DATE: November 7, 2000

In Re:

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

Applicant for Security Clearance

ISCR Case No. 00-0055

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Richard A. Cefola issued a decision, dated July 21, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Order for Remand.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992, as amended.

Applicant's appeal presents the following issue: whether pertinent information was not considered by, or not available to, the Administrative Judge when the Judge made his adverse security clearance decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated February 10, 2000. The SOR was based on Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).

Applicant submitted an answer to the SOR, dated March 6, 2000. In the answer, Applicant indicated that he "decided not to have a hearing." Department Counsel prepared a File of Relevant Material (FORM). A copy of the FORM was sent to Applicant, who submitted a response to the FORM. The case was then assigned to the Administrative Judge for consideration and disposition.

The Administrative Judge issued a written decision, dated July 21, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse decision.

Appeal Issue

On appeal, Applicant asserts the adverse decision in his case is based on a failure of the Administrative Judge to consider or understand the statements made by his former spouse about the matters covered by SOR 1.a. In support of that assertion, Applicant refers to a March 1, 2000 letter from his former spouse and attaches to his appeal brief a

September 1, 2000 letter from his former spouse.[(1)] The September 1, 2000 letter is new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. However, the March 1, 2000 letter referred to by Applicant was included in the record as an attachment to his answer to the SOR.

The March 1, 2000 letter by Applicant's former spouse contains the following paragraph: "Having spent a significant amount of time with DSS [Defense Security Service] in interviews about events during my marriage to [Applicant], I would like to reiterate the statements I made during those interviews, as they are an accurate description. The resulting written and signed statements from said interviews should supersede any statements taken out of context, so as to avoid confusion and/or misinterpretation." No copy of any written statement by Applicant's former spouse to DSS was offered by Department Counsel or Applicant during the proceedings below. The Administrative Judge's decision (at page 3) contains the following footnote: "I must assume that if such an exonerating sworn statement existed, Department Counsel, as an officer of the court, would have included it in the FORM."

The Administrative Judge's footnote indicates the Judge gave little or no weight to the March 1, 2000 letter by Applicant's spouse because the Judge concluded that if Applicant's former spouse had given written statements to the DSS, then Department Counsel would have copies of those written statements and Department Counsel would have included them in the FORM. The Judge's reasoning is flawed. First, there is no basis in the record evidence for the Judge to assume that Department Counsel had copies of any written statements that Applicant's former spouse might have given to DSS. Neither a Judge nor this Board should make assumptions, in any given case, about what documents the DSS did or did not make available to DOHA.[(2)] Second, the Judge is incorrect in assuming that Department Counsel had any obligation to place in the FORM copies of any written statements that Applicant's former spouse might have given to the DSS. The Board has specifically held that if Department Counsel is aware of potentially exculpatory information in the possession of DOHA, Department Counsel would not be obligated to present it as part of the government's case, but rather Department Counsel would have an obligation to disclose such information to the applicant. DISCR Case No. 93-0201 (May 18, 1994) at p. 5 n.3.[(3)] Accordingly, given the sparse record evidence in this case, the Judge did not have a rational basis to infer the absence of any written statements by Applicant's former spouse in the FORM meant that no such written statements existed.

Given the procedural history of this case and the sparse record evidence, it is impossible to determine: (a) whether Department Counsel was in possession of written statements that Applicant's former spouse might have given to the DSS; (b) even if Department Counsel was not in possession of such written statements, did it have information from DSS indicating whether Applicant's former spouse gave any written statements to DSS; (c) if Department Counsel was in possession of written statements by Applicant's former spouse, did Department Counsel make copies available to Applicant; or (d) whether Applicant was in possession of copies of his former spouse's written statements to DSS (obtained from DSS, Department Counsel, or his former spouse) at the time he responded to the SOR or when he responded to the FORM. Without record information about such matters, it is impossible to determine whether: (1) either Department Counsel or Applicant had possession of written statements that Applicant's former spouse might have given to DSS; (2) Applicant was hampered in his ability to present copies of his former wife's written statements in support of his case; or (3) Applicant had such written statements in his possession and waived his right to offer them by not submitting them in response to the SOR or the FORM.

Conclusion

Pursuant to Item E3.1.33.2 of the Additional Procedural Guidance, the Board remands the case to the Administrative Judge with instructions to reopen the record to receive from both parties information to determine the following: (1) whether Applicant's former spouse gave written statements to DSS; (2) if Applicant's former spouse gave written statements to DSS, were copies of them provided to DOHA; (3) if copies of such written statements were provided to DOHA by DSS, did DSS or Department Counsel provide Applicant with copies of them; (4) did Applicant have copies of such written statements because his former spouse gave him such copies; (5) if Applicant had copies of such written statements by his former spouse, did he have them when he answered the SOR or responded to the FORM; (6) whether, given all the circumstances, Applicant has a right to offer such written statements as evidence on his behalf; and (7) if so, whether Applicant wishes to exercise that right on remand. When receiving information from the parties, the Judge should entertain and rule on any objection or claim of privilege either party might raise. The Judge should then issue a new decision (pursuant to Item E3.1.25 of the Additional Procedural Guidance) which includes specific findings and

conclusions regarding these matters.

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

1. Department Counsel did not file a reply brief. Therefore, the Board does not have the benefit of Department Counsel's views about Applicant's appeal brief.

2. Experience in adjudicating industrial security clearance cases provides Administrative Judges in the Hearing Office and the Appeal Board with knowledge of many of the kinds of documents that typically are provided to DOHA by DSS. However, such knowledge does not provide a sufficient basis for a Hearing Office Judge or the Appeal Board to make assumptions about what specific documents the DSS provided to DOHA in any given case. The fact that a particular kind of document has been provided to DOHA by DSS in many past cases does not prove that a document of that kind was in fact provided to DOHA by DSS in a specific case.

3. There are several reasons why Department Counsel is not obligated to present potentially exculpatory information as part of the government's case, but is obligated to disclose such information to an applicant. First, DOHA proceedings are adversarial in nature and Department Counsel is not obligated to act as a surrogate advocate for an applicant. Indeed, expecting Department Counsel to act as a surrogate advocate for an applicant would place Department Counsel in a conflict with his or her obligations as an advocate for the Department of Defense. Second, the obligation to provide for a fair proceeding (Directive, Section 4.1.2) means that Department Counsel must take reasonable steps to avoid a possible injustice if Department Counsel is aware of potentially exculpatory information in the possession of DOHA that may not be in the possession of an applicant. Providing an applicant with a copy of such potentially exculpatory information would be one such step. Third, the substance and appearance of a fair proceeding requires that an applicant, not Department Counsel, decide whether it is in the applicant's best interest for a particular piece of evidence to be offered on his or her behalf.