

DATE: July 22, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0476

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Barry M. Sax issued a decision, dated February 10, 1999, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Order for Remand.

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

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by closing the record and issuing his decision before Applicant's response to Department Counsel's Response to Official Notice was submitted; and (2) whether the Administrative Judge's findings and conclusions under Criterion B and C are arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated September 23, 1998. The SOR was based on Criterion C (Foreign Preference) and Criterion B (Foreign Influence).

Applicant submitted an answer to the SOR in which he stated "I wish to have a decision made without a hearing." A File of Relevant Material (FORM) was prepared, and a copy of the FORM was given to Applicant. No response to the FORM was submitted by Applicant.

The Administrative Judge to whom the case was assigned issued a document captioned Official Notice, dated January 26, 1999 ("Official Notice"). The Official Notice: (a) listed nine items⁽¹⁾ the Administrative Judge proposed to take official notice of, subject to any objections raised by the parties, and (b) gave the parties an opportunity to respond to a series of questions set forth by the Judge in the Official Notice. The following passage appears at the end of the Official Notice: "If either party wishes to respond to these questions, initial responses should be sent to me and to the other party by 5:00 p.m. on Friday, February 5, 1999. Department Counsel and Applicant will then have an additional week, until 5:00 p.m. on Friday, February 12, 199 to file a response to the other's original submission. Each response brief should be

sent to me and to the other party. Upon completion of this process, either by submissions from the a [sic] parties or by either party declining to respond, this process will terminate and I will prepare my decision." Department Counsel submitted a document captioned Response to Official Notice, dated February 5, 1999 ("Department Counsel's Response").

The Administrative Judge issued a written decision, dated February 10, 1999. In that decision, the Judge: (a) stated Applicant did not file a response to the Official Notice; (b) noted Department Counsel's objections to items 2, 3, 4, 5, and 7 of the Official Notice and ruled that he would not take official notice of those items; (c) noted Department Counsel did not object to items 1, 6, 8, and 9 of the Official Notice and ruled he would take official notice of those items; (d) stated that copies of items 1, 6, and 8 "will be added to the case file as Judicial Notice Exhibits (JNE) 1, 6, and 8"; (e) stated "[b]ecause of their volume, the cited DOHA decisions [item 9 of the Official Notice] are incorporated by reference and are available in DOHA databases."

In the February 10, 1999 decision, the Administrative Judge concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

Appeal Issues

1. Whether the Administrative Judge erred by closing the record and issuing his decision before Applicant's response to Department Counsel's Response to Official Notice was submitted. On appeal, Department Counsel asserts: (a) it received from Applicant a written response to Department Counsel's Response; (b) Applicant's response was postmarked February 12, 1999; and (c) Applicant's response contains various judicial admissions that are relevant to the issues in this case. Department Counsel contends: the Administrative Judge erred by issuing his decision prior to the February 12, 1999 date set in the Official Notice; the Judge erred by not considering the information contained in Applicant's response; and the Judge's actions prevented the development of a full and complete record in this case.

There is no copy of Applicant's response to Department Counsel's Response in the case file. No copy of that document was proffered by Department Counsel in connection with its appeal brief. *Cf.* DISCR Case No. 93-0594 (May 19, 1994) at p.3 (Board considered photocopy of certified mail receipt submitted by appealing party solely for limited purpose of considering party's claim that post-hearing submission had been timely made but erroneously not transmitted to Administrative Judge); DISCR Case No. 89-1899 (July 31, 1991) at p. 2 (Board considered copies of documents submitted by appealing party solely for limited purpose of considering party's claim that those documents were erroneously not included in record below). Solely for purposes of deciding this appeal issue, the Board will accept Department Counsel's representation that it received from Applicant a written response to Department Counsel's Response, and that Applicant's response was postmarked February 12, 1999. The Board need not make any assumption or comment concerning Department Counsel's characterization of the contents of Applicant's response.

It was arbitrary and capricious for the Administrative Judge to inform the parties that he would hold the record open until February 12, 1999 and then issue his decision on February 10, 1999. *Cf.* ISCR Case No. 96-0360 (September 25, 1997) at p. 3 n.3 (arbitrary and capricious for Judge to change an earlier ruling without giving an explanation for doing so). Both the substance and the appearance of a fair and impartial adjudication (Directive, Section D.1.) requires a Judge to ensure the parties have a meaningful opportunity to make submissions and develop a full and complete record (Directive, Additional Procedural Guidance, Item 19). The Judge's issuance of his decision two days before the deadline set forth in the Official Notice for submissions from the parties constituted a violation of the Judge's obligation to "conduct all proceedings in a fair, timely, and orderly manner" (Directive, Additional Procedural Guidance, Item 10) and would lead a reasonable person to question whether the parties received a fair and impartial adjudication.

The Administrative Judge's error is harmful and warrants remand. On remand, the Judge must reopen the record to receive Applicant's response to Department Counsel's Response to Official Notice and make it part of the case record. The Judge must then consider whether Applicant's response was timely. However the Judge rules on that issue, the Judge should include his ruling and his rationale for it in his new decision in the case. If the Judge concludes that Applicant's response was timely, then the Judge must consider any statements or admissions in it that are relevant to the issue of the case as framed by the SOR allegations.

2. Whether the Administrative Judge's findings and conclusions under Criterion B and C are arbitrary, capricious, or contrary to law. Department Counsel also challenges the Administrative Judge's findings and conclusions under Criterion B and Criterion C. Except as discussed in the following paragraphs, it would be premature for the Board to address Department Counsel's arguments concerning the Judge's findings and conclusions under Criterion B and Criterion C.

Department Counsel's challenge to the Administrative Judge's findings and conclusions with respect to SOR 1.b. raises a separate procedural problem that warrants comment by the Board as a matter of judicial economy. The Judge discussed SOR 1.b. on pages 8 and 9 of his decision. The first ten lines of text on page 9 of the decision contain sentence fragments and other text that requires revision in order to be reasonably understood. The appeal rights of the parties and the ability of the Board to carry out its appellate functions are impaired when a decision contains findings and conclusions that cannot be reasonably understood. *Cf.* DISCR Case No. 93-0519 (August 25, 1994) at p. 3 ("[T]he Judge's decision must provide written findings of fact and conclusions of law sufficient to enable the parties and the Board to understand what the Judge finds and concludes on the basis of the record evidence."). On remand, the Judge should ensure that his new decision does not contain sentence fragments or otherwise unreadable text.

As a matter of judicial economy, another procedural aspect of this case warrants discussion. The Administrative Judge did not include copies of items 2, 3, 4, 5, and 7 of the Official Notice in the case file. Having attached those items to the Official Notice sent to the parties, the Judge made them part of the case record in this case. 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. Since the case is being remanded for further processing by the Judge, the Board instructs the Judge to work with the parties on remand to ensure that copies of items 2, 3, 4, 5 and 7 of the Official Notice are included with the case file. If copies of the DOHA decisions listed in item 9 of the Official Notice were attached to the copies of the Official Notice that were sent to the parties during the proceedings below, then copies of those decisions also must be included with the case file.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants remand. Pursuant to the Board's authority under Item 33.b. of the Directive's Additional Procedural Guidance, the case is remanded to the Administrative Judge for further processing consistent with items 35 and 25 of the Directive's Additional Procedural Guidance.

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. Eight of the items appear to be individual documents. The ninth item is a list of several DOHA decisions.