

DATE: August 18, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 04-01576

## **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 Applicant a Statement of Reasons (SOR), dated July 8, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline H (Drug Involvement). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated March 3, 2005.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred in considering Government Exhibit 6, (2) whether the Administrative Judge erred in not specifically discussing one of Applicant's documentary exhibits, (3) whether the Administrative Judge erred in his findings of fact, (4) whether the Administrative Judge erred in admitting Government Exhibit 5 into evidence, and (5) whether the Administrative Judge erred in not applying Guideline H, Mitigating Condition 3. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

#### **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 the Administrative Judge erred in considering Government Exhibit 6. Applicant contends the Administrative Judge erred in considering Government Exhibit 6 because the document was incomplete and was not provided in a timely manner to Applicant.

Based upon the record before us, the Board is unable to consider the substance of Applicant's appeal argument. The Board cannot determine from the decision and the record, whether the Administrative Judge admitted Government Exhibit 6 into evidence. Indeed, the Board cannot locate Government Exhibit 6 in the case file. Accordingly, the case is remanded to the Judge for him to: a) locate, identify, and place in the record, Government Exhibit 6, and b) issue a new decision stating whether Government Exhibit 6 was admitted into evidence. *See* ISCR Case No. 98-0476 (July 22, 1999) at p. 4 ("Failing to retain copies of those items in the case file resulted in an incomplete case record, which has the potential of impairing the appeal rights of the parties and interfering with the ability of the Board to carry out its appellate functions").

Further, as a matter of administrative economy, another procedural aspect of the case warrants discussion. Throughout the record, the decision, and Applicant's appeal brief, there is evidence of uncertainty, ambiguity, or confusion due to multiple methods of enumerating Applicant's Exhibits. <sup>(1)</sup> Because the case is remanded for further processing by the Administrative Judge, the Board instructs the Judge to identify and use in his remand decision one method of enumerating Applicant's Exhibits, and to label all Applicant's Exhibits accordingly.

2. Whether the Administrative Judge erred in not specifically discussing one of Applicant's documentary exhibits; 3. Whether the Administrative Judge erred in his findings of fact; 4. Whether the Administrative Judge erred in admitting

Government Exhibit 5 into evidence; and 5. Whether the Administrative Judge erred in not applying Guideline H, Mitigating Condition 3. Because the error identified by Applicant warrants a remand that will result in reopening the record and issuance of a new decision, it would be premature to address Applicant's other appeal issues.

### **Conclusion**

Applicant has demonstrated error that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge for the issuance of a new decision in accordance with the instructions herein.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. *See* Transcript at pp. 13-16; Decision at pp. 2-3; Applicant's Hearing Brief at p. 1; Applicant's Supplemental Exhibits and Argument at p. 1; and Applicant's Appeal Brief.