DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: January 30, 2023

In the matter of:	)	
	)	
-----	)	ISCR Case No. 21-01688
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Tara R. Karoian, Esq., Department Counsel
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 3, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline F (Financial Considerations) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. Department Counsel mailed the Government's File of Relevant Material (FORM) to Applicant on July 13, 2022, and afforded him an opportunity to file objections or submit material in refutation, extenuation, or mitigation. Applicant did not submit a response to the FORM. On October 14, 2022, after close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant is in his late forties. From 2008 through 2013, he attended ITT Technical Institute (ITT). The gravamen of the SOR is delinquent student loan debt from that period—14 delinquent student loans totaling about $101,200. Of the 14 student loans, 12 were Department of Education (DoE) loans and 2 were private loans from PEAKS, ITT's in-house student loan program. In his answer to the SOR, Applicant admitted the allegations.

In his findings of fact, the Judge incorporated two articles published in the Washington Post in September 2020 and August 2022 that were not offered into evidence. Those articles, quoted at length in the decision, recited the troubled history of ITT/PEAKS, to include lawsuits brought by students and Federal agencies, the resulting settlements, and the Federal government's series of remedial actions, which culminated in DoE's announcement on August 16, 2022 that it was discharging "all remaining federal student loans that borrowers received to attend [ITT Tech] from January 1, 2005, through its closure in September 2016." washingtonpost.com/education/2022/08/16/itt-tech-student-loan-forgiveness, quoted in Decision at 5. The Judge found:

> Based on all of the above, Applicant is no longer legally responsible for the student loans generated by ITT Tech and PEAKS, and it appears that all he has to do to obtain forgiveness for the loans is to complete and submit the appropriate application. [Decision at 7.]

Department Counsel's challenges to the Judge's reliance on the newspaper articles vary in merit. First, she argues that the Judge erred in that he "*sua sponte* obtained, considered and relied upon non-record evidence from a non-authoritative source." Appeal Brief at 6. As Department Counsel concedes, it is permissible for an Administrative Judge to take *sua sponte* administrative notice, including after close of the record. *See also* ISCR Case No. 17-03026 at 4, n. 4 (App. Bd. Jan. 16, 2019). However, she argues, the Judge should not have taken administrative notice from a "non-authoritative source." This argument is grounded in Appeal Board precedent, which permits administrative notice to be taken of, *inter alia*, official documents posted by Federal departments or agencies on their websites. *See, e.g.*, ISCR Case No. 99-0452 at 4 n.7 (App. Bd. Mar. 21, 2000). *See also* ISCR. Case No. 02-06478 at 4–5 (App. Bd. Dec. 15, 2003) for a lengthier discussion on administrative notice.

Because Directive ¶ E3.1.19 provides that the Federal Rules of Evidence shall serve as a guide in DOHA proceedings, it is helpful to examine how Federal courts handle requests to take judicial notice of facts in a newspaper article. In general, Federal courts have held that newspaper and online articles are not normally the kinds of evidence of which courts take judicial notice. However, Federal courts may take judicial notice of a newspaper article if the proponent demonstrates that "the facts of the article are either '(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned' as required under Rule 201(b) of the Federal Rules of Evidence." *Kress v. United States*, 382 F.Supp. 3d 820, 830 (E.D. Wis. 2019), citing *In re Am. Apparel, Inc. Shareholder Litigation*, 855 F.Supp. 2d 1043, 1063 (C.D. Cal. 2012) (quoting *Hardison v. Newland*, No. C984517CRB(PR), 2003 WL 23025432 at 5 (N.D. Cal. Dec. 17, 2003). *See also Davidson Oil Co. v. City of Albuquerque*, 545 F.Supp. 3d 1039, 1044 (D. N.M. 2021) ("Judicial notice of newspaper articles is not appropriate . . . when the reported facts are not capable of easy verification."). In short, a DOHA Judge may take administrative notice of a newspaper

article when the reported facts are easily verifiable through a reliable source. In taking such administrative notice, the Judge should explain the basis for concluding the facts are easily verifiable and, if practical, enter into the record copies of the reliable sources that verify pertinent facts.

In this case, the Washington Post article of August 16, 2022, was apparently based on a DoE press release of that same date. *See* https://www.ed.gov/news/press-releases/education-department-approves-39-billion-group-discharge-208000-borrowers-who-attended-itt-technical-institute. Consequently, the facts in that article were easily verifiable through a reliable source. Of course, the better practice would have been for the Judge to take administrative notice of the Federal agency (*i.e.*, DoE) press release—a recognized source for taking administrative notice—rather than indirectly relying on a secondary source, *i.e.*, the Washington Post article.

Department Counsel next argues that the Judge erred by drawing "a speculative legal conclusion that an unidentified loan-forgiveness program applied to Applicant's student loans." Appeal Brief at 6. Contrary to her assertion, we note that this was not "an unidentified loan-forgiveness program." As mentioned above, the Federal program made national news, was clearly identified in the Washington Post article quoted in the decision, and was easily verifiable on the DoE website. On the other hand, the Judge's reliance on the Washington Post article of September 15, 2020, addressing the forgiveness of the PEAKS loans is not easily verifiable. Since the Judge was taking administrative notice, *sua sponte*, of that article, he should have demonstrated that the pertinent facts in the article were capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. The Judge erred in taking administrative notice of the article without providing a sufficient foundation.

This error highlights the most fundamental problem with the Judge's approach—he failed to give the parties notice of his intent to take administrative notice and an opportunity to respond, as is required by Appeal Board precedent. *See, e.g.*, DISCR Case No. 90-1550 at 4 (App. Bd. Mar. 25, 1992); ISCR Case No. 20-02266 at 2 (App. Bd. Dec. 21, 2022). This requirement is particularly crucial in a case where, as here, pivotal events occur after a hearing or after submission of a FORM. The landscape of this case changed dramatically on August 16, 2022, a month after Department Counsel prepared and submitted the FORM. Even if the Judge could take administrative notice of the Washington Post article of DoE press release, the parties were entitled to be informed of that determination and given the opportunity to re-shape their evidence and arguments. In failing to give them notice and opportunity to respond, the Judge erred.

Additionally, the Judge erred in failing to enter copies of the two Washington Post articles into the record. In the past, the Board held that a Judge erred by merely citing a document's Internet Uniform Resource Locater (URL) in taking administrative notice is insufficient due to the dynamic nature of the Internet. *See, e.g.*, ISCR Case No. 00-0628 at 3 (App. Bd. Apr. 26, 2002); ISCR Case No. 02-24875 at 4, n.3 (App. Bd. Mar. 29, 2006); ADP Case No. 14-01655 at 2 (App. Bd. Nov. 3, 2015); ISCR Case No. 17-01962 at 4, n.4 (App. Bd. Oct. 25, 2018); and ISCR Case No. 20-02266 at 2. In this case, the Judge should have entered copies of the Washington Post articles into the record to facilitate review on appeal. By failing to enter those articles into record, the Judge's findings of fact regarding them are not based on record evidence.

We turn finally to Department Counsel's argument that the Judge abandoned his impartiality and "instead became a surrogate and advocate for the Applicant when he *sua sponte* introduced and considered facts not in evidence without providing the parties notice and an opportunity to respond." Appeal Brief at 7. To the extent that Applicant is arguing that the Judge was biased, we do not find that argument convincing. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 18-02722 at 5 (App. Bd. Jan. 30, 2020). The test is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question his fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 20-02787 at 4 (App. Bd. Mar. 9, 2022).

Here, the Judge took *sua sponte* notice of facts that were reported in national news, easily verifiable, and incontrovertible—that the Federal government had forgiven the remaining Federal student loan debts associated with Applicant's alma mater. Although the Judge erred in how he took administrative notice of facts, the record contains nothing that would lead a reasonable person to question the Judge's fairness and impartiality.

Based on the foregoing, we conclude the best resolution is to remand this case for the Judge to reopen the record, provide the parties any documents on which he intends to rely for taking administrative notice, and give them an opportunity to submit additional evidence or argument. On remand, the Judge is required to issue a new decision. Directive ¶ E3.1.35. The Board retains no continuing jurisdiction over a remanded decision. However, a Judge's decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28. and E3.1.30.

Order

The decision is **REMANDED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board