

DATE: April 26, 2002

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0628

**APPEAL BOARD DECISION AND REMAND ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Claude R. Heiny issued a decision, dated September 17, 2001, 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 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.

Department Counsel's appeal raises the following issues: (1) whether the Administrative Judge failed to make an overall commonsense determination because he evaluated the record evidence in a piecemeal fashion rather than in its entirety; and (2) whether the Administrative Judge's findings and conclusions under Guidelines B, C, E, and L 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 February 22, 2001. The SOR was based on Guideline E (Personal Conduct), Guideline B (Foreign Influence), Guideline C (Foreign Preference), and Guideline L (Outside Activities).

A hearing was held on June 21, 2001. The Administrative Judge issued a written decision, dated September 17, 2001, in which he 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 the Administrative Judge's favorable security clearance decision.

**Scope of Review**

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing

party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

### **Appeal Issues**

Department Counsel makes various arguments that raise the following issues: (1) whether the Administrative Judge failed to make an overall commonsense determination because he evaluated the record evidence in a piecemeal fashion rather than in its entirety; and (2) whether the Administrative Judge's findings and conclusions under Guidelines B, C, E, and L are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes it would be premature to address the merits of the appeal issues raised, and that a remand to the Administrative Judge is warranted.

At the hearing, Department Counsel offered Government Exhibit 9, which was admitted into evidence without objection. Government Exhibit 9 is a relevant and material exhibit because it pertains to Applicant's creation and maintenance of Web sites, which is relevant to some of the SOR allegations in this case, as well as some of the appeal issues. However, for the reasons that follow, the Board concludes that a complete copy of Government Exhibit 9 is not present in the case file that was forwarded to the Board after Department Counsel filed its notice of appeal.

At the hearing, Department Counsel offered Government Exhibit 9. When marking Government Exhibit 9 for identification, the Administrative Judge stated the following:

"And marking as a single exhibit, Government Exhibit 9 for identification, the first sheet bearing the name of [Applicant], Ph.d., talks about - appears to talk about different articles that have been written, could be described as web pages, taken off the computer. The last group of pages talks about information warfare. Last page, or last section, revision date is May of 1998." (Hearing Transcript at p. 31)

On appeal, Department Counsel refers to Government Exhibit 9 on several occasions and cites to passages from that exhibit which Department Counsel identifies as pages 1, 2, 3, 5, and 14. Applicant, in his reply brief, refers to Government Exhibit 9 as "Specimens of all [my] three website home pages" and states:

"Insofar as my copies of Exhibit 9 are not marked with pagination, I am unable to either (a) verify Counsel's brief's exact citations or (b) figure out what pagination convention was employed. As a result, I can only reference Exhibit 9 in general."

In trying to evaluate the significance of Department Counsel's and Applicant's references to Government Exhibit 9, the Board turned to the case file and discovered that Government Exhibit 9 consists of only three pages, all from one web site and all dated April 19, 2001.

The Board concludes that the copy of Government Exhibit 9 in the case file forwarded to the Board is not complete because: (a) the Administrative Judge's description of Government Exhibit 9 (when he marked it for identification at the hearing) refers to information that does not appear on the three-page Government Exhibit 9 that is in the case file; (b) Department Counsel's appeal brief refers to Government Exhibit 9 as having more than three pages; (c) Department Counsel's and Applicant's appeal briefs refer to Government Exhibit 9 in ways that indicate it consists of more pages and more information than that which appears in the case file forwarded to the Board; and (d) various references to

Government Exhibit 9 in the hearing transcript seem to indicate that it contains information that does not appear in the copy that is in the case file forwarded to the Board.

Applicant's appeal brief refers to the URLs for his Web sites. However, the Board will not try to recreate Government Exhibit 9 by using those URLs because: (1) the Board is not responsible for creating or reconstructing record evidence; rather, it is the primary responsibility of the parties to present evidence and develop the record evidence subject to the responsibility of the Administrative Judge to exercise reasonable control over the development of the record evidence by the parties to ensure that the case proceeds in a fair, timely, and orderly manner<sup>(1)</sup>; (2) if there is a need to recreate or reconstruct record evidence, both an applicant and Department Counsel would have a right to be informed so that they could have an opportunity to raise appropriate objections or take other appropriate action to protect and preserve their respective rights; (3) given the dynamic and changing nature of the Internet, the Board cannot be certain that the Web sites (if they still exist) are the same as they were when Web pages were downloaded and printed out to create Government Exhibit 9; and (4) even if the Web sites still exist and are identical to the way they appeared when Government Exhibit 9 was created, the Board could not be sure that if it downloaded and printed out the Web pages they would be identical (in text, graphics, spacing or page breaks, and sequence) to those that were downloaded, printed out, and compiled to form Government Exhibit 9.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.<sup>(2)</sup> However, that presumption fails when there are clear indications that an exhibit in the case file is incomplete or missing pages. Without a complete copy of Government Exhibit 9 in the case file, it is not clear what documentary evidence the Judge relied on to make his findings and conclusions about Applicant's creation and maintenance of Web sites. Furthermore, without a complete copy of Government Exhibit 9, the Board cannot conduct a meaningful review of an Administrative Judge's decision. As noted above, Applicant's creation and maintenance of Web sites are relevant to some of the SOR allegations and to some of the issues raised on appeal. Therefore, Government Exhibit 9 is important to the merits of this case and a complete copy of that exhibit is needed for a fair and impartial adjudication of this case. Without a complete copy of Government Exhibit 9, it would be premature for the Board to address the issues raised on appeal.

Because the Board is remanding this case, judicial economy warrants discussion of another procedural aspect of this case that should be dealt with on remand.<sup>(3)</sup> In the case file, the Board found between Government Exhibit 6 and Government Exhibit 7 the following document: a one-page document that appears to be the first page of a draft recommended decision concerning a member of the U.S. armed forces. On its face, that one-page document clearly is not related to Applicant's case. The Board will not speculate as to how that one-page document got in the case file in Applicant's case.

On remand, the Administrative Judge should: (a) remove from Applicant's case file the one-page document that appears to be the first page of a draft recommended decision concerning a member of the U.S. armed forces and handle it appropriately; (b) reopen the record and permit Department Counsel to submit a complete copy of Government Exhibit 9; (c) ensure Applicant has received a complete copy of the resubmitted Government Exhibit 9; (d) include the complete resubmitted Government Exhibit 9 in the case file; (e) consider the complete copy of Government Exhibit 9; and (f) issue a new decision in Applicant's case consistent with the requirements of Items E3.1.35 and E3.1.25 of the Directive's Additional Procedural Guidance.

### **Conclusion**

Pursuant to Item E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the Administrative Judge for further processing consistent with the Items E3.1.35 and E3.1.25 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. *See, e.g.*, Directive, Additional Procedural Guidance, Items E3.1.10, E3.1.13, E3.1.14, E3.1.15, E3.1.16, and E3.1.19.
2. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
3. *See* ISCR Case No. 98-0476 (July 22, 1999) at p. 4 (after deciding case had to be remanded to the Administrative Judge for further processing, Board noted -- as a matter of judicial economy -- another procedural problem that could be addressed and rectified on remand).