DATE: February 8, 2007

In Re:

SSN: -------

Applicant for Security Clearance

ISCR Case No. 03-08257

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Robert D. L'Heureux, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 23, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline K (Security Violations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 12, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied due process under Executive Order 10865 and the Directive; whether the Judge's decision is arbitrary, capricious, or contrary to law. We remand the case to the Judge for a new hearing.

Whether the Record Supports the Administrative Judge's Factual Findings

A. The Administrative Judge made the following findings:

Applicant was counseled by his employer in early 1987 for poor work performance, tardiness, and an unprofessional attitude.

Applicant was fired by his employer in March 1987 for having forged coworkers' signatures on an application for an off-duty recreation activity sponsored by the employer.

In 1999, while working as a federal contractor, Applicant placed classified information contained in a spreadsheet on an unclassified web site. Subsequently he forwarded an e-mail "containing or referencing" the classified spreadsheet. This e-mail was sent "on an unclassified network" to several recipients.

On another occasion, when leaving his work place at the end of the day, Applicant "failed to follow required procedures for initialing the security checklist," a violation of security policy.

On another subsequent occasion, Applicant failed to properly "secure the combination lock and to perform other steps to activate motor sensors" in his work facility, in violation of security policy. Two days later he was similarly neglectful.

Security inspectors discovered the lapse, and Applicant was decertified from opening or securing the facility until he received further training.

Approximately one month later, Applicant attended a meeting in which he "began to copy an unclassified file from a classified laptop computer." "If Applicant had not been stopped, the projection computer would have become classified." Applicant was discovered to be using unmarked discs to store files for the briefing and left the briefing room without securing the classified laptop computer.

Between July 20-22, 2000, Applicant sent Secret classified information over an unclassified e-mail system. As a result, his employer removed him from the work site.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Administrative Judge. We review matters of law de novo.

Applicant contends he was denied due process because he was not represented by counsel at the hearing and ". . . was uncertain concerning the issues to be address[ed] and the means of

obtaining and introducing evidence into the record." The Board finds Applicant's argument persuasive.

Based upon the record developed in this case, it is difficult for the Board to gauge the level of Applicant's understanding of the process, or his degree of preparation for the hearing. The Judge did not inquire on the record into such matters as: whether Applicant had received the DOHA documentation related to the process, such as the Directive, and any pre-hearing guidance; whether the Applicant had an opportunity to review those documents and understood them; the extent to which Applicant understood his right to have an attorney or personal representative; and the extent to which Applicant had the ability to proceed.

Moreover, the Board cannot determine with reasonable certainty whether Applicant received any written pre-hearing guidance prior to the hearing. The February 1, 2006, Notice of Hearing, was sent to Applicant at his home address. However, pre-hearing guidance was sent by letter dated February 1, 2006 to Applicant's Facility Security Officer at Applicant's work address--and returned to DOHA unopened.[(1)] The file contains a second letter transmitting pre-hearing guidance to the Applicant, also to his work address. But that letter is dated February 27, 2006--three days after Applicant's February 24, 2006 hearing--and the acknowledgment of receipt at the bottom of the letter is blank.

At the beginning of the hearing, the Judge asked Applicant if he was represented by counsel or a personal representative. Applicant responded: "It will just be me, Your Honor." The Judge accepted Applicant's response at face value, even though Applicant's next statement suggested the potential for concern:

JUDGE: All right. And do you have witnesses, sir?

APPLICANT: No, ma'am. But I would like to evidence

that these proceedings continue.

Applicant's response in that regard was sufficiently unclear so as to warrant further inquiry. Yet the Judge continued to proceed stating: "Absolutely. That is what you have a right to do in these proceedings, sir."[(2)]

At the February 24, 2006 hearing, Applicant attempted to introduce into evidence three documents, proposed exhibits, D, F, and G, which the record indicates were e-mails composed and transmitted when Applicant was employed by a

previous government contractor. Department Counsel stated that she did not object to the admission of those documents into evidence, but expressed a "hope" that none of them contained classified information. Department Counsel also stated that the documents "[did] not appear to" be classified.[(3)] The Judge stated in her decision that: "Applicant was unable to credibly establish the systems referred to in the e-mails were not now classified. (Tr. I, 72-75; 80-82.) Accordingly, I returned my copies of Ex. D, F, and G to Applicant, and Department Counsel did the same." The Judge footnoted that statement as follows: "The NISPOM definition of a security violation includes situations where the security violation makes classified information vulnerable to exposure to persons without the requisite need to know. *See* Executive Order 13292, dated March 23, 2003, Sections 4.1(a), 4.1(f), and 4.1(g)." Decision at 2. The documents in question were neither preserved for the record or otherwise secured.[(4)] The record does not indicate that an official classification review was either sought or took place. The Judge also declined to admit several other documentary exhibits offered by the Applicant, apparently based upon the lack of relevancy or authenticating witnesses, and perhaps hearsay. Those documents are also not in the record. As a result of the foregoing, none of the documents in question are available for review on appeal.

Throughout the hearing, the Applicant repeatedly demonstrated considerable confusion as to the procedures and the rules of evidence--particularly such concepts as relevance, hearsay, and authentication. The Judge had to explain to the Applicant why the government's evidence was admissible, but Applicant's was not. The Judge also advised Applicant as to what types of evidence DOHA Judges found persuasive, and how that evidence could be prepared and presented in order to enhance its credibility.[(5)] Based upon her concern that the Applicant receive a fair hearing, the Judge eventually decided to continue the case.

In her decision, the Judge indicates that she advised Applicant to consult with legal counsel prior to the resumption of the hearing. Decision at 2. However, the record is not a model of clarity in this regard. At one point, it appears that the Judge may have been preparing to advise Applicant to seek counsel. But at a crucial juncture the Judge went off the record:

JUDGE: [Applicant], you of course are entitled to represent yourself in these

proceedings. But if these matters and these records and the are - because of

our procedural rules or because the rules are the way that we carry out

hearings, some of these things cannot be admitted because they may be

classified or because they are records of investigation which do not allow

us to authenticate what it is that they say.

I wonder, [Applicant], if it might not be a good idea, and I'm

going to ask that we go off the record at this point and [Applicant] and

counsel come up here, please.[(6)]

At another point, the Judge stated: "Now I believe it's in the interest of fairness and justice in this case that we continue it so that the Applicant can obtain counsel for her security manager and others regarding the presentation of his - of his case."[(7)] The Judge did not clearly suggest that Applicant needed counsel, except to the extent that she may have been including Applicant in her general reference to "others."

When the hearing was resumed on March 8, 2006, Applicant once again appeared *pro se,* and the issue of representation was not otherwise pursued.[(8)] At the arch 8, 2006 hearing, Applicant attempted to introduce into evidence four e-mail documents as exhibits. The Judge rejected those exhibits because the Applicant "was unable to credibly assure [her] the documents did not contain or allude to systems that were classified." The Judge made that ruling despite her specific finding that: "None of the documents offered by Applicant contained markings indicating they were classified

documents." Decision at 3. As was the case at the first hearing, the documents in question were neither preserved for the record or otherwise secured, and the record does not indicate whether an official classification review was either sought or took place.[(9)] The documents are likewise not available for review on appeal.

The Board has previously noted that the failure to preserve a complete record is error, and can impair the Board's ability to perform its review function. *See, e.g.,* 04-10381 at 2 (App. Bd. Dec. 21, 2006) citing Directive ¶¶ E3.1.19 and 29; ISCR Case No. 02-24875 at 2, n1 (App. Bd. Oct. 12, 2006). Where a document is offered as an exhibit by one of the parties and discussed on the record, that document (or a copy thereof) should be marked for identification by the Judge and placed in the file of the case, even if the Judge concludes that the document should not be admitted into evidence. *See, e.g., Id.*; ISCR Case No. 02-24875 at 3 (App. Bd. Mar. 29, 2006). Department of Defense rules should be applied to documents that are classified or are reasonably suspected of being in need of classification review. In this instance, the above noted errors are harmful in that they impair the Board's ability to fully evaluate the issues raised by Applicant on appeal.

Given the record developed in this case, and the multiple problems that have been noted, the Board cannot conclude with confidence that Applicant received the due process provided for in Executive 10865 and the Directive. *See* ISCR Case No. 04-12732 (App. Bd. Nov. 2, 2006); *Compare* ISCR Case No. 02-17574 at 2 (App. Bd. July 24, 2006). On the contrary, the record in this case, as it stands, suggests that this *pro se* Applicant was denied a reasonable opportunity to offer documentary evidence on his behalf, based in part upon unresolved speculation that the documents might contain classified information--even though the documents were facially unclassified and there was no objection to their admission by the government. Accordingly, the Board remands the case to the Judge with instructions that the case be reopened and that Applicant be given a new hearing. In that regard, the Board notes that under Directive ¶ E3.1.19, the Federal Rules of Evidence serve as only a guide in DOHA hearing and "technical rules of evidence may be relaxed, except as otherwise provided [in the Directive,[(10)]] to permit the development of a full and complete record." The other issues raised by the Applicant are not yet ripe for consideration.

Order

The case is REMANDED to the Judge for a new hearing.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The Board has opened the sealed enveloped, which contains the notice of the February 24, 2006 hearing and pre-

hearing guidance.

2. Transcript I, at 4.

3. Transcript I, at 72, 80, and 82.

4. Both the February 24, 2006 and the March 8, 2006 hearings were conducted at DOHA's Headquarters located in Arlington, VA. The Board notes that the handling of classified information by DOHA personnel and in DOHA proceedings is governed principally by DOHA Operating Instructions 25, 46, and 48; Executive Order 10865 § 5; and Directive ¶¶ E3.1.21 and 23, as well as the general laws and regulations relating to such matters, such as DoD Regulation 5200.1-R.

5. For example see Transcript I, at 94.

6. Transcript I at 86-87.

7. Transcript I at 108.

8. Applicant does make a passing reference in his closing argument to the fact that he could have hired an attorney. Read in context, however, the Board concludes that Applicant is explaining several things which frustrated his efforts to represent himself at DOHA.

9. Applicant advised the Judge that the e-mails in question would demonstrate that others in his place of employment ("five to six different Air Force officers") were themselves confused about the extent to which office information should be considered classified. Transcript II at 28.

10. *See* ISCR Case No. 01-23356 at 7-8 (App. Bd. Nov. 24, 2003)(addressing the exception that is established by Directive ¶ E3.1.20).