

DATE: March 18, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06776

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Richard A. Cefola issued a decision dated November 13, 2002, 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 has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant appeal raises the following issue: Whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeal (DOHA) issued a Statement of Reasons (SOR) dated February 26, 2002. The SOR was based on Guideline J (Criminal Conduct) and Guideline F (Financial Considerations). Applicant declined a hearing. The Department Counsel submitted a File of Relevant Material (FORM) and Applicant provided a response to the FORM.

The Administrative Judge issued a decision in which he found for Applicant under Guideline J but against Applicant under Guideline F. Applicant appealed.

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. *See* 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 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. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

Appeal Issue

Applicant's appeal brief makes several arguments which the Board construes as raising the issue of whether the Judge's decision was arbitrary, capricious, or contrary to law. However, the Board notes after a review of the record that the state of the case file precludes the Board from addressing the merits of Applicant's appeal arguments at this time.

Applicant's response to the FORM in the case file received by the Board consists of a four-page narrative authored by him. At one point in the narrative (in a section titled "II. Documents"), Applicant makes reference to two documents described as "Unconditional release of EWOT," bearing different dates. He also indicates that the documents are each one page in length and are "attached." The record contains only the four-page narrative without any attached documents. A memorandum for Department Counsel prepared by a Department Paralegal in reply to Applicant's response to the FORM describes Applicant's response as consisting of four pages, which is the length of the response without any attachments. The Administrative Judge's decision makes no reference to "unconditional release of EWOT" documents submitted by the Applicant.

On March 17, 2003 the Board received a one-page memorandum dated March 10, 2003 by the Department Paralegal who prepared the earlier memorandum concerning Applicant's response to the FORM. The March 10, 2003 memorandum does not reference a specific addressee. The one-page memorandum makes the following representation, "These documents, consisting of 2 pages, belong in the [Applicant's] case file number 01-06776, which was returned to you on February 3, 2003, as a completed case. Please enter them into the record when possible. Thank you." Attached to the March 10, 2003 memorandum are what appear to be photocopies of two one-page documents, marked as "AP. EX. 1" and "A.P. Ex. 2" (sic). Each document is entitled "EARNINGS WITHHOLDING ORDER FOR TAXES."

Based on the state of the case file, the Board is unable to determine (a) whether the documents forwarded with the March 10, 2003 memorandum are the documents Applicant referenced in his reply to the FORM and presumably sought to present to the Judge; (b) whether or when Applicant submitted such documents, either in original or copy form; and (c) whether the Administrative Judge had such documents available for his consideration of the case. Without expressing any opinion on the merits of Applicant's case, the Board notes that an applicant's right to submit evidence on his or her behalf is an important one. A remand of the case is in order to ensure that Applicant's right to submit evidence on his behalf was not violated. Given the procedural posture of the case, it is premature for the Board to consider the substance of Applicant's appeal arguments.

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. The arch 10, 2003 memorandum and attachments received by the Board have been placed in the orange folder of the case file above the "Memorandum for Department Counsel" prepared in response to Applicant's reply to the FORM. On remand the Judge should ascertain the provenance of the two documents attached to the March 10, 2003 memorandum and determine whether those documents were part of Applicant's response to the FORM. The Judge should issue a new decision that specifically explains what findings and conclusions the Judge makes about the provenance of the two documents attached to the March 10, 2003 memorandum. If the Judge finds the two documents were part of Applicant's response to the FORM, then the Judge must consider them as part of the record evidence in this case.

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