

DATE: February 13, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13568

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated April 21, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline F (Financial Considerations). Administrative Judge Kathryn Moen Braeman issued a favorable security clearance decision dated September 24, 2003.

Department Counsel appealed the Administrative Judge's favorable 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 issue has been raised on appeal: whether the Administrative Judge's findings and conclusions about Applicant's alleged falsifications are supported by substantial record evidence and are not arbitrary, capricious, or contrary to law. 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 Issue

The Administrative Judge's findings and conclusions about Applicant's history of financial problems have not been challenged on appeal. Therefore, the Board need not address them for purposes of deciding this appeal.

On appeal, Department Counsel contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because: (a) the Judge misapplied Personal Conduct Mitigating Condition 2; (b) the Judge's favorable conclusions about Applicant's falsifications could not be mitigated by the application of Personal Conduct Mitigating Condition 3; and (c) Applicant's falsifications were material and raised serious security concerns. In reply, Applicant contends he did not falsify the security clearance application, takes issue with various statements in Department Counsel's appeal brief, and asks the Board to affirm the Judge's favorable decision. The Board construes the two appeal briefs as raising the issue of whether the Judge's findings and conclusions about Applicant's alleged falsifications are supported by substantial record evidence and are not arbitrary, capricious, or contrary to law.

The Board is not able to consider and address the merits of each party's arguments in a meaningfully or reasoned way because it is not clear what the Administrative Judge found and concluded with respect to the falsifications alleged in the SOR. Portions of the decision below seem to indicate the Judge found that Applicant falsified the security clearance application, but concluded that the falsifications were mitigated. Other portions of the decision below seem to indicate the Judge accepted Applicant's explanation, which would negate a finding of knowing and deliberate falsification and therefore eliminate any need to consider whether there was extenuation or mitigation. ⁽¹⁾ Although a Judge has broad latitude and discretion in deciding how to write a decision, the Judge must issue a decision that makes findings and reaches conclusions that the parties and the Board can understand. 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 this case, the Judge's decision is equivocal as to whether the Judge did or did not find Applicant engaged in a knowing and deliberate falsification. Given such an

equivocation concerning a key issue in the case, the appropriate course of action is to remand the case to the Judge for issuance of a new decision that makes clear findings and conclusions as to the SOR allegations concerning falsification of the security clearance application. *See* ISCR Case No. 01-21030 (January 13, 2004) at pp. 4-5 (remanding case for issuance of new decision when the Board was unable to make a reasoned decision on appeal because the Judge's findings of fact were vague and unspecific); DISCR Case No. 88-2295 (March 2, 1990) at pp. 2-5 (Board remanded case for issuance of new decision when it was unable to discern what the Hearing Examiner was or was not finding about SOR allegations pertaining to falsification of a security clearance application).

Conclusion

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 that makes specific findings as to whether Applicant engaged in knowing and deliberate falsifications as alleged in the SOR. If the Judge finds no knowing and deliberate falsifications occurred, then the Judge need not discuss extenuation or mitigation unless the Judge articulates a basis for doing so. If the Judge finds knowing and deliberate falsifications occurred, then the Judge should discuss whether or how the general or specific factors of the Directive apply. *See* Directive, Section 6.3; Enclosure 2, Item E2.2.1; Adjudicative Guidelines.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Implicit in the concepts of extenuation and mitigation is the predicate that some conduct occurred for which a claim of extenuation or mitigation may be raised. If an Administrative Judge finds that an applicant did not engage in misconduct, then the Judge should not engage in analysis of extenuation or mitigation unless the Judge articulates a rational basis for doing so.