

DATE: November 2, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-20365

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

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

James L. Banks, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 18, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Charles D. Ablard issued a favorable security clearance decision dated March 22, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 erred by concluding that Foreign Preference Mitigating Condition 4 applied to the case; and (2) whether the Administrative Judge erred by concluding that Foreign Influence Mitigating Condition 5 applied to the case. 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**

Department Counsel appealed the Administrative Judge's favorable security clearance decision. On appeal, Department Counsel challenges the Administrative Judge's application of Foreign Preference Mitigating Condition 4<sup>(1)</sup> and Foreign Influence Mitigating Condition 5.<sup>(2)</sup> In response, Applicant contends the Judge did not err in his application of those mitigating conditions.

While considering the appeal arguments made by the parties, the Board became aware of a problem in the case record that leaves it unable to address in a fair and meaningful way the appeal arguments made by the parties.<sup>(3)</sup> Specifically, the Administrative Judge's handling of three exhibits offered by Department Counsel at the hearing (Government Exhibits 4, 5, and 6) precludes the Board from addressing in a fair and meaningful way the issues raised by the parties on appeal.

At the hearing, Department Counsel offered Government Exhibits 4, 5, and 6 (Hearing Transcript at pp. 12-13). The Administrative Judge indicated that he would take administrative or official notice of Government Exhibits 4, 5 and 6, but would not put them in the record (Hearing Transcript at p. 13) or admit them into evidence (Hearing Transcript at p. 14). Applicant objected to the admissibility of those three exhibits on grounds of relevance and materiality (Hearing Transcript at pp. 14-15). After hearing Applicant's objection, the Judge ruled that he would take administrative or official notice of the three exhibits (Hearing Transcript at pp. 15, 16).

In the decision being appealed, the Administrative Judge stated all six of the exhibits presented by Department Counsel were "accepted into evidence" (Decision at p. 2). That statement is problematic because: (a) the Hearing Transcript shows that the Judge stated he would not put Government Exhibits 4, 5 and 5 into the record or admit them into evidence; (b) the Hearing Transcript is ambiguous as to what the Judge did or did not do with the copies of Government

Exhibits 4, 5 and 6 that were offered by Department Counsel; <sup>(4)</sup> and (c) there are no copies of Government Exhibits 4, 5, and 6 in the case file. Moreover, the Judge's decision refers to "Department of State Travel Warning, May 2003" (Decision at p. 2), yet no copy of such a document is in the case file as an exhibit and the one-page list of Government and Applicant Exhibits that appears in the case file shows that Government Exhibits 4 and 5 bear dates of November 10, 2003 and Government Exhibit 6 bears a date of April 30, 2001.

Given the record before it, the Board is not able to: (1) ascertain what happened to the copies of Government Exhibits 4, 5 and 6 that Department Counsel offered at the hearing; (2) reconcile the Administrative Judge's statement that he would not admit Government Exhibits 4, 5 and 6 into evidence with his later statement that he accepted all of Department Counsel's exhibits into evidence; (3) determine whether the May 2003 State Department document cited in the Judge's decision was supposed to be a reference to Government Exhibit 4, 5 or 6 (with a typographical error as to its date) or a reference to a totally different document; or (4) discern whether the Judge did or did not take administrative or official notice of Government Exhibits 4, 5 or 6. <sup>(5)</sup> Moreover, Department Counsel specifically refers to and relies on Government Exhibits 4, 5 and 6 in its appeal brief. Without copies of Government Exhibits 4, 5 and 6 in the case file, the Board is not able to make a meaningful decision as to whether those three documents do or do not support Department Counsel's appeal arguments. Furthermore, given the current state of the record, the Board is not able to make a meaningful decision as to whether the Judge's reference to a May 2003 State Department document is: (a) a typographical error; or (b) indicative that the Judge relied on a document not offered by either party.

### **Conclusion**

Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with the following instructions: On remand, the Judge must: (1) reopen the record to permit Department Counsel a reasonable opportunity to re-submit copies of Government Exhibits 4, 5 and 6 for inclusion in the case file, ensuring that Applicant receives copies of those three exhibits; (2) issue a new decision that complies with Directive, Additional Procedural Guidance, Items E3.1.25 and E3.1.35; (3) explicitly state in the new decision whether the Judge considered or did not consider Government Exhibits 4, 5 or 6 in making his findings of fact or reaching his conclusions in this case, and state the reasons why the Judge did or did not consider those three exhibits in this case; and (4) the Judge should clarify what is the May 2003 document (referred to in his original decision) and if it is a different document from Government Exhibits 4, 5, or 6, the Judge should provide each party with a copy and include a copy in the case file.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

### **Concurring Opinion of Administrative Judge Michael Y. Ra'anan:**

I fully agree with my colleagues' analysis and instructions in this case. Earlier this year, I observed in a separate opinion (ISCR Case No. 02-10215, January 30, 2004) that when documents subject to administrative notice are treated differently from documents admitted into evidence unnecessary difficulties result. There is a subtle philosophical distinction. However, it is evident to me that problems for the Board and others can be avoided if such documents are handled in the same way as documentary evidence.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. "Individual has expressed a willingness to renounce dual citizenship" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.4).
2. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.5).
3. The Board is directed to address the material issues raised by the parties on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. 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 cannot be taken by the Board.
4. There is no statement in the Hearing Transcript or elsewhere in the record by the Administrative Judge or Department Counsel that allows the Board to ascertain: (a) whether Department Counsel physically handed Government Exhibits 4, 5 and 6 to the Judge at any point; (b) whether the Administrative Judge had possession of Government Exhibits 4, 5 and 6 at any time during the hearing; or (c) what happened to the copies of Government Exhibits 4, 5 and 6 referred to by Department Counsel during the hearing.
5. If Administrative Judges or the parties fail (within the constraints of their respective roles) to develop a coherent, intelligible case record, or if Judges do not place in the case file copies of documents offered as evidence or for administrative or official notice (whether the documents are admitted or not admitted into evidence), then the result could impair the appeal rights of the parties or impair the ability of the Board to carry out its appellate functions. *See, e.g.*, ISCR Case No. 02-18668 (February 10, 2004) at p. 4; ISCR Case No. 02-06478 (December 15, 2003) at pp. 6-7; ISCR Case No. 98-0476 (July 22, 1999) at pp. 2 and 4. *Cf.* ISCR Case No. 03-00543 (May 21, 2004) at pp. 4-5 (noting several important reasons why procedural matters should be handled on the record). Moreover, such situations could interfere with the ability of a federal court to adjudicate a security clearance case brought before it.