

DATE: February 9, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0066

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Robert R. Gales issued a remand decision, dated September 11, 1998, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. The Board remands the case with the recommendation that the Director, Defense Office of Hearings and Appeals assign the case to another Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge failed to comply with the Board's August 28, 1998 Decision and Remand Order; (2) whether the Administrative Judge based his decision on matters other than the record evidence and applicable provisions of the Directive; and (3) whether Applicant has been deprived of his right to a fair and impartial determination.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated January 16, 1998. The SOR was based on Criterion H (Drug Involvement).

A hearing was held on April 15, 1998. The Administrative Judge subsequently issued a written decision in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. That adverse decision was appealed by Applicant.

On August 28, 1998, the Board issued a Decision and Remand Order ("Remand Order"). The Board concluded the Administrative Judge's April 15, 1998 decision was arbitrary, capricious, and contrary to law. The Board remanded the case to the Judge with instructions to issue a new decision after correction of the errors identified by the Board.

The Administrative Judge subsequently issued a Remand Decision, dated September 11, 1998. The Judge again concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is now before the Board on Applicant's appeal from the Judge's Remand Decision.

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge failed to comply with the Board's August 28, 1998 Decision and Remand Order. Applicant asserts that: (a) the Administrative Judge disagrees with the Board's Remand Order by stating that the Board "misinterpreted [the Judge's] intentions"; (b) the Judge repeated his insistence that Applicant satisfy a specific requirement for completion of a rehabilitation program; and (c) the Judge failed to comply with the Board's ruling that the Judge erred by reaching a conclusion about the effects of drug abuse on Applicant without any record evidence to support that conclusion. These assertions by Applicant raise the issue of whether the Judge failed to comply with the Board's Remand Order.

On remand, an Administrative Judge is obligated to issue a new decision that corrects the errors identified by the Board. Directive, Additional Procedural Guidance, Item 35. The Board's rulings are not merely comments, suggestions, or recommendations for the Judge to consider. The rulings of the Board are the law of the case and must be complied with by the Administrative Judge on remand. ISCR Case No. 94-1081 (May 3, 1996) at p. 2; DISCR Case No. 92-1106 (October 7, 1993) at p. 2. A Judge has no authority or discretion to ignore, disregard, or try to evade the rulings of this Board however much the Judge may personally disagree with those rulings. DISCR Case No. 87-2107 (September 29, 1992) at p. 3; DISCR Case No. 88-0286 (June 8, 1990) at p. 4; DISCR Case No. 88-1034 (March 29, 1990) at p. 4; DISCR Case No. 86-0388 (June 9, 1989) at pp. 4-5. Nor does a Judge have the authority or discretion to rule on or readdress issues decided by the Board on appeal. ISCR Case No. 95-0178 (September 4, 1996) at p. 4; DISCR Case No. 87-0955 (August 31, 1990) at p. 3; DISCR Case No. 85-1465 (September 8, 1988) at pp. 2-3. Furthermore, the right of the parties to due process is not limited to receiving due process at the hearing level. The right to due process also includes the right of the parties to receive due process at the appeal level, including the right not to be deprived of the benefit of legal rulings won on appeal once a case has been remanded to a Judge under Item 35 of the Additional Procedural Guidance. Consistent with the rule of law, the Judge must subordinate his personal disagreements with the Board to his legal obligation to follow and apply the rulings of the Board. Failure to do so can have serious legal consequences that are detrimental to the proper functioning of the DOHA process and the rights of the parties. DISCR Case No. 87-2107 (October 30, 1991) at p. 2; DISCR Case No. 87-0955 (August 31, 1990) at pp. 3-4. As will be discussed later in this decision, the Judge's disagreements with the Board also raise a question whether Applicant was deprived of his right to a fair and impartial determination in his case.

A reading of the Remand Decision indicates the Administrative Judge disagrees with various portions of the Board's Remand Order. An Administrative Judge's expression of disagreement with the Board's rulings, standing alone, does not prove the Judge failed to comply with those rulings. *Cf.* DISCR Case No. 86-0388 (June 9, 1989) at pp. 4-5 (Board noting that Judge's remand decision was consistent with Board rulings despite the Judge's expression of personal disagreement with those rulings). However, when a Judge expresses such disagreements in the course of a remand decision, the parties may have a legitimate concern about whether the Judge did, in fact, comply with the Board's rulings. *Cf.* DISCR Case No. 86-2256 (September 8, 1988) at p. 2 n.1 ("The Board will give greater scrutiny to the Examiner's Remand Determination because it reached the same ultimate finding after our initial remand."). Accordingly, Applicant's concern about whether the Judge complied with the Board's Remand Order is not a trivial one.

In its Remand Order, the Board held the Administrative Judge erred by imposing on Applicant a standard of rehabilitation that is not required by the Directive. On remand, the Judge noted the Board's ruling. However, the Judge then proceeded to discuss the matter of rehabilitation in terms that show the Judge remains convinced that the Board's ruling was in error. Moreover, considering the Judge's discussion of the matter in its entirety and in the context of the Remand Decision as a whole, the Board concludes the Judge is still evaluating Applicant's evidence of rehabilitation against that standard and finding it insufficient because it falls short of meeting that standard. *Compare* DISCR Case No. 90-0279 (September 22, 1993) at p. 4 (Board considered meaning and significance of Judge's remarks in context of record and was not bound by Judge's disclaimer concerning his intention). By doing so, the Judge acted contrary to the Board's ruling and deprived Applicant of a new decision in violation of Item 35 of the Additional Procedural Guidance.

In its Remand Order, the Board held there was no record evidence to support the Administrative Judge's finding that Applicant was at risk of returning to drug abuse when he pursues an advanced university degree. On remand, the Judge

noted the Board's ruling and proceeded to argue with it by offering a justification for his earlier finding. The Judge's justification draws a legally impermissible inference from Applicant's statements about his undergraduate college environment. As noted in the Remand Decision, there is no record evidence concerning the presence or absence of drug abuse in the graduate school setting. It is arbitrary and capricious for the Judge to infer that Applicant's comments about his undergraduate experience provide a factual basis for the Judge to draw inferences about what environment Applicant may face in the future if he follows through with his stated desire to attend graduate school. *Cf.* DISCR Case No. 92-0711 (July 14, 1993) at p. 5 (Judge should not draw inferences that lack support in the record evidence). Considering the Judge's action in the context of the Remand Decision as a whole, the Board concludes the Judge's effort to justify his earlier finding is merely a thinly veiled effort to justify his adverse Remand Decision based on a finding that was specifically found to be erroneous and unsustainable on the first appeal. By doing so, the Judge acted contrary to the Board's ruling and deprived Applicant of a new decision in violation of Item 35 of the Additional Procedural Guidance.

2. Whether the Administrative Judge based his decision on matters other than the record evidence and applicable provisions of the Directive. Applicant argues: (a) the Judge makes findings and reaches conclusions that lack a basis in the record evidence; (b) the Judge is holding Applicant to a standard of rehabilitation not required by the Directive; (c) the record evidence does not support the Judge's statement that "there is an unanswered troubling question as to the rehabilitation of the Applicant"; and (d) the Judge's Remand Decision is arbitrary and capricious.

(a) Applicant argues that the record evidence does not support the Administrative Judge's finding that Applicant's drug abuse went beyond youthful indiscretion. The Judge did not use the actual words "youthful indiscretion" in the Remand Decision. However, it is clear the Judge considered the facts and circumstances of Applicant's use of marijuana in college. Applicant's "youthful discretion" argument is little more than a quibble over words which fails to demonstrate the Judge erred.

The Board is not persuaded by Applicant's argument that the Administrative Judge erred by finding Applicant decided to "take a calculated risk" in connection with his drug abuse. Although the Judge used the phrase "take a calculated risk" in the May 11, 1998 decision, the Judge did not repeat that phrase in the Remand Decision. The Remand Decision supersedes the Judge's May 11, 1998 decision. ISCR Case No. 94-0729 (January 18, 1996) at p. 2. Accordingly, the Board will not find the Judge erred based on a statement from his first decision that does not appear, expressly or impliedly, in the Remand Decision. *But see* ISCR Case No. 94-1213 (June 7, 1996) at pp. 5-6 (on second appeal, Board will not sustain a Judge's analysis that is, for all practical purposes, indistinguishable from Judge's analysis in initial decision that Board held was erroneous on first appeal).

On this appeal, Applicant makes a variation of the argument he raised on the first appeal: that the Administrative Judge erred by reaching conclusions about Applicant's drug abuse in the absence of evidence from persons expert in diagnosis or treatment of drug abuse. The Board addressed that argument in the first appeal and sees no reason to repeat its discussion in this appeal.

(b) As discussed earlier in this decision, the Administrative Judge erred by holding Applicant to a standard of rehabilitation not required by the Directive. In doing so, the Judge acted contrary to the Directive. The Judge's plaint that the Board's ruling "would eliminate any judicial discretion in the matter" is not well-founded. Judicial discretion under the Directive is neither unlimited nor unfettered. *See, e.g.,* ISCR Case No. 97-0783 (August 7, 1998) at p. 4; ISCR Case No. 96-0869 (September 11, 1997) at p. 4. Judicial discretion must be exercised within the limits set by the Directive and applicable legal principles. *See* Directive, Additional Procedural Guidance, Items 32.b. and 32.c. ("The Appeal Board shall . . . determine whether or not: . . . b. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive; or c. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law."). Any attempt to exercise discretion in a manner that ignores those limits is arbitrary and capricious and inconsistent with the rule of law. *See* DISCR Case No. 92-1257 (November 22, 1993) at p. 3 (citing federal case for proposition that discretionary choices are not simply left to Judge's inclination, but to the Judge's exercise of judgment guided by sound legal principles).

(c) Applicant also argues that the record evidence does not support the Administrative Judge's statement that "there is an unanswered troubling question as to the rehabilitation of the Applicant." The Judge's challenged statement is problematic. The Judge's statement is a terse, cryptic conclusion that lacks even a minimal explanation or elaboration.

Considering the statement in the context of the Remand Decision as a whole, it appears to be a statement made to bolster the Judge's impermissible attempt to hold Applicant to a standard of rehabilitation not required by the Directive.

(d) On appeal, the Board must determine whether an Administrative Judge's decision is arbitrary, capricious, or contrary to law. Directive, Additional Procedural Guidance, Items 32.b. and 32.c. A Judge's decision can be arbitrary and capricious if: 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. 97-0727 (August 3, 1998) at p. 6; DISCR Case No. 94-0215 (April 13, 1995) at pp. 4-5. A Judge's decision can be contrary to law if it fails to comply with pertinent provisions of the Directive or is contrary to applicable legal principles. As discussed elsewhere in this decision, Applicant has met his burden of demonstrating the Judge's decision is arbitrary, capricious, and contrary to law.

3. Whether Applicant has been deprived of his right to a fair and impartial determination.

Applicant asserts that: (a) the Administrative Judge disagrees with the Board's Remand Order by stating that the Board "misinterpreted [the Judge's] intentions"; and (b) the Judge's decision seeks to "punish" Applicant. These assertions by Applicant raise the issue of whether he was denied a fair and impartial determination.

The parties have a right to a fair and impartial adjudication of a security clearance case. Directive, Sections D.1 and F.3. If fairness or impartiality is missing or impaired, then the validity and legitimacy of the security clearance decision is placed in doubt. *See, e.g.*, DISCR Case No. 90-0279 (September 22, 1993) at p. 6; DISCR Case No. 89-2290 (February 15, 1991) at p. 8; DISCR Case No. 89-0821 (November 6, 1990) at p. 3. Because the right to a fair and impartial adjudication touches upon the basic integrity of DOHA proceedings, any action that could impair a party's right to a fair and impartial adjudication must be closely scrutinized to determine whether a party has suffered prejudice. *See, e.g.*, ISCR Case No. 97-0409 (April 29, 1998) at p. 2.

An Administrative Judge's expression of disagreement with a Board ruling could be egregious enough to indicate the Judge has become personally involved in the outcome of the case, thereby losing the ability to render an impartial decision. DISCR Case No. 90-0279 (September 22, 1993) at p. 4; DISCR Case No. 90-1504 (July 6, 1992) at p. 3. Furthermore, a Judge's disagreement with the Board could rise to a level of dispute that could lead a reasonable person to question whether the Judge is more concerned about the Judge's disagreement with the Board than with providing the parties with a fair and impartial hearing and decision. *See* DISCR Case No. 88-1034 (March 29, 1990) at pp. 4-5.

The Board need not decide whether the Administrative Judge's expressions of disagreement with the Board's rulings, standing alone, are sufficient to warrant a conclusion that he denied Applicant the right to a fair and impartial determination. This is because the Judge's expressions of disagreement must be considered in the context of the Remand Decision as a whole. *See, e.g.*, ISCR Case No. 96-0522 (May 1, 1997) at p. 3 (citing earlier Board decision for proposition that Board will review Judge's decision as a whole, rather than focus on isolated sentences or passages, to discern what Judge meant); DISCR Case No. 90-0279 (September 22, 1993) at p. 4 (Board considered meaning and significance of Judge's remarks in context of record and was not bound by Judge's disclaimer concerning his intention). The Judge did not merely disagree with the Board's rulings. The Judge used his Remand Decision as a forum to justify and defend his May 11, 1998 decision, and in doing so, the Judge repeated some of the errors identified by the Remand Order. A reasonable person reading the Remand Decision could question whether the Judge is more concerned with justifying his original decision and airing his disagreements with the Board than with making a fair and impartial determination of Applicant's case based on the record evidence and pertinent provisions of the Directive.

Nothing in the Remand Decision indicates that the Administrative Judge is deliberately seeking to punish Applicant. However, the Judge's Remand Decision appears more concerned with justifying his original decision and airing his disagreements with the Board than with making a fair and impartial determination pursuant to his obligation under Item 35 of the Additional Procedural Guidance. A reasonable person could question whether Applicant is being "punished" by having his right to a fair and impartial determination take a back seat to other, extraneous considerations.

Considering the record as a whole, a reasonable person could question whether Applicant was denied a fair and

impartial determination in this case. Apart from the merits of this or any other DOHA case, the integrity of the industrial security program and the need to retain public confidence in that program require that there be both the substance and appearance of fairness and impartiality in DOHA proceedings. Where, as here, a reasonable doubt exists regarding either the substance or appearance of fairness or impartiality, appropriate corrective action must be taken. DISCR Case No. 90-0279 (September 22, 1993) at p. 6.

Conclusion

Applicant has met his burden of demonstrating errors that warrant remand. In light of the errors identified by the Board, no useful purpose would be served by remanding the case to the same Administrative Judge. Accordingly, the Board remands the case with the recommendation that the Director, Defense Office of Hearings and Appeals assign the case to another Administrative Judge for further processing.

When there is a remand to a different Administrative Judge, and credibility is an issue in the case, a new hearing may be necessary. *See, e.g.*, DISCR Case No. 90-0279 (September 22, 1993) at p. 6; DISCR Case No. 90-0634 (April 29, 1993) at p. 5. Because the credibility of Applicant may be important to the issues in this case, the Judge assigned to handle this case should ascertain whether the parties consent to have a determination made on the basis of the existing record. If both parties consent to such a determination, then the Judge should render a new decision without holding a new hearing. If either party declines to consent to having the case decided on the basis of the existing record, then the Judge should hold a new hearing and then issue a decision that complies with all the relevant provisions of the Directive.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See dissenting opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Dissenting Opinion of Administrative Judge Michael Y. Ra'anan

My colleagues' analysis of the remand decision is cogent and fair. However, I part company with them on the matter of disposition.

The record in this case was closed on April 15, 1998. With a disposition of remand and reassignment, the earliest possible new hearing office decision would be close to a year after the close of the record. It is plausible that either party could conclude that re-opening the record to introduce evidence of events from the last year is desirable. If the record is re-opened then we may expect the hearing office decision to be issued at a later date. At some point the parties are entitled to closure.

The interests of the parties and the interests of fairness would, at this point, best be served by reversing the Administrative Judge's remand decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains some assertions about factual matters that have no support in the record evidence. Such assertions constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item 29. Applicant also asks for relief (*i.e.*, being allowed to submit to periodic drug testing as a condition of receiving a security clearance) that the Board concluded, on the first appeal, was unavailable. That relief remains unavailable for the same reason stated in the Board's Remand Order.