

DATE: August 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23979

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Eli D. Stutsman, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated May 7, 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 Martin H. ogul issued an unfavorable security clearance decision dated December 31, 2003.

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 failed to consider all the record evidence presented by Applicant; (2) whether the Administrative Judge failed to apply the whole person concept when making his decision; (3) whether the Administrative Judge erred by failing to take into account concessions Department Counsel made during closing argument; and (4) whether the Administrative Judge's adverse conclusions under Guideline B 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 the Administrative Judge failed to consider all the record evidence presented by Applicant. Applicant acknowledges the Board has held that there is a rebuttable presumption that an Administrative Judge considered all the record evidence, but contends that presumption has been rebutted in this case. Applicant's contention is persuasive.

Applicant correctly notes the hearing was held on two consecutive days, with two witnesses testifying for Applicant on the first day and three other witnesses testifying for Applicant on the second day. Although Applicant presented five witnesses (other than Applicant himself), the Administrative Judge specifically stated that Applicant testified and presented three witnesses (Decision at p. 2) and made findings of fact that specifically refer to only three witnesses appearing on behalf of Applicant (Decision at p. 3). Moreover, Applicant correctly notes that there is no record evidence to support the Judge's findings that Applicant is a defense contractor employee (Decision at p. 2) or the principal of a consulting engineering company which is a defense contractor (Decision at p. 3).

Applicant is entitled to an adjudication of his security eligibility after consideration of all available, reliable information. *See* Directive, Section 6.3 and Adjudicative Guidelines, Item, E2.2.1. Applicant has a reasonable basis for questioning whether the Administrative Judge considered all the record evidence because the Judge's decision erroneously indicates Applicant presented only three witnesses, the Judge explicitly incorporated the erroneous statement that Applicant presented only three witnesses in the Judge's findings of fact, and the Judge erroneously identified Applicant's employer as a defense contractor. Taken together, those errors undercut the presumption that the Judge considered all the record evidence.⁽²⁾

Central to the concept of due process is notice and a meaningful opportunity to respond. Implicit in the concept of a meaningful opportunity to respond is the premise that a party will receive fair consideration of the evidence that it presents. Public confidence in the fairness and integrity of the industrial security program⁽³⁾ depends, to a large degree, on there being both the substance and the appearance of a fair and impartial adjudication after reasonable consideration of the record evidence as a whole. If an Administrative Judge makes statements or acts in a manner that could lead a reasonable person to question whether the Judge considered all the record evidence,⁽⁴⁾ then a party could understandably question whether it received fair consideration of the evidence it presented.

In this case, Applicant has identified flaws in the Administrative Judge's decision that raise a legitimate question as to whether the Judge considered all the evidence Applicant presented at the hearing. Considering the record as a whole, the Board concludes the flaws identified by Applicant are harmful to his procedural rights under the Directive.

2. Applicant's other issues. Given the errors identified by Applicant, it would be premature to address Applicant's other appeal issues. Since Applicant has rebutted the presumption that the Administrative Judge considered all the record evidence, the Board is not in a position to make a reasoned decision as to the merits of Applicant's remaining appeal issues. However, the error identified by Applicant does not warrant reversal (as requested by Applicant), but rather warrants a remand to the Judge for issuance of a new decision that reflects a fair and reasonable consideration of all the evidence submitted by Applicant.

Conclusion

Applicant has met his burden of demonstrating harmful error below. 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 corrects the errors identified by this Board decision and complies with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25. By remanding this case, the Board is not expressing or implying any opinion as to what findings of fact the Judge should make or what conclusions the Judge should reach on remand.

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

1. Department Counsel elected to not submit a reply brief in this case.

2. Mere typographical errors in an Administrative Judge's decision are not likely to be harmful. *See, e.g.*, ISCR Case No. 02-11402 (February 10, 2004) at p. 3 n. 1; ISCR Case No. 99-0500 (May 19, 2000) at p. 3. However, the Administrative

Judge's errors in this case cannot be simply dismissed as mere typographical errors.

3. Maintaining public confidence in the industrial security program is a factor to be considered. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 10 (noting that maintaining public confidence in the industrial security program is a factor that can be relevant in these proceedings).

4. A party's personal belief, however sincerely held, is not sufficient to raise a serious question as to whether an Administrative Judge considered the record evidence. Rather, a party must base such a claim of error on something in the record that would permit a reasonable, disinterested person to fairly question whether the Judge considered the record evidence. *Cf.* ISCR Case No. 01-04713 (March 27, 2003) at p. 3 ("The issue is not whether Applicant personally believes that he has been discriminated against. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge."); ISCR Case No. 99-0710 (March 19, 2001) at p. 5 (using similar language).