because of when they were received, and argues that the major reason for the adverse decision in his case is the fact that a letter from his ex-wife⁽¹⁾ is being ignored. Applicant's arguments seem simple and straightforward. However, in order to understand Applicant's arguments and address them, a review of the procedural history of this case is warranted.

On the first appeal of this case, Applicant asserted the Administrative Judge's July 21, 2000 adverse decision was based on a failure of the Administrative Judge to consider or understand the statements made by his ex-wife about the matters covered by SOR paragraph 1.a. In support of that assertion, Applicant referred to a March 1, 2000 letter from his ex-wife and attached to his appeal brief a September 1, 2000 letter from his ex-wife. The March 1, 2000 letter referred to by Applicant was in the record as an attachment to his answer to the SOR. The September 1, 2000 letter was new evidence, which the Board could not consider. Directive, Additional Procedural Guidance, Item E3.1.29.

On November 7, 2000, the Board remanded the case to the Administrative Judge "with instructions to reopen the record to receive from both parties information to determine the following: (1) whether Applicant's former spouse gave written statements to DSS [Defense Security Service]; (2) if Applicant's former spouse gave written statements to DSS, were copies of them provided to DOHA; (3) if copies of such written statements were provided to DOHA by DSS, did DSS or Department Counsel provide Applicant with copies of them; (4) did Applicant have copies of such written statements because his former spouse gave him such copies; (5) if Applicant had copies of such written statements by his former spouse, did he have them when he answered the SOR or responded to the FORM; (6) whether, given all the circumstances, Applicant has a right to offer such written statements as evidence on his behalf; and (7) if so, whether Applicant wishes to exercise that right on remand. When receiving information from the parties, the Judge should entertain and rule on any objection or claim of privilege either party might raise. The Judge should then issue a new decision (pursuant to Item E3.1.25 of the Additional Procedural Guidance) which includes specific findings and conclusions regarding these matters."

On remand, Department Counsel submitted copies of Applicant's investigative file that the DSS had provided to DOHA and (a) indicated its review of the investigative file disclosed no references to DSS interviews of Applicant's wife; (b) noted the investigative file contained no copies of any written statements by Applicant's wife to DSS; (c) provided an explanation why it had no reason to believe that DSS had interviewed Applicant's wife; (d) stated that the DSS Special Agent who interviewed Applicant and prepared the most recent Report of Investigation in Applicant's case advised Department Counsel that she never interviewed Applicant's ex-wife and she had not received any written statements from her; and (e) took the position that Department Counsel was under no obligation to provide Applicant with copies of documents that were not in the possession of DOHA (citing Directive, Additional Procedural Guidance, Item E3.1.11) or that were in Applicant's possession or which Applicant could readily acquire from other sources.

Applicant was provided copies of Department Counsel's remand submissions. In response, Applicant offered six documents, and gave his explanation why he believed DOHA had copies of statements his wife gave to government investigators in April 1999. The Administrative Judge noted that two of the six documents submitted by Applicant already were in the record evidence, that three of the documents were from the National Security Agency (NSA) and predated the issuance of the SOR in Applicant's case, and one of the documents postdated the issuance of the Judge's July 21, 2000 decision. The Judge asked Department Counsel to submit its response, if any, to the four documents that were not already part of the record evidence in Applicant's case. Department Counsel noted that two of the six documents were already in the record evidence and indicated it had no objection to the three documents from the NSA⁽²⁾ that predated the issuance of the Judge's July 21, 2000 decision. However, Department Counsel objected to the document that postdated the issuance of the Judge's July 21, 2000 decision on the grounds that it was a third-party statement not subject to cross-examination, it was prepared in anticipation of litigation before DOHA, and it was made

after the close of the record and the issuance of the Judge's July 21, 2000 decision.

The Administrative Judge issued a remand decision, dated December 6, 2000. In the remand decision, the Judge ruled: (1) the two documents submitted by Applicant that were already in the record evidence would not be admitted into evidence a second time; (2) the three documents from NSA would be admitted into evidence; and (3) the document that postdated the Judge's July 21, 2000 decision would not be admitted into evidence because "[t]his letter post dates my original Decision, was also submitted to the Appeal Board, and, as the Appeal Board notes in its [Remand Order], 'is new evidence, which . . . cannot [be] considered (sic).'"

Applicant's complaint about the Administrative Judge's exclusion of his ex-wife's September 1, 2000 letter is not frivolous. The Judge had the discretion to decide whether to admit that document into evidence on remand. However, the Judge abused his discretion and acted in an arbitrary and capricious manner by excluding that document based on a truncated, out-of-context quotation from the Board's Remand Order. The full sentence from the Board's Remand Order reads: "The September 1, 2000 letter is new evidence, *which the Board cannot consider*. Directive, Additional Procedural Guidance, Item E3.1.29." The Directive provision which prohibits the Board from considering new evidence on appeal is irrelevant to a Judge's obligation to make rulings on the admissibility of documents, which is covered by Directive, Additional Procedural Guidance, Items E3.1.10 and E3.1.19.

However, the Administrative Judge's erroneous exclusion of the September 1, 2000 letter on remand was harmless error under the particular facts of this case. In that letter, Applicant's former wife: (1) took exception with statements attributed to her in a police report (File of Relevant Material, Item 6); and (2) referred to statements she gave to federal investigators in 1999, stating those statements "should supersede the [X] County Police Report." The statements Applicant's ex-wife gave to federal investigators in 1999 were admitted into evidence and, therefore, were available for the Judge to consider. Furthermore, it is untenable for Applicant to assert that his case turns on the police report and that acceptance of his ex-wife's September 1, 2000 letter would "put to rest" the case against him. The statements Applicant's ex-wife gave to federal investigators in 1999 are not exculpatory in nature. To the contrary, those statements support the government's case against Applicant. Accordingly, the Judge's erroneous exclusion of the September 1, 2000 letter did not prejudice Applicant in any meaningful way. *See, e.g.*, ISCR Case No. 99-0500 (May 19, 2000) at p. 3 (error is harmless when there is not a significant chance that it fatally affects an otherwise sustainable decision).⁽³⁾

2. Whether the Administrative Judge failed to consider all the record evidence. Applicant contends some of the documents he submitted "were ignored" because of when they were received by DOHA. As discussed earlier in this separate opinion, only one document submitted by Applicant was not admitted into evidence. As to the remaining documents submitted by Applicant, there is a rebuttable presumption that a Judge considered all the record evidence unless the Judge specifically stated otherwise. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at p. 3. Applicant's appeal arguments clearly fail to overcome or rebut that presumption.

3. Whether the Administrative Judge's findings and conclusions are arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's findings about his acts of domestic violence and his falsification of an August 1998 written statement. I concur with my colleagues' conclusion that the record evidence supports the Judge's findings and conclusions. The Judge's findings and conclusions about Applicant's conduct provide a rational basis for his adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. At the time the case was first appealed, Applicant was no longer married to his wife. Apparently, Applicant's ex-wife was still married to him when she was interviewed by federal investigators in 1999. Accordingly, the terms "Applicant's wife," "Applicant's ex-wife," and "Applicant's former spouse" refer to the same person.

2. Applicant's submission on remand shows that the NSA had sent him the three documents (with other documents) in December 1999, six months before Applicant submitted his response to the File of Relevant Material.

3. I concur with my colleagues that the Administrative Judge's remand decision failed to comply with the Board's remand instructions to make findings about certain matters. The Judge's failure to do so does not warrant a remand or reversal because a review of the case file shows that the proceedings on remand resolved the concerns that led the Board to remand the case in the first place.