DATE: November 2, 2006

In Re:

SSN: -------------------

Applicant for Security Clearance

ISCR Case No. 04-12732

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 22, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 21, 2006, after the hearing, Administrative Judge Robert J. Tuider 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 issue on appeal: whether Applicant was denied due process under Executive Order 10865 and the Directive. We remand the case to the Administrative Judge for a new hearing.

Whether the Record Supports the Administrative Judge's Factual Findings

A. The Administrative Judge made the following findings of fact:

Applicant is a 49-year-old married man employed as a software engineer for a defense contractor. He has been with his current employer since February 2000. Applicant seeks a security clearance for the first time.

Applicant was born and raised in Iran. In August 1975, at age 19, Applicant came to the U.S. to attend college on a student visa. In December 1979, Applicant was awarded a bachelor of science degree, majoring in mechanical engineering. In August 1983, Applicant was awarded a master's degree in nuclear engineering. In May 1988, he was awarded a second master's degree in computer science. Applicant's father fully supported him while he was in college.

In May 1982, Applicant married his wife, a native-born Iranian citizen he met in the U.S., who became a naturalized U.S. citizen in August 1995. In February 2000, Applicant became a naturalized U.S. citizen and in December 2000, he was issued a U.S. passport. Applicant has two U.S. born children, a daughter in college, and a son in high school. Applicant possessed an Iranian passport issued to him in 1974, which he used to enter the U.S. in August 1975. He used this passport for a family visit in approximately 1977. This passport expired in 1978. In October 1999, Applicant renewed his Iranian passport. In March 2001, he returned to Iran for a family visit following his father's heart surgery.

In May 2002, Applicant attempted to relinquish his Iranian passport following an interview with the Defense Security

Service (DSS), wherein, he was informed of DoD policy prohibiting possession of a foreign passport while holding a security clearance unless sanctioned by the U.S. government. Applicant attempted to surrender his Iranian passport to the Immigration and Naturalization Service (INS), but was informed by INS they did not have the authority to accept an Iranian passport. Applicant cut off the corners of his passport, and the passport expired in 2004.

In 1985, Applicant's father retired from the Iranian Army as a senior officer after approximately 30 years of service. He receives a military retirement.[(1)] In 1995, Applicant's mother retired as a high school teacher. She receives a pension, which is funded by government and private funds. Applicant has no idea of his parent's political affiliations. Applicant testified that neither his father nor any of his family members are involved in Iran's nuclear power program.

Applicant has two adult sisters living in Iran. One sister is a college graduate and a homemaker, whose husband is a self-employed civil engineer. They have five children. Applicant's other sister is a high school teacher, whose husband is a freelance architect. They have three children.

In Applicant's signed, sworn statement to DSS dated July 31, 2003, he described his contact with his family in Iran as follows:

I have approximately monthly telephonic contact with my family in Iran. I call them or they will call me. I also email my sister, . . . and her daughter approximately bi-weekly. We send each other family pictures and talk about our families. I have no other contact with anyone outside of the US.

In Applicant's Response to the SOR dated May 10, 2005, when describing contact with family members in Iran, he stated:

I do not admit that: I have close ties of affection or obligations to my parents. I do not admit that: I have close ties of affection or obligation to my two siblings. In fact, I have no contact with my siblings and/or their families and do not know of their where abouts (sic) in Iran. I do not admit that: I have close ties of affection or obligation to my brother-in-law. In fact, I have no contact with brother-in-law and/or his family and do not know his where about (sic) in Iran.

When describing contact with his family in Iran, Applicant testified at his hearing:

Department Counsel: Now, sir, even though you have I guess - what is it? - monthly maybe telephone contact with your family?

Applicant: That's questionable, yeah.

Department Counsel: Well, whatever contact you do have, do you still

have a feeling of a family bond towards your parents?

Applicant: A little bit toward my parents as a respect, not as an

obligation or any kind of bond that, you know, is, as they say here,

about affection. It's nothing like that. You know, we didn't talk - we

didn't communicate for 15 years. That tells you a lot.

Applicant explained the 15-year family rift occurred as a result of a "personality conflict" between his wife and his mother when his parents were visiting them in 1986. Applicant testified during this time he did not speak to his parents for 15 years. In 1990, Applicant's wife took their two children to Iran for a family visit, and while there his children visited his parents.

Applicant has a brother-in-law, who is a resident citizen of Iran. He and his Iranian wife are both anesthesiologists living and working in Iran. They have two children. Applicant's contact with his brother-in-law is limited to occasional

telephone calls on birthdays or holidays.

Applicant has one brother, who lives in the U.S. He is married to a former Iranian citizen. Applicant's brother and sister-in-law are naturalized U.S. citizens.

Applicant submitted a document at hearing titled "Profile" that described his contact with family members in Iran as follows:

Sister 1: I made about 5 phone calls in the past 30 years.

She has never called me. Occasional email 02-03.

Sister 2: I made about 2 phone calls in the past 30 years.

She has never called me. No email.

Parents: visited USA in 1986.

Parents: Visited father after heart surgery in 2001.

Parents: Occasional phone calls in past 4 years.

Brother-in-law: no direct phone call or contact.

Applicant's company President described his employment record as "exemplary" and added that he has had consistent positive performance appraisals. Another supervisor described Applicant as "very conscientious," a "well-informed performer," a "team player," "dedicated," conscientious," "trustworthy," "innovative," and "most professional." In short, Applicant is considered to be an asset to his employer, and an employee who is making a contribution.

B. Discussion

The Judge's findings of fact are not challenged on appeal.

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 may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency. . ." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 42. We review matters of law de novo.

Applicant argues he was denied due process, and requests that his case be remanded and his hearing reopened. In support of that argument, Applicant's appellate counsel asserts that Applicant's *pro se* representation was ineffective because Applicant was totally uninformed about the hearing process, the meaning of the rules of evidence, the role of the Administrative Judge, and what evidence could be produced at the hearing. As a result, Applicant's counsel contends that Applicant missed significant opportunities to produce evidence at the hearing. The Board finds Applicant's argument persuasive.

A review of the record indicates that Applicant arrived at the hearing under the impression that his supervisor was to act as his personal representative.[(2)] He was, therefore, apparently confused when Department Counsel informed his supervisor that he could not be present in the hearing room. The relevant portion of the transcript is as follows:

ADMINISTRATIVE JUDGE: Very well. Thank you [Department Counsel].

Is the Applicant represented by an attorney or personal representative?

APPLICANT: Personal representative.

ADMINISTRATIVE JUDGE: You mean, you're representing yourself?

APPLICANT: Well, I have been accompanied by my supervisor. He's here

right now, but he said that he has to wait outside as a witness.

ADMINISTRATIVE JUDGE: Well, he's a witness; right?

APPLICANT: Well, he was supposed to be my company and, you know,

help me with this case, but apparently he was asked to stay outside.(3)

Although the exclusion of witnesses from the evidentiary portion of the hearing is not unusual, there is typically no reason for excluding them from most of the non-evidentiary portions of the hearing, such as the discussion of preliminary matters. More importantly, the exclusion of witnesses from the hearing is a decision for the Administrative Judge. A party may request "a rule on the witnesses" from the Judge, but it is the Judge who decides whether or not to grant that rule. Similarly, it is the Judge who should instruct the witnesses to leave the hearing room as appropriate--not one of the parties. It is unclear from the record why Department Counsel instructed Applicant's supervisor that he could not be present during the preliminary matters phase of the hearing. Regardless of the reason, Department Counsel's action appears from the record to have confused the Applicant and deprived him of the support and advice of his supervisor--an individual Applicant apparently considered his personal representative--at a crucial juncture in the proceeding.

The situation was aggravated by the Administrative Judge's subsequent handling of the matter. The Judge had a discussion with Department Counsel as to whether Applicant's supervisor was a personal representative or a witness. The Judge then reached a conclusion, after ambiguous input from the Applicant, and presented it to Applicant for ratification--again, without Applicant's supervisor being present:

ADMINISTRATIVE JUDGE: Yeah. Very well. [Applicant], if -

you're entitled to have a personal representative or an attorney

represent you. However, if your personal representative is

going to testify, he can't do both. So -

APPLICANT: He would represent me as far as my job is concerned,

about my performance in my job as far as the security concerns of

my job. He will talk about that and he's the expert on that.

ADMINISTRATIVE JUDGE: Okay. It sounds like he's more of a

witness than a personal representative. Personal representative would

be someone that, you know, would guide you through the process and

is familiar enough with the proceedings to help you.

[Department Counsel]?

DEPARTMENT COUNSEL: Yes, sir. That was my understanding of

the conversation, that that's what he'd be here to do, so I -- I assumed

that he'd be a witness vice the personal representative and that's

why I instructed him to remain outside, sir.

ADMINISTRATIVE JUDGE: Yeah. It sounds like he's a witness

more than a personal representative.[(4)]

The Administrative Judge's statement that Applicant's supervisor could not be both a personal representative and a witness was problematic, in that there is no absolute rule. Even the rule that a lawyer may not act as an advocate at a trial in which he is likely to be a necessary witness provides an exception for instances where disqualification of the lawyer would work a substantial hardship on the client.[(5)] Unlike a lawyer, a personal representative does not have a direct financial interest in the case and is not governed by bar rules of professional conduct. Therefore, under the circumstances of this case, there was no ethical prohibition against Applicant's supervisor serving as both a personal representative and as a witness.[(6)]

The Administrative Judge's statement that a personal representative needed to be someone sufficiently familiar with the security clearance process to be of help was also problematic. The Board is unaware of any qualification requirements for personal representatives of the type suggested by the Judge. On the contrary, a personal representative can be anyone the Applicant wants to help him, including a friend or family member.

In any event, the Administrative Judge's statements, when taken together, may have left the Applicant with the erroneous impression that his supervisor could not be a witness if he was going to serve as a personal representative, and that his supervisor was unqualified to serve as a personal representative. Accordingly, the record in this case, as it stands, suggests that Applicant was mistakenly separated from his personal representative at the beginning of the hearing, and then provided with erroneous information that may have convinced him he should represent himself.

It is not clear from the record why the Administrative Judge solicited such extensive input from Department Counsel as to whether Applicant's supervisory was to be a witness or a personal representative. Nor is it clear from the record why the Judge did not immediately call Applicant's supervisor into the hearing room, and question him as to what he understood his role to be at the hearing. Whether Applicant intended his supervisor to be a witness or personal representative, or both, was a matter principally for Applicant's determination. As such, the Judge should have resolved the issue in discussion with the Applicant, not Department Counsel--and with the supervisor present at all times until the matter was resolved. Where an applicant identifies an individual as his personal representative, that individual should be present at all material proceedings of the hearing until such time as it is definitively determined that he or she will not be representing the applicant.

A review of the record also indicates that at other junctures in the proceedings the Administrative Judge had to make procedural decisions either for the Applicant, or without significant input from the Applicant, or otherwise essentially conducted the proceedings on the Applicant's behalf. At DOHA hearings, the question of whether the hearing shall be open or closed is governed by Directive ¶ E3.1.12. If an applicant requests a closed hearing, then Judge listens to the applicant's reasons and makes a ruling on the matter. In this case, the Judge decided on his own, without any input from the Applicant, that the hearing would be open:

ADMINISTRATIVE JUDGE: . . . Open and closed hearings.

Paragraph (3).1.12 of Enclosure 3 to DoD Directive 5220.6

provides that hearings will be open to spectators except upon

the request by the applicant that it be closed or if there is a need

to protect classified information or for other good cause.

In this instance, I have determined there is not sufficient

reason to close the hearing. Accordingly, the hearing will be open.

No classified information may be introduced, discussed,

or otherwise reveal during this hearing.

Do you understand?

APPLICANT: Yes.[(7)]

When it came time for Applicant's supervisor to testify, the Administrative Judge appears to have conducted most of the direct examination on Applicant's behalf.[(8)]

Based upon the record developed in this case, it is difficult for the Board to gage the level of Applicant's understanding of the process, or his degree of preparation for the hearing. In this case, the Administrative 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 notice, 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 was prepared to proceed. Moreover, no written pre-hearing guidance is in the file.

The notice of hearing was issued on June 14, 2005 and the hearing was held eight days later on June 22, 2005. Therefore, it appears the Applicant did not receive the 15 days advanced notification mandated by Directive ¶ E3.1.8. An applicant may waive the 15 day notice requirement. However, given the absence of a discussion on the record between the Administrative Judge and the parties on this issue, the Board cannot determine with certainty that he did.

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. *Compare* ISCR Case No. 02-17574 at 2 (App. Bd. July 24, 2006). Accordingly, the Board remands the case to the Judge with instructions that the case be reopened and that Applicant be given an opportunity to have a new hearing.

Order

The decision of the Administrative Judge denying Applicant a clearance is REMANDED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Judge's decision states the pension is from the "Iraqi" government. The Board construes this as a typographical error. Transcript at 32-33.

2. In his Answer, Applicant specifically stated: "I will attend the hearing accompanied by may personal representative."

3. Transcript at 5-6.

4. Transcript at 6-7.

5. *See, e.g.,* D.C. Bar Rules of Professional Conduct, Rule 3.7-Lawyer as Witness.

6. There is apparently no consistent practice among Hearing Office Administrative Judges with respect to this issue. *See, e.g.,* ISCR Case No. 01-10870 (A.J. Apr. 21, 2006)(Individual allowed to serve as both a personal representative and a witness). In this case, the Administrative Judge did not state a legal basis for his holding in this regard. However, the Judge's view was arguably consistent with a cursory reading of the Board's prior holding in ISCR Case No. 98-0619 (App. Bd. Sept. 10, 1999). That case can be distinguished from the instant case, in that in that case the record clearly reflected the fact that Applicant had received appropriate pre-hearing guidance. However, the Board has reconsidered its holding in ISCR Case No. 98-0619 as to the above point, in light of the facts and circumstances presented in this case. The Board now concludes that the better view was expressed in the dissenting opinion of Administrative Judge Emilio Jaksetic. For the purpose of clarity, and to establish a consistent practice, the Board adopts the rule that an applicant's personal representative may also serve as a witness in the case. To the extent it is practical, implementation of this rule should be consistent with hearing practices designed to produce a reliable record, such as witness sequestration.

7. Transcript at 8.

8. Transcript at 51-58.