

DATE: January 18, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-07825

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

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated May 18, 2005, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated October 31, 2005.

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 Applicant was denied the opportunity to have his response to the File of Relevant Material considered by the Administrative Judge; and (2) whether the Administrative Judge's findings and conclusions under Guideline G (Alcohol Consumption) are not supported by the record evidence. 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**

1. Whether Applicant was denied the opportunity to have his response to the File of Relevant Material considered by the Administrative Judge. In the decision below, the Administrative Judge stated that Applicant did not submit a response to the File of Relevant Material (FORM) within the deadline for such a response. The Judge's statement is consistent with the September 20, 2005 memorandum that forwarded the case to him for determination. In that memorandum, the following statement appears: "The Applicant did not submit any information within the time period of 30 days after receipt of copy of the file of relevant material. Response was due on 09/10/2005."

On appeal, Applicant contends that he submitted a response to the FORM (a letter dated September 4, 2005). In support of that contention, Applicant attached to his appeal brief copies of his September 4, 2005 letter and documents from the U.S. Postal Service that indicate he sent an Express Mail package to DOHA that was signed for by a DOHA staff person on September 9, 2005.

Applicant's claim about submitting a response to the FORM before the deadline for its receipt passed raises the serious question of whether Applicant was denied the right to have evidence submitted by him considered by the Administrative Judge. Normally, a party is expected to raise objections or similar claims of error in a timely manner during the proceedings before the Judge in order to preserve them for appeal. However, implicit in that general rule is the assumption that the objecting party: (a) is aware of what is happening in the proceedings before the Judge; and (b) has an opportunity to raise an objection before the Judge, orally or in writing, in a timely manner. Given the particular nature of the claimed procedural error in this case, Applicant could not reasonably be expected to have raised that claim of error until after he received a copy of the Judge's decision. Furthermore, given the particular nature of Applicant's claim of procedural error, Applicant could not reasonably be expected to raise it solely based on the case record. *See, e.g.*, ISCR Case No.03-00543 (May 21, 2004) at pp. 3-4 (noting there may be some unusual situations when a party

cannot raise an appeal issue without referring to a matter that is not contained in the record of the proceedings below).

An applicant's right to present evidence for consideration in his or her case is an important one. *See, e.g.*, ISCR Case No. 02-20031 (August 31, 2004) at p. 4. Neither the substance nor the appearance of a fair and impartial adjudication (*see* Directive, Section 4.1) would be served by failing to address a nonfrivolous claim that an applicant was denied a reasonable opportunity to present evidence for consideration in his or her case, or allowing such a claim to be stymied because it arises under circumstances that have the effect of making it impossible or impractical for an applicant to make a timely objection on the record during the proceedings below.

Applicant's appeal submission persuades the Board that he sent a response to the FORM to DOHA in a timely manner. The failure to incorporate Applicant's submission into the case record meant that Applicant was denied the right to have his response to the FORM considered by the Judge. The appropriate remedy is to remand the case to the Judge so that Applicant's response to the FORM can be made part of the record evidence and considered by the Judge in deciding Applicant's case.

2. Whether the Administrative Judge's findings and conclusions under Guideline G (Alcohol Consumption) are not supported by the record evidence. Applicant also challenges the Administrative Judge's findings and conclusions, arguing they are not correct. The Board construes Applicant's arguments as raising the issue of whether the record evidence does not support the Judge's findings and conclusions under Guideline G (Alcohol Consumption).

In support of this claim of error, Applicant makes arguments that could be construed as based on the record evidence, as well as arguments based on three documents bearing dates that are after the date of the Administrative Judge's decision. The three documents dated after the Judge's decision constitute a proffer of new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, because those three documents are dated after the Judge's decision, they clearly were not part of Applicant's response to the FORM.

What remains of Applicant's challenge to the Administrative Judge's findings and conclusions are some arguments that could be construed as based on the record evidence that was before the Judge. Because the Board's resolution of the first appeal issue warrants a remand to the Judge for further processing and issuance of a new decision, it would be premature for the Board to address Applicant's second appeal issue.

### **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 should reopen the record to allow Applicant a reasonable opportunity to submit a copy of his September 4, 2005 response to the FORM for inclusion in the case record. The Judge should then 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