

DATE: December 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ADP Case No. 03-21205

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Anna C. Ursano, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated May 18, 2004, which stated the reasons why DOHA proposed to deny or revoke access to automated information systems in ADP-I and ADP-II sensitivity positions for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Michael J. Breslin issued a favorable trustworthiness decision, dated February 8, 2005. Department Counsel appealed that favorable decision.

The Composite Health Care System Program Office, the Directorate for Industrial Security Clearance Review (now Defense Office of Hearings and Appeals), and the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence entered into a memorandum of agreement (MOA), effective April 9, 1993, under which the Defense Office of Hearings and Appeals (DOHA) is authorized to adjudicate trustworthiness cases involving personnel working on unclassified automated systems in ADP-I and ADP-II sensitivity positions as defined in DoD Regulation 5200.2-R. This Board has jurisdiction on appeal by virtue of the MOA, Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended), and DoD Regulation 5200.2-R, dated January 1987 (as amended).

The issues raised on appeal are: (1) whether the Administrative Judge misapplied Foreign Influence Mitigating Condition 1; and (2) whether the Administrative Judge's decision is consistent with prior Board decisions.

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). [\(1\)](#)

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 trustworthiness cases involving personnel working on sensitive ADP positions 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 the Administrative Judge misapplied Foreign Influence Mitigating Condition 1. On appeal, Department Counsel contends the Administrative Judge erred by misapplying Foreign Influence Mitigating Condition 1. Applicant counters that the Judge did not misapply that mitigating condition.

This case presents the Board with an unusual threshold legal question that must be decided before the merits of the appeal arguments made by the parties could be addressed in any meaningful way.

Applicant's case involves an adjudication of her eligibility for assignment to a sensitive ADP position. Such adjudications are covered by DoD Regulation 5200.2-R. Under the MOA authorizing DOHA to adjudicate ADP trustworthiness cases, the procedures used will be those applied by DOHA under DoD Directive 5220.6, but the investigative and adjudicative standards are provided by DoD Regulation 5200.2-R. ⁽²⁾

In the decision below, the Administrative Judge cites the language of Foreign Influence Mitigating Condition 1 as it appears in Appendix 8 of DoD Regulation 5200.2-R. ⁽³⁾ However, the Judge also cites the language of Foreign Influence Mitigating Condition 1 as it appears in the current version of DoD Directive 5220.6. The two versions of Foreign Influence Mitigating Condition 1 differ significantly in their wording. The Judge seems to hold that Foreign Influence Mitigating Condition 1 as it appears in Appendix 8 of the DoD Regulation 5200.2-R ⁽⁴⁾ is the version applicable to

Applicant's ADP trustworthiness case, but then construes and interprets it in terms of Foreign Influence Mitigating Condition 1 as it appears in the current version of DoD Directive 5220.6.⁽⁵⁾ It is not clear whether the Judge's decision is relying on the language of Foreign Influence Mitigating Condition 1 as it appears in the current version of DoD Directive 5220.6 as legally binding in Applicant's ADP trustworthiness case or only as persuasive authority in construing and interpreting the language of Foreign Influence Mitigating Condition 1 as it appears in Appendix 8 of DoD Regulation 5200.2-R.

In order to decide the merits of this appeal, the Board would have to make a threshold determination as to which version of Foreign Influence Mitigating Condition 1 is applicable in ADP trustworthiness cases adjudicated under DoD Regulation 5200.2-R. Resolution of that threshold question would involve consideration of novel factual and legal issues that were not addressed during the proceedings below. The Board concludes that the most appropriate course of action would be for the Board to remand the case with instructions to the Judge to reopen the record to allow the parties a reasonable opportunity to present evidence and argument as to which version of Foreign Influence Mitigating Condition 1 is applicable to the adjudication of Applicant's ADP trustworthiness case, and to rule on the issue.

2. Whether the Administrative Judge's decision is consistent with prior Board decisions. Department Counsel contends the Administrative Judge's decision is not consistent with prior Board decisions. Applicant counters by arguing that the Judge's decision is consistent with prior Board decisions. Because of the resolution of the first appeal issue, it would be premature for the Board to address this issue. Whether or not the Judge's decision is consistent with prior Board decisions turns, in large part, on resolution of the unusual threshold question noted earlier in this decision.

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. After allowing the parties a reasonable opportunity to present evidence and argument, the Judge should issue a new decision consistent with the requirements of Directive, Additional Procedural Guidance, Item 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

1. This case involves an adjudication (under DoD Regulation 5200.2-R) of Applicant's eligibility to occupy a sensitive ADP position, not an adjudication (under DoD Directive 5220.6) of Applicant's eligibility for a security clearance. However, the Board can cite and rely on its decisions in security clearance cases when those decisions support legal

propositions and principles that are pertinent to the adjudication of an ADP trustworthiness case. *See, e.g.*, ADP Case No. 00-0131 (May 3, 2001) at p. 2 n.2.

2. *See also* ADP Case No. 00-0131 (May 3, 2001) at p. 2 n.2 (noting the adjudication of eligibility to occupy a sensitive ADP position under DoD Regulation 5200.2-R is not identical to the adjudication of eligibility for a security clearance under DoD Directive 5220.6).

3. In the decision below, the Administrative Judge's references to DoD Regulation 5200.2-R, are consistent with the regulation as posted on the Department of Defense Web site. A copy of DoD Regulation 5200.2-R can be accessed through the Department of Defense web site at <http://www.dtic.mil/whs/directives/corres/html/52002r.htm>

4. "[A] determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk."

5. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States."