

DATE: May 12, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02994

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 16, 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). Administrative Judge Martin H. Mogul issued an unfavorable security clearance decision, dated February 15, 2005.

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 Applicant was denied the right to have her response to the File of Relevant Material considered by the Administrative Judge; and (2) whether the Administrative Judge's findings and conclusions about Applicant's history of financial difficulties are supported by the record evidence. 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. Whether Applicant was denied the right to have her response to the File of Relevant Material considered by the Administrative Judge. On appeal, Applicant questions whether the Administrative Judge received information she submitted for consideration in her case. In its reply brief, Department Counsel takes the position that Applicant was denied the opportunity to have her response to the File of Relevant Material (FORM) considered by the Judge.

On appeal, Department Counsel makes representations about the circumstances under which Applicant submitted a response to the FORM, and states that a copy of Applicant's response was forwarded to the Judge after the case was assigned to the Judge. Department Counsel attached documentation to its reply brief in support of its representations. The case file does not contain a copy of Applicant's response to the FORM. Indeed, the November 23, 2004 memorandum assigning the case to the Judge specifically states "The Applicant did not submit any additional information for your consideration." Moreover, the case file does not contain a copy of the documentation attached to Department Counsel's reply brief.

The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. However, that provision of the Directive does not prohibit the Board from considering, in an appropriate case, non-record statements for the limited purpose of deciding whether a party was wrongfully denied the opportunity to have evidence entered into the record for the Administrative Judge to consider in a case. In general, a party's failure to raise evidentiary issues before a Judge in a timely, reasonable manner can result in the loss or waiver of important rights. However, there may be some situations where a party may not be able to raise evidentiary issues in a timely manner before a Judge on the hearing level. The Board has to decide, on a case by case basis, whether the party could reasonably have been expected to raise the evidentiary issue before the Judge at the hearing level. *See, e.g.*, ISCR Case No. 03-00543 (May 21, 2004) at pp. 3-5 (discussing general rule concerning need to raise matters on the record before a Judge, but

noting possibility that a party might not be able to raise a procedural issue until the appeal). In this case, Applicant could not reasonably be expected to know that her response to the FORM would not be considered by the Judge until she received the Judge's decision.

Given the representations made by Department Counsel in its reply brief, the Board concludes there is sufficient reason to remand the case to the Administrative Judge with the following instructions: The Judge should allow the parties a reasonable opportunity to submit to him: (a) a copy of Applicant's response to the FORM; and (b) relevant documentation concerning the facts and circumstances under which Applicant's response was received and handled by DOHA. Upon receipt of that documentation, the Judge should decide whether there is good cause to reopen the record to include Applicant's response to the FORM as evidence in the case. If the Judge decides there is good cause to reopen the record and include Applicant's response to the FORM, then the Judge should issue a new decision that complies with Directive, Additional Procedural Guidance, Item E3.1.25 after he considers the FORM and Applicant's response to the FORM. If the Judge concludes that there is not good cause to reopen the record to include Applicant's response to the FORM as evidence in the case, then the Judge should issue a new decision that includes an explanation for his ruling to not reopen the record.

2. Whether the Administrative Judge's findings and conclusions about Applicant's history of financial difficulties are supported by the record evidence. Applicant also challenges the Administrative Judge's findings and conclusions about her history of financial difficulties. However, given the Board's resolution of the first appeal issue, it would be premature for the Board to address this appeal issue.

Conclusion

The Board remands the case to the Administrative Judge with instructions for further processing consistent with this Remand Order.

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