

DATE: October 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24227

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Frank A. Libby, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 26, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement). Administrative Judge Wilford H. Ross issued an unfavorable security clearance decision dated April 23, 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 issue has been raised on appeal: whether the Administrative Judge lacked subject matter jurisdiction to issue a security clearance decision in this case. 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 contends the Administrative Judge lacked subject matter jurisdiction to issue his adverse security clearance decision and asks the Board to vacate the Judge's decision. In support of that contention, Applicant argues:

- (a) lack of subject matter jurisdiction can be raised at any time during these proceedings, including for the first time on appeal;
- (b) DOHA's jurisdiction to adjudicate a security clearance case terminates upon its receipt of notification that an applicant's security clearance has been administratively terminated;
- (c) submission of a notice that an applicant's security clearance has been administratively terminated operates as notification to DOHA;
- (d) Applicant's security clearance was administratively terminated, and notice of that action was submitted on December 10, 2002;
- (e) upon submission of the notice that Applicant's security clearance had been administratively terminated, DOHA's jurisdiction to adjudicate Applicant's security clearance case ceased;
- (f) in view of the foregoing, the Administrative Judge lacked authority to issue a security clearance decision in Applicant's case; and
- (g) therefore, the Board should vacate the Administrative Judge's security clearance decision.

In response, Department Counsel argues:

- (i) Applicant's appeal brief contains some factual errors about when DOHA received notice that Applicant's security clearance had been administratively terminated;
- (ii) there is no evidence that, before the case was assigned to the Administrative Judge on January 3, 2003, anyone at DOHA received notice that Applicant's security clearance had been administratively terminated;
- (iii) under Directive, Section 4.4, actions taken pursuant to the Directive shall cease upon termination of an applicant's need for access to classified information;
- (iv) Directive, Section 4.4.2 provides an exception to Section 4.4 when a security clearance decision has been issued;
- (v) although it is not clear when DOHA first received notice that Applicant's security clearance had been administratively terminated, DISCO did receive such notice in December 2002;
- (vi) if the Board concludes that notice to DISCO is sufficient to trigger Section 4.4, then the Administrative Judge's decision should be vacated; and
- (vii) if the Board concludes that notice to DISCO is not sufficient to trigger Section 4.4, then the Administrative Judge's decision should be affirmed because the Judge did not receive notice of administrative termination of Applicant's security clearance until after the Judge had issued his security clearance decision.

For the reasons that follow, the Board concludes the case should be remanded to the Administrative Judge for further proceedings.

The Board accepts Applicant's argument that the lack of subject matter jurisdiction can be raised at any time during these proceedings, including for the first time on appeal. Lack of subject matter jurisdiction to adjudicate a security clearance case is not waivable, can be raised by either party at any time in these proceedings, and can be raised *sua sponte* by a Hearing Office Administrative Judge or the Board even if neither party raises the issue. Of necessity, a Hearing Office Judge and the Board have jurisdiction to consider and resolve the threshold issue of whether there is subject matter jurisdiction to adjudicate a particular security clearance case under the Directive. *Cf. Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996).

To the extent that Applicant relies on decisions issued by Hearing Office Administrative Judges, the Board notes that such decisions may be cited as persuasive authority, but they are not legally binding precedent that the Board must follow. Similarly, those decisions are not legally binding precedent on the Judge in this case. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges and factors that a party should consider before citing such decisions on appeal).

Department Counsel correctly notes that Directive, Section 4.4 provides for the termination of actions under the Directive "upon termination of the applicant's need for access to classified information" with three specified exceptions.

The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, the Board is not authorized to conduct evidentiary hearings to resolve factual disputes, including factual disputes about procedural issues. As a matter of judicial economy, in some appeals where a claim of error would, at most, show harmless error, the Board has assumed, solely for the sake of disposing of an appeal issue, that factual assertions that go beyond the record evidence are true. Making such an assumption to resolve an appeal issue can save valuable time and resources by avoiding a remand that would not result in any significant or meaningful change in the decision below. The Board has not taken that approach when acceptance of the claim of error would lead to a conclusion that harmful error occurred. Accordingly, the Board declines to address the arguments made by both parties that are based on factual assertions which go beyond the record evidence that was before the Administrative Judge.

Applicant's appeal raises a serious legal issue that requires the development of an evidentiary record concerning Applicant's claims about the facts and circumstances surrounding the administrative termination of his security clearance. Under the Directive, the development of such an evidentiary record is the responsibility of the Administrative Judge. Accordingly, the case is remanded to the Judge with instructions that the Judge: (1) reopen the record to allow

the parties to present evidence concerning the facts and circumstances of the termination of Applicant's security clearance, and (2) make a ruling as to whether Applicant's case should have been terminated, pursuant to Section 4.4 of the Directive, without a security clearance decision being issued.

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 Board's rulings and instructions.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Separate opinion of Administrative Judge Michael Y. Ra'anan

Applicant and Department Counsel both appear to agree that the Department of Defense knew or should have known that Applicant had no need for a security clearance months before the Administrative Judge's decision. I believe that for the sake of judicial economy the Judge's decision should be vacated.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board