

DATE: November 24, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0277

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

In the Matter of Petition for Award of Attorney's Fees and Expenses Pursuant to the

Equal Access to Justice Act

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

David H. Shapiro, Esq.

STATEMENT OF THE CASE

On September 9, 1999, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive),⁽¹⁾ acting by the undersigned Administrative Judge, issued a decision that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. On July 8, 1999, a hearing--at which this Administrative Judge presided--had been conducted in the manner of an adversary proceeding.

On September 17, 1999, the Government, acting by the Department Counsel, filed a notice of appeal with the DOHA Appeal Board. On October 18, 1999, the Chairman, DOHA Appeal Board, advised the Applicant's attorney that the Department Counsel had withdrawn its appeal and that the September 9, 1999 decision had become the final decision in his client's case.⁽²⁾ On November 16, 1999--within the requisite 30 days of the final disposition of the case on the merits--a petition pursuant to the Equal Access to Justice Act (EAJA)⁽³⁾ was received by this Administrative Judge.

The petition under the EAJA alleges that the Applicant is the prevailing party in an adversary adjudication resulting in the decision of September 9, 1999, that the position of the Department of Defense was not substantially justified, and that the Applicant's net worth did not exceed \$2 million at the time the said adjudication was initiated. The petition asks that the Applicant be granted fees and expenses in the amount of \$13,697.87, or the maximum amount allowed by law if that amount is less, pursuant to the EAJA. The attorney acknowledges receipt of \$11,049.87 thereof from the client, all paid through July 22, 1999.

By Order dated November 16, 1999, the Department Counsel was required to respond to the petition by Answer within 30 days. On November 22, 1999, the Department Counsel responded to the petition, contending that this Administrative

Judge lacks jurisdiction to rule on the petition and recommending that the petition be forwarded to the Director, DOHA, for processing in accordance with items 42 and 44 of the additional procedural guidance (APG) appended at enclosure 3 of the Directive, Title 32 Code of Federal Regulations, Pt. 155 (Appendix A).

ANALYSIS

The EAJA provides in pertinent part:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the *adjudicative officer* of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1) (emphasis added). The term "adjudicative officer" is defined for purposes of the EAJA by § 504(b)(1)(D) to be:

. . . the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

At first glance it appears that this Administrative Judge is the "adjudicative officer" rather than the Director, DOHA, or designee, who did not preside at the July 8, 1999 hearing in the Applicant's case.

An examination of the regulations of the Department of Defense cited by the Department Counsel at 32 C.F.R. Pt. 155 (Appendix A) shows that they pertain to the reimbursement--as determined by the Director, DOHA, or designee--of certain pecuniary loss of earnings by an applicant "resulting from the suspension, revocation, or denial of his or her security clearance" before he ultimately received a favorable clearance decision.⁽⁴⁾ They do not authorize reimbursement in cases in which an applicant's security clearance was at the outset granted or continued and had never been suspended or revoked. This Applicant successfully sought to obtain a Secret security clearance: his clearance was granted--not denied--and had never been previously suspended or revoked.

It is perfectly plain that the APG authorizes no relief to the Applicant to recover his costs. His petition stands far too short to reach the exceedingly narrow aperture of APG authority. Perhaps that is why his petition does not seek relief under the APG but is predicated solely on the Equal Access to Justice Act (EAJA). Consequently, the analysis cannot logically conclude at this point after a review of the APG. It is frivolous to argue that the APG regulations pre-empt and override the statutory EAJA provisions. Statutes prevail over inconsistent regulations.

An examination of the EAJA is now in order. As indicated above, the EAJA applies only in instances of "adversary adjudications." Section 504(b)(1)(C) defines for purposes of the EAJA the term "adversary adjudication" to mean one of four kinds of proceedings; three of these kinds are obviously inapplicable to industrial security clearance proceedings. The remaining kind of proceeding is:

[A]n adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license.

An examination of section 554, to which reference is made, is therefore necessary. Title 5 United States Code, § 554, pertains to formal agency adjudications under the Administrative Procedure Act. It provides in pertinent part:

This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved-- [exceptions].

Thus, the EAJA applies only to adversary agency adjudications that are required by statute.

Industrial security clearance proceedings are not required by statute. *Compare* title 5 United States Code, § 7532. As noted in the first sentence of the September 9, 1999 decision as well as this decision, industrial security clearance proceedings are authorized only by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992. The Executive Order was issued in response to the United States Supreme Court decision in *Greene v. McElroy*, 360 U.S. 474 (1959), which held that, in absence of explicit authorization from either the President or Congress, the Department of Defense was not empowered to deprive an employee of a government contractor of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

DECISION

The petition of the Applicant for award of attorney's fees and expenses pursuant to the Equal Access to Justice Act is denied.

Jerome H. Silber

Administrative Judge

1. Title 32 Code of Federal Regulations, Pt. 155.
2. On October 18, 1999, the decision favorable to the Applicant became final and unreviewable for purposes of 5 U.S.C. § 504(a)(2).
3. Title 5 U.S.C. § 504; Pub. L. 96-481, title II, sec. 203, approved on Oct. 21, 1980, 94 Stat. 2325, as amended. In absence of regulations promulgated by the Department of Defense specifically implementing the EAJA, administrative notice has been taken of the regulations of the Department of Justice at 5 C.F.R. Pt. 24, and the model rules proposed by the former Administrative Conference of the United States contained in Federal Administrative Procedure Sourcebook (2d ed.1992), Chapter 7; 1 C.F.R. Pt. 315 (1991).
4. The additional procedural guidance (APG) provides:
 42. An applicant may file a written petition, under oath or affirmation, for reimbursement of loss of earnings resulting from the suspension, revocation, or denial of his or her security clearance. The petition for reimbursement must include as an attachment the favorable clearance and documentation supporting the reimbursement claim. The Director, DOHA, or designee, may in his or her discretion require additional information from the petitioner.
 43. Claims for reimbursement must be filed with the Director, DOHA, or designee, within 1 year after the date the security clearance is granted. Department Counsel generally shall file a response within 60 days after receipt of applicant's petition for reimbursement and provide a copy thereof to the applicant.
 44. Reimbursement is authorized only if the applicant demonstrates by clear and convincing evidence to the Director, DOHA, that all of the following conditions are met:
 - a. The suspension, denial, or revocation was the primary cause of the claimed pecuniary loss; and
 - b. The suspension, denial, or revocation was due to gross negligence of the Department of Defense at the time the action was taken, and not in any way by the applicant's failure or refusal to cooperate.
 45. The amount of reimbursement shall not exceed the difference between the earnings of the applicant at the time of the suspension, revocation, or denial and the applicant's interim earnings, and further shall be subject to reasonable efforts on the part of the applicant to mitigate any loss of earnings. No reimbursement shall be allowed for any period of undue delay resulting from the applicant's acts or failure to act. Reimbursement is not authorized for loss of merit raises and general

increases, loss of employment opportunities, counsel's fees, or other costs related to proceedings under this part.

46. Claims approved by the Director, DOHA, shall be forwarded to the Department or Agency concerned for payment. Any payment made in response to a claim for reimbursement shall be in full satisfaction of any further claim against the United States or any Federal Department or Agency, or any of its officers or employees.

DoD Directive 5220.6, Jan. 2, 1992, has been administratively reissued as of April 20, 1999, and the above APG items have been assigned alphanumeric designations.