

DATE: August 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18663

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

-----, Personal Representative

Administrative Judge James A. Young issued a decision, dated March 25, 2003, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: whether the Administrative Judge failed to adhere to the Directive by failing to notify Applicant at least 15 days in advance of the time and place of the hearing; and whether certain of the Administrative Judge's conclusions with respect to Applicant's personal conduct were 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 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 September 20, 2002. The SOR was based on Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The case was assigned to the Administrative Judge on January 7, 2003. On February 11, 2003, a notice of hearing was issued, scheduling a February 21, 2003, hearing date. The Administrative Judge issued a written decision, dated March 25, 2003, 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.

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 Administrative Judge erred by not adhering to the Directive in that he did not notify Applicant at least 15 days in advance of the time and place of the hearing. Applicant's Personal Representative (referenced hereafter as "representative") requests that, if the Board does not reverse the Administrative Judge's decision based on the claims of error she raises, then it should remand this matter for further hearing because the Judge did not notify Applicant at least 15 days in advance of the time and place of the hearing. As the representative notes, a notice of hearing was issued on February 11, 2003, for a hearing that was held on February 21, 2003. The representative contends that the shortened period directly impacted Applicant's ability to prepare her response to the allegations under Guideline E because, as a result of the shortened period, Applicant was not able to secure the testimony of two former managers and was not able to secure the former employer's rules and regulations with regard to the frequent dining program within the 10 days allowed to her.

The Judge's failure to notify Applicant of the hearing 15 days in advance is harmful error. The language in the Directive clearly mandates that: "[t]he applicant shall be notified *at least* 15 days in advance of the time and place of the hearing . . ." *See* Directive, Additional Procedural Guidance, Item E3.1.8 (italics added). The Administrative Judge notified Applicant of a hearing date 10 days in advance, and there is no indication in the record why the Judge gave Applicant less than 15 days, as the Directive requires. Although there can be circumstances in which it is appropriate to hold a hearing with less than 15 days notice, the Board need not decide in this case what such circumstances may be. In light of all of the facts in this record, the Board finds no basis for the Judge to hold this hearing with less than 15 days notice. Consequently, a new hearing is the appropriate remedy to resolve this error.

2. Whether certain of the Administrative Judge's conclusions with respect to Applicant's personal conduct were arbitrary, capricious or contrary to law. The representative raises additional claims of error, each of which she believes would be sufficient in itself to require reversal. It is premature for the Board to address these claims of error due to the need to remand this matter for a new hearing to remedy the failure to provide Applicant 15 days notice.

Conclusion

Pursuant to Item E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the Administrative Judge with instructions. The Administrative Judge shall notify Applicant at least 15 days in advance of the time and place of a new hearing. After conducting a new hearing, the Judge shall issue a new decision consistent with his duties under Items E3.1.25 and E3.1.35 of the Directive's Additional Procedural Guidance.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board