

DATE: April 6, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07857

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 January 5, 2004, 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 James A. Young issued an unfavorable security clearance decision, dated December 17, 2004.

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 Applicant was denied the right to have the Administrative Judge consider his response to the File of Relevant Material; and (2) whether some of the Administrative Judge's findings of fact concerning Applicant's history of financial difficulties are erroneous. 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 Applicant was denied the right to have the Administrative Judge consider his response to the File of Relevant Material. The Administrative Judge's decision indicates that Applicant did not timely respond to the File of Relevant Material (FORM). On appeal, Applicant contends he submitted his response to the FORM before the deadline passed and that, therefore, the Judge should have considered his response to the FORM. Applicant's appeal raises the issue of whether he was denied the right to have the Judge consider his response to the FORM.

Applicant's response to the FORM is in the case file that was before the Administrative Judge. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption has been rebutted in this case by the Judge's statement that Applicant's response to the FORM was not timely submitted (Decision at p. 2) and the Judge's statement that Applicant "failed to respond to the FORM" (Decision at p. 3).

On appeal, Applicant attaches a photocopy of a certified mail receipt that shows a member of the DOHA administrative staff signed for a package from Applicant on November 17, 2004. Apart from the photocopy of the certified mail receipt, a review of the case file shows that the November 30, 2004 memorandum assigning the case to the Hearing Office for determination contains the following statement: "The Applicant submitted information within the time period of 30 days after receipt of copy of the file of relevant material."

An applicant's right to submit evidence for the Administrative Judge to consider in his or her case is an important one. The timeliness of an applicant's response to the FORM is not measured against when a case is assigned to the Hearing Office, but rather when the applicant's response is received by DOHA. Since Applicant submitted his response to the FORM in a timely manner, he was entitled to have it considered in his case.

In view of the foregoing, the Board concludes Applicant was denied his right to have his response to the FORM considered in his case. That denial was prejudicial to Applicant's rights in a material manner that warrants remand.

2. Whether some of the Administrative Judge's findings of fact concerning Applicant's history of financial difficulties are erroneous. Applicant's appeal brief contains statements that the Board construes as challenging some of the Administrative Judge's findings of fact about Applicant's history of financial difficulties. Because the Board has concluded that this case should be remanded, it would be premature for the Board to address this appeal issue.

Conclusion

Applicant has demonstrated 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 with the following instruction: On remand, the Administrative Judge must consider Applicant's response to the FORM and issue a new decision pursuant to Directive, Additional Procedural Guidance, Item E3.1.25.

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