

DATE: November 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18297

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 April 19, 2004 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision dated August 6, 2004.

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.

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

Applicant's case involved the adjudication of his security eligibility in light of 10 U.S.C. §986. While this case was pending appeal, Congress amended that statute. *See* Section 1062 of Defense Authorization Act for Fiscal Year 2005 (hereinafter "Section 1062").

If Congress expressly indicates that a statute is to apply retroactively, an appellate tribunal must apply that statute to cases on appeal that fall under the statute even if the cases on appeal were decided before the statute was enacted. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995). Even if Congress does not specifically indicate that a statute is to apply retroactively, federal courts generally will apply the statute to cases on appeal that fall under the statute, with some exceptions. *See Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 263-280 (1994).

Nothing in Section 1062 indicates whether Congress intended that Section 1062 be applied retroactively. However, Section 1062: (a) changes the applicability of 10 U.S.C. §986 to cases involving criminal convictions; and (b) amends the language pertaining to waivers under the statute.

As a matter of fairness to the parties in this case and in recognition of the limits of the Board's authority under the Directive, the Board hereby remands the case to the Administrative Judge to allow the parties an opportunity -- consistent with basic principles of due process -- to present their views on the effect of Section 1062 on Applicant's case. On remand, the Administrative Judge must allow Department Counsel the opportunity to obtain guidance and direction from appropriate Department of Defense officials as to the legal effect of Section 1062 on pending cases and how the Department of Defense proposes to implement that statute. *See* Directive, Sections 5.1 and 5.2. ⁽¹⁾

Because of the unusual procedural posture of this case and the need to remand the case to the Administrative Judge for further processing in light of Section 1062, no useful purpose would be served by the Board addressing the issues raised on appeal before the amendment of that statute.

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 this decision. The Judge can reopen the record for taking

new evidence on remand if either party shows that there is good cause for doing so under the particular facts of circumstances of this case.

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

1. The Board notes that after 10 U.S.C. §986 was enacted into law, the Deputy Secretary of Defense issued a June 7, 2001 memorandum providing guidance on how the Department of Defense was going to implement that statute.