

DATE: May 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05665

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the December 16, 2002 decision of Administrative Judge Claude R. Heiny II, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 Board should review Applicant's life during the last seven years, her awards, and her service record; (2) whether the Administrative Judge erred by finding that Applicant falsified a security clearance questionnaire; and (3) whether the Board should address Applicant's arguments concerning the Guideline F allegations. For the reasons that follow, 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.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated April 1, 2002. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). A hearing was held on August 8, 2002. The Administrative Judge issued a written decision, 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 decision.

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 Issues

1. Whether the Board should review Applicant's life during the last seven years, her awards, and her service record. Applicant asks the Board to review her life during the last seven years, her awards, and her service record. As noted earlier in this decision, 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. The Board will not review the record evidence *de novo* and make its own findings and reach its own conclusions about Applicant's security eligibility.
2. Whether the Administrative Judge erred by finding that Applicant falsified a security clearance questionnaire. On appeal, Applicant challenges the Administrative Judge's finding that she falsified a security clearance questionnaire by not disclosing all of her delinquent debts. In support of that challenge, Applicant argues: (a) it is not clear from the Statement of Reasons or the exhibits presented by Department Counsel which delinquent debts she is alleged to have omitted or concealed when she completed the security clearance questionnaire; (b) she did not believe she was 90 days delinquent on any debts when she completed the security clearance questionnaire; (c) the security clearance questionnaire did not indicate she should obtain a copy of her credit reports; (d) no person told her to obtain a copy of her credit report to complete the security clearance questionnaire; (e) she made no attempt to conceal anything and cites her openness on several issues and refers to the remarks section of the security clearance questionnaire; and (f) she told an investigator about her financial situation. ⁽¹⁾

This appeal presents an unusual situation: a lack of specificity in the SOR, the nature of the evidence presented by Department Counsel, and somewhat problematic language in the Administrative Judge's decision, taken together, leave the Board unable to discern the Judge's findings, conclusions, and reasoning about Applicant's alleged falsification of the security clearance questionnaire sufficiently to resolve the merits of Applicant's appeal.

Applicant correctly notes that it is not clear from the SOR which delinquent debts she is alleged to have omitted or concealed when she completed the security clearance questionnaire (as alleged in SOR subparagraph 2.a. An SOR must "be as comprehensive and detailed as the national security permits." Executive Order 10865, Section 3; Directive, Additional Procedural Guidance, Item E3.1.3. The Board has held that the sufficiency of SORs should be reviewed under the somewhat relaxed standards applied to administrative pleadings. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. However, even under the somewhat relaxed standard applied to administrative pleadings, an SOR must place an applicant on reasonable notice of what he or she is being accused of doing or not doing so that the applicant can respond to the allegation(s) and present evidence on his or her behalf. Apart from providing notice to an applicant, an SOR provides an important benchmark against which the Board can evaluate the sufficiency of a Judge's findings and conclusions when they are pertinent to appeal issues. ⁽²⁾ In this case, SOR subparagraph 2.a did not identify which delinquent debts Applicant is alleged to have concealed or tried to conceal from the government when she completed the security clearance questionnaire. The identity of those delinquent debts is critical because: (i) SOR subparagraph 2.a alleges that Applicant falsified her answer to question 39 on the security clearance questionnaire; and (ii) given the wording of question 39, the identity of which delinquent debts Applicant did or did not disclose on the security clearance questionnaire is important to a finding of falsification (or no falsification).

Applicant correctly notes that during the hearing Department Counsel did not present evidence that specifically identifies which delinquent debts were the basis of the falsification allegation (SOR subparagraph 2.a). Clearly, an applicant cannot dictate to Department Counsel what evidence it can or should present in support of its case against the applicant. However, Department Counsel bears the burden of presenting evidence to prove controverted allegations. *See* Directive, Additional Procedural Guidance Item E3.1.14. ⁽³⁾ Because the wording of SOR subparagraph 2.a is somewhat

problematic, the nature of the evidence presented by Department Counsel in this case⁽⁴⁾ adds to the difficulty in discerning whether there is sufficient record evidence for the Board to conclude whether the Judge made a rational decision as to whether or not Department Counsel met its burden of proof under Directive, Additional Procedural Guidance, Item E3.1.14.⁽⁵⁾

An Administrative Judge has broad discretion in writing a security clearance decision. Furthermore, a Judge's decision is not reviewed against a standard of perfection. However, the Judge's decision must be written in a manner that allows the parties and the Board to discern what findings the Judge is making and what conclusions the Judge is reaching. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 2. Given the lack of specificity in the wording of SOR subparagraph 2.a, the nature of the evidence presented by Department Counsel, and the wording of the Judge's decision, it is not clear what delinquent debts the Judge found Applicant omitted from the security clearance questionnaire. The Board's dilemma is compounded by the fact that the Judge's decision at page 9, paragraph 3 appears to be internally inconsistent as to what the Judge is or is not finding or concluding about Applicant's intent or state of mind when she completed the security clearance questionnaire.

Given the unusual interaction among the wording of SOR subparagraph 2.a, the nature of the evidence presented by Department Counsel, and the wording of the Administrative Judge's decision, Applicant's appeal arguments persuade the Board that harmful error occurred that warrants a remand with instructions.

3. Whether the Board should address Applicant's arguments concerning the Guideline F allegations. On appeal, Applicant makes a variety of arguments about the Guideline F allegations in this case. Because the Board is remanding the case with instructions that will result in the Administrative Judge issuing a new decision in this case, it would be premature for the Board to address Applicant's arguments on this aspect of the case.

Conclusions

Applicant has demonstrated error below that warrants a remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with the following instructions: (1) the Judge shall permit the parties a reasonable opportunity to supplement the record evidence with respect to SOR subparagraph 2.a, and such opportunity shall include the right of either party to ask for a supplemental hearing; (2) the Judge has the discretion to allow either party to move to amend SOR subparagraph 2.a to reflect the record evidence or for other good cause; and (3) after allowing the parties a reasonable opportunity to supplement the record evidence, the Judge shall issue a new decision consistent with the provisions of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

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 also makes factual assertions in support of her interpretation of Government Exhibit 6 to bolster her claim that she did not falsify the security clearance questionnaire. Most of those factual assertions go beyond the record evidence and, as such, constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
2. The SOR sets forth the allegations being made against an applicant (Directive, Additional Procedural Guidance, Item E3.1.3), and provides a baseline for what Department Counsel must prove when SOR allegations are controverted (Directive, Additional Procedural Guidance, Item E3.14). Furthermore, an Administrative Judge's decision must include "pertinent findings of fact, policies, and conclusions as to the allegations in the SOR." Directive, Additional Procedural Guidance, Items E3.1.25.
3. During the proceedings below, Applicant denied that she had engaged in falsification as alleged by SOR subparagraph 2.a.
4. For example, Government Exhibits 6 and 7 are credit reports that do not contain any explanation of various codes and notations contained therein. *Compare* Applicant Exhibit G, which is a credit report that contains an explanation of various codes and notations contained therein. Even Government Exhibit 1, the basis for the allegation of falsification, is open to various interpretations when read as a whole.
5. In deciding whether Department Counsel has met its burden of proving controverted SOR allegations, an Administrative Judge must consider all the record evidence, not just the evidence presented by Department Counsel. Furthermore, when considering a challenge to a Judge's factual findings, the Board must consider 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."