

DATE: November 29, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17522

**APPEAL BOARD DECISION**

**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 October 23, 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), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Michael H. Leonard issued an unfavorable security clearance decision dated August 18, 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 the Administrative Judge erred by proceeding with Applicant's hearing and issuing a written decision despite the issuance of a Letter of Consent to Applicant's employer in April 2004; and (2) whether Applicant can be allowed to present his case before the Board. For the reasons that follow, the Board affirms the Administrative Judge's 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. 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 Administrative Judge erred by proceeding with Applicant's hearing and issuing a written decision despite the issuance of a Letter of Consent to Applicant's employer in April 2004. Applicant challenges the Administrative Judge's security clearance decision on the ground that the Department of Defense issued a Letter of Consent to his employer in April 2004, and the Letter of Consent stated that he had been granted a security clearance. For the reasons that follow, the Board concludes Applicant has not demonstrated the Judge erred by proceeding with his hearing and issuing a security clearance decision.

DOHA issued to Applicant a statement of reasons, dated October 23, 2003. Applicant submitted an answer to the SOR, notarized November 5, 2003. In that answer, Applicant asked for a hearing to be held in his case. A notice of hearing was issued on March 31, 2004, setting the date for Applicant's hearing as April 21, 2004. On April 12, 2004, the Defense Security Service issued to Applicant's employer a Letter of Consent, which stated that Applicant had been granted a security clearance. Applicant's employer faxed a copy of the Letter of Consent to the Washington Hearing Office on April 15, 2004. The Defense Security Service then sent a letter, dated April 19, 2004, to inform Applicant's employer that the Letter of Consent "was issued in error and that the clearance has been administratively withdrawn without prejudice." Before the hearing, there was a conference call -- involving the Administrative Judge, Department Counsel, and Applicant -- in which Applicant was told that the hearing would proceed and that he should attend. Applicant appeared at the hearing on April 21, 2004. The matter of the Letter of Consent was raised and discussed on the record and the Judge ruled that the rescission of the Letter of Consent meant that Applicant's hearing should proceed.

The Directive does not give Hearing Office Administrative Judges or the Board supervisory jurisdiction or authority over the actions of the Defense Security Service or the issuance of Letters of Consent. Furthermore, there was no legal

reason or basis for the Judge to ignore or vacate the Defense Security Service letter, dated April 19, 2004. There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Nor is there a right to retain a security clearance based on a claim of equitable estoppel. *See, e.g.*, ISCR Case No. 02-05854 (April 15, 2004) at p. 4. The erroneous issuance of a Letter of Consent did not confer on Applicant any reasonable expectation in holding or retaining a security clearance. The Judge acted properly by proceeding with the hearing and issuing a decision concerning Applicant's security eligibility.

2. Whether Applicant can be allowed to present his case before the Board. Applicant asks to present his case before the Board. Applicant's request can be construed in three ways: (a) Applicant is requesting an opportunity to appear before the Board in person to argue his case; (b) Applicant is requesting an opportunity to have his case decided *de novo* by the Board; or (c) Applicant is asking for an opportunity to submit another appeal brief to challenge the Administrative Judge's decision on the merits if the Board does not rule in Applicant's favor with respect to his first issue. For the reasons that follow, Applicant is not entitled to any of those options.

First, there is no authority under the Directive to allow a personal appearance before the Board. *See, e.g.*, ADP Case No. 30-1130 (January 4, 2001) at p. 2 (citing earlier Board decisions). Accordingly, Applicant is not entitled to appear before the Board in person to argue his case. Second, the Board does not review cases *de novo*. Under the Directive, the Board reviews decisions issued by Hearing Office Administrative Judges to determine whether an appealing party has raised identifiable claims of actual or legal error, and whether -- based on the record developed before the Judge, and applicable law -- the appealing party has demonstrated error below. *See* Directive, Additional Procedural Guidance, Items E3.1.29 through E3.1.33. The Board does not review cases *de novo*, receive new evidence on appeal, make its own findings of fact, or reach its own conclusions as to an applicant's security eligibility. Third, Applicant had the opportunity to raise in his appeal brief any claim of factual or legal error that he wanted the Board to consider. Applicant is not entitled to multiple appeals briefs.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

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