

DATE: August 19, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24965

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the April 22, 2003 decision of Administrative Judge Joan Caton Anthony, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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: (1) whether Applicant was denied the opportunity to respond in person to evidence against him; (2) whether the Administrative Judge failed to consider Applicant's submissions; (3) whether the Administrative Judge's factual findings are erroneous; (4) whether the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law; and (5) whether the Administrative Judge's adverse security clearance decision is 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.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 3, 2002. The SOR was based on Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

Applicant submitted an answer to the SOR, in which he indicated "I will state here, in accordance with your instructions that the right to hearing is waived." A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant.

The case was assigned to the Administrative Judge for determination. The Judge issued an adverse security clearance decision dated April 22, 2003. The case is before the Board on Applicant's appeal from that adverse decision.

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 Applicant was denied the opportunity to respond in person to evidence against him. On appeal, Applicant states: (a) "I was not afforded the opportunity to respond directly to the DSS agent[']s report, or his agency"; and (b) "I was not afforded the opportunity of an interview to accompany [my] 2001 application for security clearance, which was implied in the 'File of Relevant Material' submitted by counsel, and [the Administrative Judge's decision]." The Board construes these statements as raising the issue of whether Applicant was denied the opportunity to respond in person to evidence against him.

Applicant was entitled to request a hearing in his case. *See* Directive, Section 4.3.3 and Additional Procedural Guidance, Item E3.1.4. Applicant waived his right to a hearing. That waiver is contained in his answer to the SOR. When Applicant waived his right to a hearing, he waived his right to appear before the Administrative Judge and present his case in person.

Although the case file contains copies of two written statements that Applicant gave to federal investigators, one in May 1982 and the other in September 1998 (FORM, Items 5 and 6), there is no DSS agent's report in the case file. Since no DSS agent's report was included in the FORM, there is no DSS agent's report for Applicant to respond to, or for the Administrative Judge to consider.

The record evidence indicates that Applicant received an adverse security clearance decision in 1999, when he was employed by the Department of Navy. To the extent Applicant's arguments could be construed as challenging the legal sufficiency or correctness of that earlier adjudication, these proceedings are not a proper forum for raising such a challenge. Under the Directive, the Board has jurisdiction over appeals from industrial security clearance decisions made by DOHA Administrative Judges. The Board does not have jurisdiction over appeals from security clearance decisions made by the Department of Navy in cases involving its employees. Such cases are governed by DoD Directive 5200.2-R, which does not give this Board any authority to handle appeals in such cases.

2. Whether the Administrative Judge failed to consider Applicant's submissions. On appeal, Applicant contends that the Administrative Judge failed to take into account his answer to the SOR and his response to the FORM. In considering this contention, the Board notes there is a procedural anomaly in this case.

The case file indicates the following: Applicant's response to the FORM originally was due by January 15, 2003. On December 31, 2002, Applicant called to request additional time to submit his response to the FORM. Department Counsel granted Applicant additional time, until January 21, 2003, to submit his response to the FORM. On February 3, 2003, the case was assigned to the Administrative Judge for determination. The memorandum assigning the case to the Judge indicates that Applicant's response to the FORM was due on January 15, 2003. The memorandum is silent on the extension of time granted to Applicant by Department Counsel.

The Administrative Judge's decision notes that Applicant's response to the FORM was due within 30 days of his receipt of the FORM, indicates that he received the FORM on December 16, 2002, and that Applicant did not submit a response to the FORM "within the set time period." The decision then indicates that on December 31, 2002 Applicant asked for

additional time to respond to the FORM and was granted an extension of time by Department Counsel until January 21, 2003. The Judge's decision then states -- without any further reference to the extension of time granted to Applicant -- that the case was assigned to the Judge on February 3, 2003. As noted earlier in this decision the memorandum assigning the case to the Judge is silent on the extension of time granted to Applicant and indicates that his response to the FORM was due by January 15, 2003.

Attached to Applicant's appeal brief is a copy of a document dated January 16, 2003 that is captioned as his response to the FORM. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. However, that prohibition does not preclude the Board from considering documents that may have been omitted or excluded from the record evidence, for the limited purpose of determining whether those documents were properly omitted or excluded. If a document was wrongfully omitted or excluded from the record in a case, then the injured party is entitled to seek redress on appeal.

Given the state of the record in this case, the Board is unable to determine whether the January 16, 2003 document was received by DOHA prior to the January 21, 2003 deadline, if at all. It is not included in the case file provided to the Board. Furthermore, there is no indication in the case file or the decision below as to what was the basis for the Judge's statement about Applicant not submitting a response to the FORM within the set time period.

Under Executive Order 10865 and the Directive, applicants have the right to receive a reasonable opportunity to respond to the evidence presented against them and to present evidence on their behalf for consideration in their cases. That right can be waived or lost by failure to take reasonable, timely steps to exercise it. However, the waiver or loss of that important right should not be assumed or lightly inferred. Furthermore, Administrative Judges have the responsibility to "rule on questions on procedure, discovery, and evidence and [to] conduct all proceedings in a fair, timely, and orderly manner" (Directive, Additional Procedural Guidance, Item E3.1.10), subject to appellate review for legal error or abuse of discretion (Directive, Additional Procedural Guidance, Items E3.1.32.2 and E3.1.32.3).

Given the state of the case file in this case, the Board is unable to conclude: (1) whether Applicant's right to respond to the FORM was violated or waived; or (2) whether the Administrative Judge's conclusion that Applicant did not submit a response to the FORM within the set time period was based on legal error, was based on an abuse of discretion, or was legally sustainable.

Considering all the circumstances, the Board concludes that the case should be remanded to the Administrative Judge with the following instructions:

On remand, the Administrative Judge should ascertain whether (a) Applicant submitted a response to the FORM, or (b) Applicant did not submit a response to the FORM.

If the Administrative Judge finds that no response to the FORM was submitted by Applicant, then the Judge should issue a new decision that includes a specific discussion for the basis of that finding.

If the Administrative Judge finds that a response to the FORM was submitted by Applicant, then the Judge should: (1) make a finding as to when it was submitted and when it was received by DOHA, and (2) make a ruling (pursuant to Directive, Additional Procedural Guidance, Item, E3.1.10) as to whether the Judge will accept or exclude the response to the FORM.

If the Judge rules that Applicant's response to the FORM was untimely and there is not good cause to accept it late, then the Judge should issue a new decision that includes a specific discussion and explanation for that ruling.

If the Judge finds that Applicant's response to the FORM was timely received, or rules that there is good cause for accepting it late, then the Judge should consider Applicant's response to the FORM as part of the record for purposes of making findings and reaching conclusions about the SOR allegations. Then the Judge should issue a new decision that (a) includes a specific discussion for her finding or ruling about the timely receipt or late acceptance of Applicant's response to the FORM, and (b) include findings and conclusions about the SOR allegations that reflect consideration of Applicant's response to the FORM.

For purposes of carrying out these instructions, the Judge has broad discretion in deciding how best to communicate with the parties and documenting the information pertinent to her rulings on remand.

To facilitate the Administrative Judge's handling of the case on remand, the Board will place in the orange exhibits file a photocopy of the January 16, 2003 document that was attached to Applicant's appeal brief. That photocopy will be marked "APPEAL BOARD COPY" to facilitate its identification by the Judge. By placing a photocopy of that document in the exhibits file, the Board expresses no opinion as to the authenticity or provenance of that document, and expresses no opinion as to what findings of fact the Judge should make or conclusions the Judge should reach about that document on remand.

3. Whether the Administrative Judge's factual findings are erroneous; Whether the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law; and Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Because the case is being remanded to the Administrative Judge for further processing and issuance of a new decision, it would be premature to address the remaining issues raised by Applicant's appeal brief.

Conclusion

Applicant has demonstrated error below that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.32.3, the Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions of the Board, and issuance of a new decision consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

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