

DATE: August 31, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20031

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 June 3, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated June 10, 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 opportunity to have the Administrative Judge consider his response to the File of Relevant Material; (2) whether some of the Administrative Judge's findings are not supported by the record evidence; and (3) whether the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) are 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 Issues⁽¹⁾

1. Whether Applicant was denied the opportunity to have the Administrative Judge consider his response to the File of Relevant Material. In the decision below, the Administrative Judge stated Applicant did not submit a response to the File of Relevant Material (FORM). On appeal, Applicant takes exception with that statement, asserting that he faxed to DOHA a response to the FORM for consideration by the Judge in his case. In support of that claim, Applicant has submitted a photocopy of a telephone bill extract that bears an entry that shows on April 10, 2004, a four-minute call was placed to the fax number used by Department Counsel located in California.⁽²⁾ According to the letter sent to Applicant with a copy of the FORM, Applicant had until April 11, 2004 to submit his response to the FORM.

The Board has held that an appealing party must take timely, reasonable steps to raise objections or other procedural matters to preserve them for appeal.⁽³⁾ The Board also has recognized that there may be some circumstances when an appealing party may not be able to raise a timely objection during the proceedings below and can, as a practical matter, only raise a claim of error for the first time on appeal.⁽⁴⁾ A review of the procedural history of this case persuades us that prior to the receipt of the Administrative Judge's decision, Applicant could not reasonably have been expected to know that his April 10, 2004 submission had not been forwarded to the Judge. Given the particular procedural history of this case, Applicant's claim of error falls within a narrow exception to the general rule that a party must make objections or raise procedural matters during the proceedings below. Accordingly, Applicant's claim of error is timely under the particular facts and circumstances of this case.

An applicant's right to submit evidence -- in a timely manner -- for consideration in his or her case is an important one.⁽⁵⁾ Applicant has submitted documentation that indicates he made a reasonable attempt to submit a timely response to

the FORM. Applicant was entitled to have his response forwarded to the Administrative Judge for consideration in his case. For reasons not apparent from the case file, Applicant's response to the FORM was not forwarded to the Judge. Applicant was denied the right to have his response to the FORM considered in his case. The Board will not review the contents of Applicant's response to the FORM and decide what weight it might give to that document if it were the trier of fact in the first instance, nor will the Board speculate as to what weight the Judge might give to that document. ⁽⁶⁾

The appropriate remedy in this case is to remand the case to the Administrative Judge with instructions to reopen the record to receive Applicant's April 10, 2004 response to the FORM, subject to any evidentiary objections that Department Counsel might raise to the contents of Applicant's April 10, 2004 response. To facilitate the Judge's handling of the case on remand, the Board will place in the exhibit file a photocopy of Applicant's April 10, 2004 response to the FORM, marked as Appellate Exhibit.

On remand, the Administrative Judge should provide a copy of that document to Department Counsel, and allow Department Counsel a reasonable opportunity to raise or waive any objections to its contents. After allowing Department Counsel a reasonable opportunity to make or waive any objections, the Judge should issue a new decision that complies with Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

2. Whether some of the Administrative Judge's findings are not supported by the record evidence; and 3. Whether the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. Because the error identified by Applicant warrants a remand that will result in reopening the record and issuance of a new decision, it would be premature to address Applicant's other appeal issues.

Conclusion

Applicant has demonstrated error that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with instructions.

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

1. Department Counsel did not file a reply brief in this case. Accordingly, the Board does not have the benefit of Department Counsel's views on Applicant's appeal issues.

2. The case file contains a copy of an undated letter from Department Counsel to Applicant that accompanied the copy of the FORM provided to Applicant. That undated letter has a letterhead from the Department Counsel office in

California and bears the fax number indicated in Applicant's telephone bill.

3. *See, e.g.*, ISCR Case No. 02-18668 (February 10, 2004) at p. 4 (failure of appealing party to take basic, minimum steps to preserve the record on an evidentiary issue can result in loss of important rights on appeal). *See also* ISCR Case No. 03-00543 (May 21, 2004) at pp. 4-5 (discussing reasons why parties need to raise objections or other procedural matters on the record in a timely manner).

4. *See, e.g.*, ISCR Case No. 03-00543 (May 21, 2004) at pp. 3-4.

5. *See, e.g.*, ISCR Case No. 01-06776 (March 18, 2003) at p. 3; DISCR Case No. 92-0898 (April 19, 1993) at p. 3.

6. *See, e.g.*, DISCR Case No. 92-0898 (April 19, 1993) at pp. 2-3.