

DATE: December 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22603

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 October 17, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct). Administrative Judge Richard A. Cefola issued an unfavorable security clearance decision, dated April 26, 2004.

This is the third appeal in this case. The prior procedural history of this case is set forth in the Appeal Board Decision and Remand Order, dated September 3, 2004 and the Appeal Board Decision and Remand Order, dated August 9, 2005, and that prior procedural history need not be repeated for this appeal.

Applicant has appealed the Administrative Judge's unfavorable remand decision, dated November 2, 2005. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

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

Applicant challenges the Administrative Judge's November 2, 2005 Remand Decision.⁽¹⁾ However, the Board is not able to address or consider the merits of Applicant's challenge to the Judge's November 2, 2005 Remand Decision.

After Applicant appealed the Administrative Judge's November 2, 2005 Remand Decision, the Board was provided with an incomplete case record.⁽²⁾ The Chairman requested assistance from DOHA administrative personnel and the Hearing Office in locating the missing portions of the case record. To date, the Appeal Board has received only the following portions of the case record: (1) the Administrative Judge's November 2, 2005 remand decision (with attached copy of an undated "Joint Amendment to Statement of Reasons"); (2) three items of Hearing Office correspondence dated November 2, 2005; and (3) the appeal files for the first two appeals in this case. The case record provided to the Board is missing the following: (a) the original SOR; (b) Applicant's answer to the SOR; (c) the hearing transcript; (d) the exhibits and any other submissions made to the Hearing Office by the parties; (e) the Judge's April 26, 2004 decision; (f) the Judge's September 17, 2004 remand decision⁽³⁾; (g) all correspondence pertaining to the case at the hearing level prior to the issuance of the Judge's November 2, 2005 remand decision; and (h) any order or other issuance made by the Judge prior to the November 2, 2005 remand decision, as well as the parties' responses to such orders or issuances.

It is impossible for the Board to decide this appeal on the merits in the face of an incomplete case record. Accordingly, pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with the following instructions: On remand, the Judge should take reasonable steps to locate the missing portions of the case record, or work with the parties to use copies of documents in the possession of the parties

to substitute for the missing portions of the case record. If any portion of the case record cannot be located or reconstituted through the use of substitute copies on remand, the Judge has the discretion to take appropriate steps -- including reopening the evidentiary record -- to allow the parties a reasonable opportunity to present additional evidence or submissions necessary to reconstitute the case record as close as practical to the original case record. The Judge should document the steps taken on remand to locate or reconstitute the missing portions of the case record, having the discretion to do so through correspondence with the parties, acceptance of a written stipulation by the parties, written rulings, or discussion in his written decision. Finally, after the Judge has relocated the missing portions of the case record or reconstituted it with the assistance of the parties, the Judge should issue a new decision consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

Conclusion

Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge for further processing consistent with the instructions set forth in this Decision and Remand Order.

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

1. By the time Applicant's appeal brief was received by the Board, it became obvious to the Board that the case record was not in a condition to be adjudicated. Therefore, no useful purpose would be served by needlessly delaying disposition of this appeal until Department Counsel has an opportunity to reply to Applicant's appeal brief.

2. "Upon receipt of a notice of appeal, the Appeal Board shall be provided the case record." Directive, Additional Procedural Guidance, Item E3.1.29.

3. The date of the original SOR and the dates of the Administrative Judge's first two decisions are taken from the Appeal Board Decision and Remand Order, dated September 3, 2004 and the Appeal Board Decision and Remand Order, dated August 9, 2005.