DATE: November 29, 2006

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In re:

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SSN: --------

Applicant for Security Clearance

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ISCR Case No. 05-04831

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

Jeffrey J. Harradine, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 12, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision-security concerns raised under Guideline H (Drug Involvement) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 11, 2006, after the hearing, Administrative Judge James A. Young denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant claims on appeal that the Judge's decision was arbitrary and capricious because it failed to correctly apply the "whole person" test, and failed to explain his conclusion that Applicant's drug use was recent. Applicants assertion of error is without merit. However, the Judge's decision is vacated because Applicant's termination from employment before the hearing, albeit then unknown to the Judge or Department Counsel representing the Government, ended DOHA's jurisdiction to grant or deny a clearance under the Directive.

**Whether the Judge's Decision was Arbitrary, Capricious or Contrary to Law**

The Appeal Board may reverse or remand the Judge's decision to grant, deny, continue or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. A long line of our cases, based on Supreme Court precedent, define the "arbitrary and capricious" standard as one that requires an Administrative Judge to examine the relevant evidence and articulate a satisfactory explanation for his conclusions, including a "rational connection between the facts found and the choice made."[(1)] A decision is arbitrary and capricious when 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."[(2)] In deciding whether a decision is contrary to law, the Board will consider whether it is contrary to the provisions of Executive Order 10865, the Directive, or other applicable federal law.[(3)]

The facts of this case require us to decide whether DOHA jurisdiction to render a clearance decision ended when, after the issuance of the SOR and his reply thereto but some seven weeks before the hearing, Applicant quit the job for which he was seeking a clearance. Applicant's failure to appreciate or raise this as an issue on appeal does not negate our obligation to resolve this fundamental jurisdictional concern. As the Board has held:

Lack of subject matter jurisdiction to adjudicate a security clearance case is not waivable, can be raised by either party at any time in these proceedings, and can be raised *sua sponte* by a Hearing Office Administrative Judge or the Board even if neither party raises the issue. Of necessity, a Hearing Office Judge and the Board have jurisdiction to consider and resolve the threshold issue of whether there is subject matter jurisdiction to adjudicate a particular security clearance case under the Directive.[(4)]

The Board is neither permitted to consider new evidence on appeal, nor authorized to conduct evidentiary hearings to resolve factual disputes, including factual disputes about procedural issues.[(5)] In this case, however, the Judge properly entered findings of fact sufficient to permit resolution of this issue; an issue on which he correctly observed there is neither binding precedent nor an obvious single answer apparent from the language of the Directive itself.

The dispositive facts, as found by the Judge, are that Applicant was employed by Company A from 12 July 2004 until 31 January 2006. He completed a security clearance application on 13 July 2004. On 12 October 2005, DOHA issued the SOR, to which Applicant replied and elected a hearing on 19 December 2005. The hearing was conducted, with Applicant represented by counsel, on 24 March 2006. That same date, 24 March, Applicant's employer mailed a notice to DOHA that Applicant had been "separated" from employment on 31 January 2006.[(6)] This notice was received and provided to the Judge before he rendered his decision to deny Applicant a clearance.

Although the Judge cited provisions of DISCR (now DOHA) Operating Instruction 29, ¶ 1.F (May 19, 1986)[(7)], rather than Directive ¶ 4.4.which governs this issue, he correctly noted the rule that the case will continue to be processed through appeal despite termination of the applicant's employment if a hearing has already been held. He further noted that it is not clear from the OI (which is based on the Directive language[(8)]) whether continued processing of the case is appropriate when the applicant's employment or need for access to classified information was terminated before the hearing but neither the Government nor the Judge were so apprised.[(9)] Accordingly, the Judge rendered his decision and the issue is now ripe for Appeal Board clarification and decision.

The plain language of Directive ¶4.4. triggers the cessation of action pursuant to the Directive on the "termination of the applicant's need for access to classified information," rather than on any form of actual or constructive notice to the Government that this has occurred.[(10)] The exceptions permitting continuation of DOHA actions apply if the termination of need for access occurs after a hearing has commenced, after a decision has been issued, or an applicant whose clearance is suspended requests continuation. In the absence of some greater policy context indicating that this language necessarily implies a notice requirement, the plain meaning of the Directive is dispositive.

As is apparent from the facts of this case, it is not always possible for the Government to cease action on the clearance determination immediately upon termination of applicant's need for access when the Government actors don't know that has taken place. However, this rule is intended to define when DOHA jurisdiction to decide a pending case will end because there is no longer any need for the decision. If some form of actual or constructive notice from Applicant, or the employer in question, controlled whether jurisdiction continues, that would confer on those parties the power to continue proceedings, potentially granting a clearance to someone with no actual need for one. On the other hand, as illustrated by this case, clearance denial under such circumstances results in adverse consequences for the applicant when the need for the determination is moot. Neither outcome is in the best interests of national security.

The three stated exceptions also inform our decision on this issue. Only the third exception provides the option for continuation of the clearance determination at the request of the applicant. If continuing jurisdiction was intended to be left in the control of the applicant or employer through some notice provision, that "applicant request" language would not be found only in the third exception.

Finally, the plain language of Directive ¶4.4. establishes a workable, bright-line objective test for continuing or ending jurisdiction that is clearly harmonious with the overall Presidential policy that clearances only be granted when an applicant's access to classified information is clearly in the national interest. Continuation or termination of jurisdiction to decide the clearance action does not turn on whether the outcome is ultimately favorable or unfavorable to the applicant. Until subject matter jurisdiction attaches by commencement of the actual adjudication phase of the

proceedings, termination of the need for access to classified information ends DOHA's jurisdiction to proceed further in resolving the contested issues. The first two exceptions identify circumstances when the adjudicative phase has already been initiated to resolve an actual dispute over clearance eligibility, subject matter jurisdiction has attached, and at that point the applicant or employer involved should not be able to moot a potential adverse determination by simply withdrawing from the process.

While there may be cases in which the termination date for an applicant's need for access to classified information is factually disputed, this is certainly not such a case. Applicant left employment at Company A almost two months before the hearing and has never held any position needing access to classified information since then. Clearly a readily determinable rule for determining subject matter jurisdiction will benefit Judges and practitioners alike. Both notification and hearing procedures can be easily modified to ascertain before commencement of the hearing (or issuance of the decision in the absence of a hearing) whether the applicant continues to need access to classified information. Accordingly, under Directive ¶4.4., the actual date upon which an applicant's need for access to classified information terminates will, in the absence of one of the three stated exceptions, terminate DOHA jurisdiction to continue processing the security clearance determination. Actions taken after that date, without regard to when notice of such termination is received, will be considered null and void as being "contrary to law."

The Judge's rulings and conclusions denying Applicant a clearance were contrary to law because DOHA lacked jurisdiction under the Directive to conduct the hearing or render a clearance decision after Applicant's 31 January 2006 termination of employment. This is harmful error. Directive ¶E3.1.33 authorizes the Board to remand or reverse the decision of the Judge as necessary to correct identified error. There is no purpose to be served by remanding this case since the facts found by the Judge below demonstrate that DOHA authority to act on Applicant's clearance request ended in January 2006. Reversal[(11)], in the sense of vacating the decision and rendering void all proceedings in this case after that date, is mandated under these circumstances to correct this error.

**Order**

The Judge's decision to deny Applicant a security clearance is reversed. All DOHA processing in this case after 31 January 2006 shall be without legal effect.

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: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. *See* ISCR Case No. 04-04008 at 2 (App. Bd. Dec. 29, 2005) (citing ISCR Case No. 97-0435 at 3 (App. Bd. July 14,

1998)); *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)).

2. ISCR Case No. 03-10004 at 1-2 (App. Bd. Jan. 27, 2006) (citing ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998)).

3. ISCR Case No. 02-24227 at 3 (App. Bd. Oct. 7, 2003).

4. *Id.*, at 8 (citing *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996)).

5. *Id.*, at 9.

6. That notice included a copy of Applicant's JPAS "Person Summary" indicating he separated from employment on January 31, 2006 and that data had been entered into JPAS well before the hearing date.

7. This Operating Instruction (OI) establishes internal guidance concerning proper notification procedures and formats for processing terminations after issuance of an SOR. Unlike Directive ¶4.4., it is not jurisdictional. However, consistent with the Directive, it does provide that proceedings will continue upon termination if the hearing has commenced or a decision has been issued.

8. Directive ¶4.4. provides:

Actions pursuant to this Directive shall cease upon termination of the applicant's need for access to classified information except in those cases in which:

4.4.1. A hearing has commenced;

4.4.2. A clearance decision has been issued; or

4.4.3. The applicant's security clearance was suspended and the applicant provided a written request that the case continue.

9. Although Applicant's voluntary departure from Company A was noted as Background Information in Applicant Exhibit C (a clinical psychologist's evaluation report which was provided to Department Counsel several days before the hearing and to the Judge at the hearing), it is clear from the hearing transcript that neither the Judge nor Department Counsel then realized that Applicant no longer worked at Company A, and that neither Applicant nor his counsel appreciated that this fact might be significant. There is no evidence whatsoever that applicant attempted to conceal this from the Judge or Department Counsel. These observations are not additional facts necessary for decision of the issue, but are included to make clear that no additional fact finding with respect to any issue of bad faith is called for on the state of this record.

10. In the case cited at Note 3, *supra*, both Applicant and Department Counsel framed the issue of whether jurisdiction was lost before the decision was rendered as one turning on when the Government could be held to have received notice of the Applicant's termination. The Board did not decide that issue, instead remanding the case to the Hearing Office for additional necessary fact-finding because the decision below did not contain any facts bearing on continuation or termination of jurisdiction. The issue was first raised by Applicant on appeal in that case. On remand, the Judge found that DOHA jurisdiction over Applicant's case ended on the date his employer terminated his need for access to classified information and properly filed the form 562. ISCR Case No. 02-24227 (A.J. Dec. 31, 2003).

11. Black's Law Dictionary defines "Reverse" as "To overthrow, vacate, set aside, make void, annul, repeal or revoke; as to reverse a judgement, sentence or decree, or to change to the contrary or to a former condition." Although the Board routinely uses the word, "reverse" to mean entry of a final clearance decision opposite to that reached by the Hearing Office Administrative Judge, such usage is not compelled nor, in this case, appropriate.