

DATE: April 14, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0681

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Robert R. Gales issued a decision, dated December 6, 1996, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This 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 by not accepting a document submitted after the hearing; and (2) whether Applicant is entitled to have the case remanded to the Administrative Judge with instructions to reopen the record to receive and consider the document submitted by Applicant after the hearing, or to receive the testimony of the author of that document.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated September 23, 1996 to Applicant. The SOR was based on Criterion F (Financial Considerations).

A hearing was held on November 13, 1996. At the hearing, Applicant indicated that he had hoped to be accompanied by an attorney, but that the attorney was not available due to an emergency. After a colloquy among the Administrative Judge, Applicant, and Department Counsel, Applicant indicated he would proceed without the assistance of the attorney (Hearing Transcript at pp. 7-9). At no time during the hearing did Applicant state or suggest that the attorney was supposed to appear as a witness.

At the hearing, Applicant offered no documents for the Administrative Judge's consideration (Hearing Transcript at p. 27). After testifying on his own behalf, Applicant rested his case without offering any documents (Hearing Transcript at p. 72). Nothing in the record indicates or suggests that Applicant asked the Judge for permission to submit any

documents after the hearing.

The case file contains a letter, dated November 14, 1996, that was mailed to the Administrative Judge. The envelope bears a postmark of November 14, 1996. The letter is from a lawyer, writing on behalf of Applicant as a character witness. The letter notes that the lawyer "was unable to appear as a witness for [Applicant]" because of a medical problem.

The Administrative Judge issued a written decision, dated December 6, 1996, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. In the decision, the Judge stated the following:

"On November 14, 1996, one day after the record closed, a letter was submitted in Applicant's behalf by an attorney whom Applicant had previously identified as his prospective representative. No mention was made that the attorney was to have appeared as a witness, rather than as a representative. Because no request had been made by Applicant to keep the record opened in anticipation of the submission, and the submission was made after the record had closed, I have not considered the document nor the information appearing therein."

Applicant filed a timely notice of appeal. Approximately one week before Applicant's appeal brief was due, he submitted a request to the Administrative Judge which asked the Judge to accept the November 14, 1996 letter, or in the alternative, to reopen the record to permit the author of that letter to testify on Applicant's behalf. At the same time, Applicant submitted to the Appeal Board a request for an extension of time to file his appeal brief until 15 days after Applicant received from the Judge a response to his request concerning the November 14, 1996 letter or the alternative of reopening the record.

By letter dated January 16, 1997, the Chairman denied Applicant's request for an extension of time on the ground that the Administrative Judge had no jurisdiction over the case while it was on appeal. Although Applicant filed no appeal brief, his appeal was not defaulted. Applicant's notice of appeal will be considered as the equivalent of an appeal brief.

Appeal Issues

The record shows that Applicant was provided a copy of the Directive and the Prehearing Guidance for DOHA Hearings. During the hearing, the Administrative Judge explained to Applicant his obligation to present evidence on his behalf. Furthermore, a review of the record shows that Applicant was given a reasonable opportunity to present evidence on his behalf. At the hearing, Applicant did not present any documentary evidence on his behalf. Nor did he indicate to the Judge that he wanted an opportunity to submit any documents after the hearing. Under the circumstances, Applicant had no reasonable expectation that the Judge would accept a posthearing submission.

The Administrative Judge had the discretion to decide whether to accept the November 14, 1996 letter that was submitted after the hearing. The Judge elected not to do so. The Board does not have to agree with the Judge's ruling to conclude it fell within the scope of his discretion. Nothing in the case record or Applicant's appeal persuades the Board that the Judge's ruling to not accept the November 14, 1996 letter was arbitrary, capricious, or contrary to law.

Applicant is not entitled to have the case remanded with instructions to the Administrative Judge to reopen the record to receive and consider the November 14, 1996 letter, or to reopen the record to receive testimony from the author of that letter. Absent harmful error, Applicant is not entitled to have the case remanded to reopen the record for his benefit. *See, e.g.*, ISCR Case No. 94-1081 (August 17, 1995) at p. 6 n.8 (where applicant had the opportunity to present evidence on his behalf, applicant is not entitled to have record reopened to give him a second chance to make his case).

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Administrative Judge's December 6, 1996 decision is affirmed.

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