

DATE: January 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01542

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated May 14, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision dated November 24, 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 Applicant was denied the right to have the Administrative Judge consider certain documentation. 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

At the hearing, the Administrative Judge granted Applicant an opportunity to submit additional documentation for consideration in his case (Hearing Transcript at p. 84). There is no indication in the case file or the decision below that the Administrative Judge received or considered any post-hearing submission by Applicant.

On appeal, Applicant claims that after the hearing he faxed documents to Department Counsel that he wanted the Judge to consider in his case and he believes that those documents were not forwarded to the Judge. In its reply brief, Department Counsel states that Applicant made a timely submission of documents, but that it believes the documents were not received by the Judge. Department Counsel's reply brief does not elaborate on why the documents were not forwarded to the Judge for consideration in Applicant's case. ⁽¹⁾

The right to submit evidence for consideration by an Administrative Judge is an important one. If a party makes a timely submission of evidence that fails to reach the Judge through some administrative or other mistake that is not the party's fault, the party has suffered prejudicial error that warrants a remand to rectify the situation.

Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands this case to the Administrative Judge with the following instructions: (1) the Administrative Judge should reopen the record to allow Applicant's post-hearing submission to be received, subject to any reasonable objection Department Counsel might have to the post-hearing submission; (2) the Judge should decide whether Applicant's post-hearing submission should be included in the record evidence; (3) the Judge should issue a new decision, consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.25 and E3.1.35, that specifically indicates: (a) what ruling(s) the Judge made concerning Applicant's post-hearing submission, and (b) if the Judge rules that Applicant's post-hearing submission should be included in the record evidence, the new decision should reflect the Judge's consideration of that evidence in making his findings and reaching his conclusions in the new decision.

Conclusion

Applicant has demonstrated error that warrants remand of this case to the Administrative Judge with instructions. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Judge for further processing consistent with the Board's instructions.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Department Counsel's reply brief also states that there has been a change in its procedures to avoid a recurrence of the situation in this case. Because the Board does not have general or supervisory jurisdiction over the activities of Department Counsel, it will not address Department Counsel's statement concerning a change in its procedures. Furthermore, any change in Department Counsel's procedures in future cases is irrelevant to whether Applicant suffered any prejudice to his rights in this case.