

DATE: January 17, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06212

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 21, 2004, 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 Barry M. Sax issued an unfavorable security clearance decision, dated November 1, 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 issue has been raised on appeal: Whether Applicant was denied the right to have certain documents considered by the Administrative Judge. 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

Whether Applicant was denied the right to have certain documents considered by the Administrative Judge. Applicant contends he made a submission in response to the File of Relevant Material (FORM), and states he is surprised that the Judge's decision indicates that his response to the FORM was not received. Applicant attached to the appeal brief a copy of the documents he claims he wanted the Judge to consider in his case. Applicant also makes an assertion about a change in his financial situation that he claims has occurred since the Judge's decision was issued. Finally, Applicant asks the Board to reverse the Judge's unfavorable decision. Department Counsel elected to not file a reply brief.

The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Applicant's assertion about the change in his financial situation constitutes a proffer of new evidence, which the Board cannot consider.

Applicant's claim about submitting documentation in response to the FORM raises the serious question of whether Applicant was denied the right to have documentary evidence considered by the Administrative Judge. Normally, a party is expected to raise objections or similar claims of error in a timely manner during the proceedings before the Judge in order to preserve them for appeal. However, implicit in that general rule is the assumption that the objecting party: (a) is aware of what is happening in the proceedings before the Judge; and (b) has an opportunity to raise an objection before the Judge, orally or in writing, in a timely manner. Given the particular nature of the claimed procedural error in this case, Applicant could not reasonably be expected to have raised that claim of error until after he received a copy of the Judge's decision. Furthermore, given the particular nature of Applicant's claim of procedural error, Applicant could not reasonably be expected to raise it solely based on the case record. *See, e.g.*, ISCR Case No.03-00543 (May 21, 2004) at pp. 3-4 (noting there may be some unusual situations when a party cannot raise an appeal issue without referring to a matter that is not contained in the record of the proceedings below).

An applicant's right to present evidence for consideration in his or her case is an important one. *See, e.g.*, ISCR Case No.

02-20031 (August 31, 2004) at p. 4. Neither the substance nor the appearance of a fair and impartial adjudication (*see* Directive, Section 4.1) would be served by failing to address a nonfrivolous claim that an applicant was denied a reasonable opportunity to present evidence for consideration in his or her case, or allowing such a claim to be stymied because it arises under circumstances that have the effect of making it impossible or impractical for an applicant to make a timely objection on the record during the proceedings below.

Applicant's appeal raises a serious question as to whether he was denied the right to present evidence for consideration in his case, but the procedural posture of the case makes it impractical for the Board to resolve the question on appeal. Resolution of the question requires a remand to the Administrative Judge.

Conclusion

Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with the following instructions: On remand, the Judge should allow the parties a reasonable opportunity to make submissions concerning Applicant's claim about submitting a response to the FORM. The Judge should then decide whether there is good cause to reopen the record to accept Applicant's claimed response to the FORM. The Judge should then issue a new decision, consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25. The Judge has the discretion to document the actions taken on remand by correspondence, acceptance of a written stipulation by the parties, written rulings, or discussion in his new written decision.

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