

DATE: August 28, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-20562

## **APPEAL BOARD DECISION AND REMAND ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn A. Trowbridge, Esq., Department Counsel

#### **FOR APPLICANT**

Herbert M. Silverberg, Esq.

Department Counsel has appealed the February 21, 2003 decision of Administrative Judge Roger C. Wesley, in which the Judge concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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's application of Personal Conduct Mitigating Condition 3 is not supported by the record evidence; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, 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.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated August 12, 2002. The SOR was based on Guideline E (Personal Conduct). A hearing was held on November 13, 2002. The Administrative Judge issued a favorable security clearance decision dated February 21, 2003. The case is before the Board on Department Counsel's appeal from the Judge's favorable 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 also* 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 the same record. 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**

On appeal, Department Counsel contends: (1) the Administrative Judge's application of Personal Conduct Mitigating Condition 3 is not supported by the record evidence; and (2) the Judge's decision is arbitrary, capricious, or contrary to law. In support of the second contention, Department Counsel argues: (a) the Judge erred by evaluating Applicant's conduct in a piecemeal manner under Guideline E; (b) the Judge failed to take into account the evidence that shows or demonstrates the security significance of Applicant's conduct; (c) the Judge failed to give sufficient or due weight to Personal Conduct Disqualifying Condition 4; and (d) the Judge's application of Personal Conduct Mitigating Condition 3 is arbitrary, capricious, or contrary to law.

In response, Applicant contends: (i) the record evidence as a whole supports the Administrative Judge's decision; (ii) the Judge's findings of fact are based largely on his favorable assessment of Applicant's credibility, and the deference owed to the Judge's credibility determinations extends to his findings of fact; (iii) the Judge properly applied Personal Conduct Mitigating Condition 3; (iv) the psychiatric evaluation submitted on Applicant's behalf shows Applicant is not a security risk; (v) the Judge's decision is supported by the favorable opinions of Applicant expressed by his supervisor; and (vi) there is no evidence that Applicant's past and present foreign contacts pose any security risk.

While considering the appeal arguments made by the parties, the Board has identified an anomaly in the case file that leaves it unable to address the appeal arguments made by the parties. In the orange exhibit file there is a copy of an e-mail message from Department Counsel to the Judge, forwarding the text of a portion of an article posted on the Internet. The e-mail message is dated February 14, 2003, approximately two months after the hearing. The text of the e-mail message contains a portion of an article posted on the Internet that is cited in the Judge's decision (Decision at p. 8). Although the article was referred to by Department Counsel in her closing argument (Transcript at pp. 135-136), it was not offered as an exhibit at the hearing. The e-mail message in the case file is not marked as an exhibit. Furthermore, nothing on the face of the e-mail message indicates that a copy was sent to Applicant's counsel. And, nothing in the case file indicates whether Department Counsel or the Judge provided Applicant's counsel with a copy of the e-mail message, or whether Applicant's counsel had an opportunity to object or otherwise respond to it.

Whether the e-mail message and the article extract reproduced in that e-mail message were made part of the record evidence in this case or were otherwise properly before the Administrative Judge is pertinent to the Board's consideration of the appeal arguments raised by the parties. *See* Directive, Additional Procedural Guidance, Item E3.1.32 ("The Appeal Board shall address the material issues raised by the parties to determine whether harmful error occurred."). Considering all the circumstances, the Board concludes that the case should be remanded to the Judge with the following instructions:

On remand, the Administrative Judge should ascertain whether (1) Applicant's counsel received a copy of the e-mail message; and (2) if so, whether Applicant's counsel had the opportunity to object to its submission, or otherwise respond to it. For that purpose, the Judge should reopen the record to receive information from the parties pertinent to the status of the e-mail message, and allow the parties to raise objections or make appropriate motions pertaining to the e-mail message. The Judge should then issue a new decision which explains and clarifies the status of the e-mail message.

### **Conclusion**

The case record contains an anomaly that adversely affects the ability of the Board to address the appeal arguments made by the parties and carry out its responsibility under Directive, Additional Procedural Guidance, Item E3.1.32. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the case is remanded to the Administrative

Judge with instructions to address and resolve that anomaly and issue a new decision consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

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