

DATE: March 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07191

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 6, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision dated November 26, 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 an inadequate background investigation was conducted in Applicant's case; and (2) whether the Administrative Judge failed to consider the record evidence. 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 an inadequate background investigation was conducted in Applicant's case. On appeal, Applicant questions the adequacy of the background investigation conducted in his case. The Board construes Applicant's brief as raising the issue of whether an inadequate background investigation was conducted in his case.

Under the Directive, there is no jurisdiction or authority to adjudicate, in DOHA proceedings, the adequacy of a background investigation. *See, e.g.*, ISCR Case No. 01-03112 (March 20, 2002) at p. 3. Accordingly, Applicant's expressed concern about the adequacy of the background investigation in his case raises a claim that cannot be addressed by the Board. By holding there is no jurisdiction or authority to address this claim, the Board does not express or imply any opinion about the adequacy of the background investigation in Applicant's case.

2. Whether the Administrative Judge failed to consider the record evidence. Applicant correctly notes that, in the decision below, the Administrative Judge misidentifies Applicant as a 26-year-old female. The Board construes Applicant's brief as questioning whether the Judge considered the record evidence in his case. For the reasons the follow, the Board concludes Applicant's claim has merit.

The File of Relevant Material (FORM) prepared by Department Counsel contains two parts: documentary evidence (consisting of seven documents) and Department Counsel's discussion and argument about the documentary evidence. [\(1\)](#)

In the discussion and argument portion of the FORM, Department Counsel states Applicant is a 26-year-old female and repeatedly refers to Applicant as a female (by using the pronouns "she" and "her"). However, the record evidence shows Applicant is a man who was 30 years old as of the date of the FORM, and 31 years old when the Administrative Judge

issued her decision. Despite the record evidence showing that Applicant is a 31-year-old man, the Judge found Applicant is a 26-year-old female and made repeated references to Applicant using the pronouns "she" and "her."

There is a rebuttable presumption that an Administrative Judge considered all the record evidence. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Although appealing parties have a heavy burden when trying to rebut that presumption, it can be rebutted successfully. *See, e.g.*, ISCR Case No. 02-00318 (February 25, 2004) at p. 8 (holding that the appealing party rebutted the presumption in that case).

In this case, the presumption that the Administrative Judge considered the record evidence is rebutted because the Judge made an erroneous finding about the identity of Applicant that is not supported by any record evidence and reflects acceptance of Department Counsel's misidentification of Applicant in the nonevidentiary portion of the FORM. Furthermore, given the Judge's repeated, multiple references to Applicant as a female, the Judge's error is not merely an isolated typographical error. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at p. 2 (Board indicating it would consider the Judge's decision in its entirety before deciding whether an identified error was only a typographical one)

Applicant is entitled to an adjudication of his security eligibility after consideration of all available, reliable information. *See* Directive, Enclosure 2, Item E2.2.1. Furthermore, Applicant is entitled to challenge the Administrative Judge's findings on the basis that they are not supported by the record evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Given the Judge's misidentification of Applicant -- which is based on the nonevidentiary portion of the FORM -- Applicant has a reasonable basis for questioning whether the Judge considered the record evidence as a whole. Because the Judge's decision clearly misidentifies the Applicant in a material way, a reasonable person could fairly question whether the Judge considered the record evidence when making her other findings in this case. The Judge's consistent failure to correctly identify Applicant precludes the Board from concluding the Judge considered the record evidence as a whole and engaged in the whole person analysis required under the Directive. A fundamental error in identifying an applicant cannot simply be ignored or dismissed as harmless error. [\(2\)](#)

Given the nature of the error identified by Applicant, the appropriate remedy would be to remand the case to the Administrative Judge with instructions to issue a new decision (consistent with the requirements of Directive, Additional Procedural Guidance, Item E3.1.25 and E3.1.35) after consideration of the record evidence as a whole. Although the Judge can consider the arguments made by Department Counsel in the nonevidentiary portion of the FORM, the Judge cannot treat those arguments as the equivalent of record evidence.

Conclusion

Applicant has met his burden of demonstrating error below that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge for issuance of a new decision after correction of the errors identified in this Decision and Remand Order.

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. Department Counsel's discussion and argument is not evidence, but merely the written equivalent of an opening statement and closing argument, which are often presented at a hearing. *See, e.g.*, ISCR Case No. 96-0544 (May 12, 1997) at p. 4 (statement made by Department Counsel in closing argument is not evidence). *Cf.* ISCR Case No. 95-0178 (September 4, 1996) at p. 4 (appeal briefs do not constitute evidence).
2. *Compare* ISCR Case No. 01-05500 (April 15, 2003) at p. 3 (noting that the Administrative Judge's finding about the applicant's job title was not material to any issue in that case).