

KEYWORD: Guideline H

DIGEST: Nothing in the remand order authorized the Judge to solicit or receive new evidence. The Judge cited no authority for her direction to Applicant to perform certain acts. There is no authority for the Board or the Judge to mandate drug testing. The right to examine documents produced by an opposing party for errors or irregularities is basic. Where either the substance or the appearance of fairness and impartiality are in doubt, corrective action must be taken. Favorable decision Remanded to a new Judge.

CASENO: 09-02839.a1

DATE: 10/29/2010

DATE: October 29, 2010

In Re:)
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-----) ISCR Case No. 09-02839
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Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 15, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 23, 2010, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. The Appeal Board issued a remand decision, dated May 17, 2010, instructing the Judge to issue a new decision correcting certain identified errors. On July 30, 2010, the Judge issued a Decision on Remand, again granting Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred by exceeding the scope of the remand order and whether the Judge’s favorable decision is arbitrary, capricious, or contrary to law.

The Judge found that Applicant has a history of infrequent and sporadic use of marijuana over a lengthy period beginning at age 14. She concluded that Applicant reconsidered her marijuana use and credibly stated an intention to abstain permanently. The Judge concluded that Applicant’s marijuana use was mitigated. The Board summarized the Judge’s original findings of fact and conclusions thoroughly in our prior decision, ISCR Case No. 09-02839 (App. Bd. May 17, 2010). The thrust of the Judge’s findings and conclusions on remand are consistent with those in the prior decision.

Department Counsel argues that the Judge did not comply with the requirements of the remand order, insofar as the Judge reopened the record and solicited new evidence, which she then considered in her remand decision. The Board finds Department Counsel’s argument persuasive.

The Appeal Board has authority to remand a case to a Judge for the correction of errors. “If the case is remanded, the Appeal Board shall specify the action to be taken on remand[.]” Directive ¶ E3.1.33.2. The case will then be assigned to a Judge “for correction of error(s) in accordance with the Appeal Board’s clearance decision. The assigned Administrative Judge shall make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board.” *Id.* at ¶ E3.1.35. In this case, the Board’s remand order instructed the Judge to consider conflicts in the record evidence, to consider the viability of a Guideline H mitigating condition in light of conflicting evidence, and to consider the effect of character witnesses’ lack of knowledge about Applicant’s history of marijuana use when weighing the evidence proffered by the character witnesses. No portion of the Board’s instruction directed or even suggested that the record be reopened for the purpose of obtaining additional evidence.

Without prompting from either party, the Judge issued a Remand Order, dated June 2, 2010, wherein she stated, “Given that this case involves past drug use, Applicant is requested to submit to a drug test within 48 hours of her receipt of this Order and to provide a written documentation of the results of this test no later than June 23, 2010.” On June 4, 2010, Department Counsel filed a Motion to Rescind the Judge’s Remand Order, arguing that nothing in Executive Order 10865 or in

DoD Directive 5220.6 provides an administrative judge with the authority to order an applicant to undergo mandatory drug testing. Applicant filed a response to Department Counsel's motion on June 10, 2010, wherein she argued that the Board's Remand Order set no limitations on the Judge regarding what portions of evidence the Judge was to review, and that the Judge's Order of June 2, 2010 would not lead to the creation of new evidence but was merely allowing for a necessary updating of evidence. Applicant then filed a Motion to Re-Open the Record on June 14, 2010, asking that the record be reopened to allow an updating of evidence in the form of drug test results from after the date of the hearing. Department Counsel filed a response opposing the motion on June 15, 2010. On June 17, 2010, the Judge issued a second Order, rescinding her Order issued on June 2, 2010, and granting Applicant's Motion to Re-Open. The Judge directed Applicant to submit a sworn affidavit concerning her drug use since the hearing and to submit a new drug test report within 10 days of the receipt of the Order. Applicant complied, and these two items were made part of the record after remand.¹

In this case, the Judge exceeded the scope of the Board's Remand Order by soliciting and then receiving new evidence from Applicant through a process that was initiated by her issuance of an order *sue sponte*. As stated in a preceding paragraph, nothing in the Board's Remand Order can reasonably be construed as authorizing or even permitting a post-appeal expansion of the record in this case. The Judge cites to no authority that gives her the power to direct Applicant to perform certain acts, post-hearing and post-appeal, the effect of which is the creation of new evidence to be added to the record and considered. There is no authority for the Judge or the Board to mandate drug testing. *See* ISCR Case No. 98-0066 at 4 (App. Bd. Aug. 28, 1998). Similarly, there is no authority for the Judge to order Applicant to produce evidence in the form of an affidavit that speaks to her drug use. A party is not entitled to have the case reopened to allow the introduction of evidence that comes into existence after the close of the record. *See* ISCR Case No. 00-0250 at 3 (App. Bd. Feb. 13, 2001). The Judge has no authority to order the supplementation of the record with evidence that comes into existence after the close of the record.

Apart from a lack of authority and the language in the Directive, the Judge's action in supplementing the record evidence after the appeal process has begun runs afoul of the general legal principle of finality. As the Supreme Court has noted:

"Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order the litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process would ever be consummated in an order that would not be subject to reopening." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel. Inc.*, 435 U.S. 519, 554-555 (1978)(quoting earlier Supreme Court decision).

¹They are identified in the record as Applicant's Exhibits S and T.

There is also the issue of fundamental fairness. Applicants are entitled to receive their full measure of due process under Executive Order 10865 and the Directive. Applicants are not entitled to relief that ignores or circumvents the pertinent provisions of Executive Order 10865 or the Directive. Furthermore, applicants are entitled to have the provisions of Executive Order 10865 and the Directive applied in a fair, impartial and even-handed manner. Ignoring the pertinent provisions of Executive Order 10865 or the Directive to give an applicant the benefit of an expanded record would have the practical effect of depriving other applicants of the fair, impartial and even-handed application of the law to which they are entitled.²

The Board also notes that the manner in which the Judge directed her Order to be carried out was prejudicial to the procedural rights of Department Counsel. After erroneously giving Applicant the unilateral right to expand the record, the Judge compounded the error when she did not direct that Department Counsel be given the opportunity to examine the documents proffered by Applicant and raise any specific objections as to form or content that might directly affect admissibility or the weight given to the evidence. The right to examine the documents actually produced by the opposing party for errors or irregularities is basic, notwithstanding the fact that the Judge in this case, by denying Department Counsel's objections to Applicant's Motion to Re-Open, already deemed the anticipated evidence relevant to the proceedings.³

The Judge's actions in expanding the record *sue sponte* and the particular manner in which she proceeded, as described earlier in this decision, raise the issue of whether the Judge still retains the substance and the appearance of fairness and impartiality. The standard for determining bias is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 03-07245 at 3-4 (App. Bd. May 20, 2005). Where either the substance or the appearance of fairness and impartiality are in reasonable doubt, appropriate corrective action must be taken. *See* ISCR Case No. 98-0066 at 4 (App. Bd. Feb. 9, 1999). The Board concludes that such a situation exists in this case. The proper resolution is to remand this case to another Judge. The new decision should be based on the record as it existed at the time the Board ordered the first remand, if both parties consent. However, because credibility may be an important

²The wording of the Judge's June 17, 2010 Order strongly suggests that she adopted Applicant's proposition that the Judge had the discretion to review all relevant evidence and that this discretion was enhanced by the fact that the record evidence in the case was "outdated" and "required updating." Even assuming that this supposed criterion for expansion does not run afoul of the Directive, as well as the tenets of finality and fundamental fairness, it is wholly undefined, subjective, unworkable, and therefore arbitrary and capricious.

³A review of the administrative record in this case reveals that Applicant's counsel sent Department Counsel copies of the documents they were submitting in response to the Judge's June 17, 2010 Order and that this was done contemporaneously with the submission of the documents to the Judge. Notwithstanding this fact, and notwithstanding the fact that Department Counsel did not subsequently raise specific objections to the form and content of the documents, the actions of Applicant's counsel were not the result of anything contained in the Judge's June 17, 2010 Order, as the order was completely silent on the issue of submitting the documents to Department Counsel for examination prior to their admission. The Judge's error cannot be deemed harmless in that the effect of her silence on Department Counsel's subsequent actions cannot be known, and the Judge's method of proceeding suggests that the Judge was working toward a predetermined result.

issue in this case, if either party requests a new hearing, then the new Judge should convene one expeditiously.

Because the Board has reached a resolution of this case based on the issue of the Judge expanding the scope of the remand order, the Board need not address the other issues raised by Department Counsel.

Order

In accordance with the Board's preceding discussion, the Judge's decision granting Applicant a security clearance is REMANDED to a new Judge .

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board