

DATE: January 13, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21030

APPEAL BOARD DECISION AND REMAND ORDER

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 February 11, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision dated September 3, 2003.

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 the Personnel Security Specialist who prepared the SOR failed to give due attention to information favorable to Applicant; (2) whether the Administrative Judge was influenced by Department Counsel's attacks on Applicant's character and integrity; (3) whether the Administrative Judge erred by finding against Applicant with respect to debts that were paid prior to the SOR, or were duplicated in the SOR; and (4) whether the Administrative Judge failed to give due weight to evidence showing that there were mitigating circumstances surrounding Applicant's debts. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing consistent with the Board's rulings and instructions.

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 the Personnel Security Specialist who prepared the SOR failed to give due attention to information favorable to Applicant. Applicant contends the SOR "was laden with inaccurate and duplicate negative information" and the Personnel Security Specialist who prepared the SOR "failed to give key facts in evidence the attention and weight that was given to the negative allegations in this case."

The Board does not have jurisdiction or authority over personnel involved in the issuance of SORs. Accordingly, the Board cannot review the actions of Personnel Security Specialists involved in issuing the SOR to Applicant. However, the Board can review claims that a deficient SOR prejudiced an applicant's right to a fair adjudication of the applicant's security clearance case. *See, e.g.*, ISCR Case No. 02-05665 (May 7, 2003) at p. 3 (an SOR must place an applicant on reasonable notice of what the applicant is being accused of doing or not doing so the applicant can respond to the allegations and present evidence in his or her defense).

Even if the Board were to assume, solely for purposes of deciding this appeal, that the SOR issued to Applicant was poorly drafted, it did not prejudice Applicant's rights under the Directive. The SOR placed Applicant on adequate notice of the allegations against her. Furthermore, during the proceedings below Applicant had the opportunity to respond to the SOR allegations and present evidence to refute, rebut, or explain the debts alleged in the SOR. Therefore, any flaw with the SOR did not deny Applicant her right to a fair hearing on the merits of her security clearance case.

2. Whether the Administrative Judge was influenced by Department Counsel's attacks on Applicant's character and integrity. Applicant asserts the Administrative Judge "was influenced by the attacks of Department [C]ounsel who

attempted but failed to attack my character and integrity." This assertion is not persuasive.

There is a rebuttable presumption that an Administrative Judge is fair and impartial. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 3. Applicant's strong dissatisfaction with the Judge's decision is wholly insufficient to rebut or overcome that presumption. Nothing in the record below indicates or suggests that the Judge was unduly influenced by Department Counsel's advocacy during the hearing.

3. Whether the Administrative Judge erred by finding against Applicant with respect to debts that were paid prior to the SOR, or were duplicated in the SOR. Applicant also contends the Administrative Judge erred by finding against Applicant with respect to debts that were paid prior to the SOR, or were duplicated in the SOR. The Board's ability to address this claim of error is greatly impaired by deficiencies in the Administrative Judge's decision.

An Administrative Judge has broad discretion and latitude in how to write a security clearance decision, subject to the legal constraints of the Directive and basic concepts of due process. *See, e.g.*, ISCR Case No. 02-02528 (May 28, 2003) at p. 3. A Judge is required to issue a decision that sets forth "pertinent findings of facts, policies, and conclusions as to the allegations in the SOR." Directive, Additional Procedural Guidance, Item E3.1.25. In meeting that requirement, a Judge must set forth findings and conclusions with sufficient specificity and clarity so that the parties and the Board can discern what the Judge is finding and concluding. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 2. The appeal rights of the parties and the ability of the Board to carry out its appellate functions are impaired when a decision contains findings and conclusions that cannot be understood. *See, e.g.*, ISCR Case No. 98-0476 (July 22, 1999) at p. 4. In order to determine whether a Judge's findings are supported by substantial record evidence,⁽¹⁾ or whether the Judge's conclusions are arbitrary, capricious, or contrary to law,⁽²⁾ the Board must be able to discern what findings the Judge made and what conclusions the Judge reached as to the SOR allegations.

In this case, the Administrative Judge's findings are vague and unspecific. It is not clear which debts alleged in the SOR the Judge found were paid or settled, which debts alleged in the SOR the Judge found were still outstanding, or which debts the Judge found were paid just before the hearing. Furthermore, although Applicant claimed that some of the debts alleged in the SOR were duplicates, nothing in the decision below indicates what the Judge found or concluded about that claim. Without more specific factual findings, the Board cannot discern: (a) what the Judge found as to current status of the debts alleged in the SOR; (b) what the Judge found about when debts were satisfied; and (c) whether the Judge accepted or rejected Applicant's claim that some of the debts alleged in the SOR were duplicates. Furthermore, the vagueness of the Judge's findings precludes the Board from making a reasoned decision as to whether the Judge's conclusions are sustainable or are arbitrary, capricious, or contrary to law.

The Board cannot make a reasoned decision as to this appeal issue because of the vagueness and lack of specificity in the Administrative Judge's findings of fact. Accordingly, the appropriate remedy is to remand the case to the Judge to issue a new decision that corrects the deficiencies with his findings of fact. *See, e.g.*, ISCR Case No. 93-0519 (August 25, 1994) at pp. 3-4 (concluding remand is appropriate when Board cannot discern what the Administrative Judge relied on in reaching his ultimate determination); DISCR Case No. 89-0806 (July 26, 1991) at p. 2 (concluding remand is appropriate when decision below does not contain clear and unambiguous findings regarding the various debts alleged in SOR and the Board cannot discern what facts the Judge relied on in reaching his ultimate conclusions).

4. Whether the Administrative Judge failed to give due weight to evidence showing that there were mitigating circumstances surrounding Applicant's debts. Applicant also contends the Administrative Judge did not give fair consideration to the evidence showing that there were mitigating circumstances surrounding her debts. Because the Board is remanding the case to the Judge for issuance of a new decision, it would be premature for the Board to address this issue now.

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 that sets forth specific findings of fact as to each of the debts alleged in the SOR to eliminate the vagueness and uncertainty identified in this Board decision. Upon issuance of a new decision by the Judge, the parties retain their appeal rights. *See* Directive, Additional Procedural Guidance, Item

E3.1.35.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Directive, Additional Procedural Guidance, Item E3.1.32.3. *See* discussion of arbitrary and capricious standard in Scope of Review section of this decision.