

DATE: November 16, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-17720

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

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

Robert J. Honigford, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 8, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision dated July 20, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge failed to consider evidence submitted by Applicant; (2) whether some of the Administrative Judge's factual findings are erroneous; and (3) whether the Administrative Judge's unfavorable decision has a rational basis in the record evidence as a whole. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing consistent with the Board's rulings and instructions.

### **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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to

a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

### **Appeal Issues**

Applicant appealed the Administrative Judge's unfavorable security clearance decision. On appeal, Applicant asserts the Judge's decision should not be affirmed for three reasons: (1) the Judge failed to consider certain evidence submitted by Applicant; (2) some of the Judge's factual findings are erroneous; and (3) the Judge's decision does not have a rational basis in the record evidence as a whole. While considering Applicant's appeal contentions, the Board became aware of several problems with the case record that leave it unable to address Applicant's appeal arguments in a fair and meaningful way. [\(1\)](#)

Taken in their entirety, those problems leave the Board unable to ascertain what constitutes the record evidence in this case, how various documents in the case file found their way into the case file, and whether some submissions were made by Applicant but were not received by the Judge or were received but not included in the case file.

A hearing in this case was held on February 5, 2004. According to the hearing transcript, Applicant offered various documents that were referred to as Exhibits A through N. The Administrative Judge did not retain those documents in the case file and directed Applicant to resubmit two copies of them (one for the Judge and one for Department Counsel) within 30 days of the hearing, and indicated Department Counsel would have an opportunity to object to the exhibits after Applicant re-submitted them.

The case file does not contain any correspondence or other documentation indicating that Applicant re-submitted Exhibits A through N. However, the case file contains documents marked as Exhibits C, J, L, and M, without any correspondence or other documentation indicating: (a) when or how those four documents were submitted to the Administrative Judge; (b) whether Department Counsel received copies of those four documents, had an opportunity to object to them, or informed the Judge as to its position on the admissibility of those four documents; or (c) whether the

Judge informed the parties that he was admitting them into the record evidence.<sup>(2)</sup>

The Administrative Judge's decision refers to Exhibits A and I (Decision at pp. 3 and 4), but there are no documents in the case file marked as Exhibits A or I. Moreover, the case file does not contain any correspondence or other documentation indicating: (a) the identity of Exhibits A and I; (b) when or how Exhibits A and I were submitted to the Administrative Judge; (c) whether Department Counsel received copies of those two documents, had an opportunity to object to them, or informed the Judge as to its position on the admissibility of those four documents; (d) whether the Judge informed the parties that he was admitting them into the record evidence; or (e) the status or location of those two documents. The uncertainty about the identity, status and location of Exhibits A and I is compounded by the following: the Judge's decision states that Applicant re-submitted four of the exhibits that he had proffered at the hearing (Decision at p. 2, footnote 1); the case file contains four exhibits marked as Exhibits C, J, L, and M; yet, the Judge's decision refers to six exhibits bearing letters corresponding to those referred to in the hearing transcript -- A, C, I, J, L, and M.<sup>(3)</sup>

The Administrative Judge's decision contains a footnote indicating that Applicant submitted "additional exhibits" after the hearing, but that footnote does not identify the additional exhibits or provide information about the circumstances under which the unidentified additional exhibits were submitted and admitted into the record evidence by the Judge. The case file contains documents marked as Exhibits O through X. Because the hearing transcript does not contain any reference to exhibits bearing those letters, the Board assumes those documents were post-hearing submissions. But, the case file does not contain any correspondence or other documentation indicating: (a) when or how those documents were submitted to the Administrative Judge; (b) whether Department Counsel received copies of those documents, had an opportunity to object to them, or informed the Judge as to its position on the admissibility of those documents<sup>(4)</sup>; or (c) whether the Judge informed the parties that he was admitting them into the record evidence.

Mixed in with the documents marked as exhibits, are several other pages of documents that appear to have been submitted by Applicant, but which are not marked as exhibits and for which there is no correspondence or other documentation indicating: (a) when or how those documents were submitted to the Administrative Judge; (b) whether Department Counsel received copies of those unmarked documents, had an opportunity to object to them, or informed the Judge as to its position on the admissibility of those unmarked documents; or (c) whether the Judge informed the parties that he was admitting or not admitting them into the record evidence.

The Administrative Judge's decision contains two statements indicating that Department Counsel did not object to Applicant's post-hearing submissions: a statement that Department Counsel had no objection to Applicant's post-hearing submission of documents (Decision at p. 2), and a statement that cites page 49 of the transcript as indicating Department Counsel did not object to the marking and admission of additional post-hearing exhibits (Decision at p. 5). The first statement contains no reference to the hearing transcript or any other correspondence or documentation in the case file. Furthermore, the Board found no correspondence or other documentation in the case file that would support the first statement. A review of page 49 of the transcript shows that Department Counsel reserved the right to object to the admissibility of any documents that Applicant might submit after the hearing, not that Department Counsel waived any objection to their admissibility. And, in any event, page 49 of the transcript does not legally, logically or factually establish that Department Counsel received copies of Applicant's post-hearing submissions, had an opportunity to object to them, or informed the Judge as to Department Counsel's position as to the admissibility of the post-hearing submissions.

Applicant's appeal brief attaches a copy of a fax submission, dated July 9, 2004, that indicates Applicant submitted additional documentation to the Administrative Judge in response to a request from the Judge.<sup>(5)</sup> The case file does not contain a copy of that July 9, 2004 fax submission, nor does it contain any correspondence or other documentation indicating that the Judge received it, or whether Department Counsel was informed about the fax submission being made to the Judge. Furthermore, nothing in the Judge's decision appears to refer to that fax submission, procedurally or substantively.

Finally, adding to the Board's difficulties with understanding what constitutes the case record in this case, the various documents were placed in the case file in a manner that does not follow alphabetical order (by Exhibit letter) and that lacks any clear or identifiable separation between the documents marked as exhibits and the documents not marked as

exhibits.

The Board cannot rely on the presumption of administrative regularity, or the presumption that the Administrative Judge considered all the record evidence, to enable it to address in a fair and meaningful way the issues raised by Applicant on appeal because:

(1) the case file does not contain correspondence or other documentation concerning: (a) the circumstances under which Applicant made post-hearing submissions; (b) how various documents were apparently admitted into the record evidence and placed in the case file; (c) whether Department Counsel received copies of Applicant's post-hearing submissions and had an opportunity to object to them; (d) whether the Administrative Judge admitted into the record evidence several pages of unmarked documents mixed in the case file with the documents marked as exhibits; (e) whether the Department Counsel was aware of the July 9, 2004 fax submission made by Applicant to the Judge; (f) whether the Judge received the July 9, 2004 fax submission made by Applicant; (g) if the Judge received the July 9, 2004 fax submission, why a copy of that submission is not in the case file, either as an admitted exhibit or a rejected exhibit; and (h) the status or location of Exhibits A and I (which are referred to in the Judge's decision, but are not in the case file); and

(2) the Judge's decision does not provide any meaningful answers to the questions listed in the preceding sub-paragraph that are supported by the hearing transcript, correspondence or other documentation in the case file.

The Board's uncertainty is compounded by the fact that, given the state of the case file, the Board is unable to discern what the parties know or do not know about: the submission of documents; their inclusion in or absence from the case file; how the Judge marked particular documents as exhibits; or how the Judge treated the unmarked documents that were filed among the documents marked as exhibits.

The case record in this case is not coherent or intelligible about the identity, evidentiary status, and handling of documents submitted by Applicant after the hearing. Furthermore, there appear to be three documents that were submitted by Applicant after the hearing that are not in the case file. Given the current state of the case file, the appeal rights of the parties and the ability of the Board to carry out its appellate functions have been significantly impaired. *Cf.* ISCR Case No. 02-20365 (November 2, 2004) at p. 4 n.5.

### **Conclusion**

Given the current state of the case file, the Board is unable to address the issues raised on appeal in a fair and meaningful way. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with the following instructions:

The Administrative Judge should, after consultation with the parties, address and document -- on the record -- the following: (a) whether Department Counsel received copies of Applicant's post-hearing submissions and, if so, which post-hearing submissions Department Counsel received; (b) whether Department Counsel had an opportunity to object to Applicant's post-hearing submissions; (c) if Department Counsel raised any objections to the admissibility of Applicant's post-hearing submissions, what rulings the Judge made on those objections; (d) the identity and evidentiary status of the unmarked documents filed among the documents marked as exhibits; (e) the evidentiary status and location of the July 9, 2004 fax submission made by Applicant; and (f) the evidentiary status and location of Exhibits A and I that were referred to in the Judge's decision, but which are not in the case file. In order to carry out these instructions, the Judge has the discretion to act through correspondence or other written communications with the parties, by holding a procedural hearing limited to addressing and resolving the questions and difficulties identified in this Decision and Remand Order, or both.

After the Administrative Judge has addressed and resolved the procedural questions and difficulties identified in this Decision and Remand Order, the Judge should issue a new decision that is consistent with the requirements of Directive, Additional Procedural Guidance, Item E3.1.35 and E3.1.25.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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

1. The Board is directed to address the material issues raised by the parties on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.32. When faced with a problem on appeal that precludes the Board from addressing in a fair and meaningful way the material issues raised by the parties on appeal, the Board is -- of practical necessity -- required to decide whether the threshold problem can be resolved so that the Board can decide an appeal on its merits, or whether the threshold problem requires remand for corrective action that the Board cannot take. *See* ISCR Case No. 02-20365 (November 2, 2004) at p. 3 n.3.

2. The Administrative Judge's decision contains a footnote indicating that Applicant re-submitted four exhibits after the hearing, but that footnote does not identify the four exhibits or provide information about the circumstances under which the four unidentified exhibits were submitted and admitted into the record evidence by the Judge. The Judge's decision does contain references to Exhibits C, L, and M (Decision at pp. 3 and 4), but those references do not shed any light on how those documents were submitted and admitted into the record evidence.

3. Given the state of the case record, the Board is not sure whether the documents referred to in the Administrative Judge's decision as Exhibits A and I correspond to the documents referred to by those letters in the hearing transcript. The documents in the case file marked as Exhibits C, J, L, and M appear to match the description of those documents set forth in the hearing transcript at pp. 32, 41-47.

4. The document in the case file marked as Exhibit Q bears a fax cover sheet indicating the document was faxed to Department Counsel. Later in the case file, there is a duplicate copy of Exhibit Q (unmarked) with a fax cover sheet from Department Counsel to the Administrative Judge.

5. Because the July 9, 2004 fax submission apparently was made to the Administrative Judge during the proceedings below before the Judge issued his decision, it does not constitute new evidence on appeal that would be precluded by Directive, Additional Procedural Guidance, Item E3.1.29.