

DATE: December 31, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-24227

**REMAND DECISION AND ORDER OF  
ADMINISTRATIVE JUDGE WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Eric Borgstrom, Esquire, Department Counsel

**FOR APPLICANT**

Frank A. Libby, Jr., Esquire

**SYNOPSIS**

On Remand. It is found that the Department of Defense did not have jurisdiction over the Applicant when the original Decision was issued on April 23, 2003. That is because a valid Form 562 (Clearance Change Notification) terminating the Applicant's pending application for a security clearance was properly submitted to the Department of Defense on December 10, 2002. Decision of April 23, 2002, is found null and void. Prior Decision Vacated.

**STATEMENT OF THE CASE**

On April 23, 2003, I issued a Decision (Decision) in this case finding that it was not clearly consistent with the national interest to grant the Applicant access to classified information. The Applicant appealed this Decision and, on October 7, 2003, the Appeal Board of the Defense Office of Hearings and Appeals (Appeal Board) remanded the Decision to this Administrative Judge with instructions stating that I, "(1) reopen the record to allow the parties to present evidence concerning the facts and circumstances of the termination of Applicant's security clearance, and (2) make a ruling as to whether Applicant's case should have been terminated, pursuant to Section 4.4. of the Directive [DoD Directive 5220.6], without a security clearance decision being issued." (Appeal Board Decision and Remand Order (Appeal Board Decision) at 5.)

Pursuant to those instructions I issued an Order Reopening Record on Remand (Order) on October 16, 2003. The Order required the parties to meet and confer, and to serve on me a Joint Stipulation of Agreed Facts (Joint Stipulation). Each party was also to prepare a Proposed Statement of Contested Facts (if any) and a Memorandum of Points and Authorities.

The Joint Stipulation, together with nine Documentary Exhibits (Joint Stipulation Exhibits 1 through 9), was submitted to me on November 13, 2003. Neither party submitted a Proposed Statement of Contested Facts. The Applicant's counsel also prepared and submitted a Memorandum of Points and Authorities on November 13, 2003. On November 17, 2003, Department Counsel submitted a letter stating that he would not be submitting a Memorandum of Points and

Authorities.

### ISSUE

The issue in this case on remand is whether the Applicant's case should have been terminated, pursuant to Section 4.4 of the Directive, without a decision being issued.

### FINDINGS OF FACT

The Joint Stipulation of Agreed Facts is hereby incorporated by reference into this Decision and Order. Based on that Joint Stipulation, the nine Joint Stipulation Exhibits, as well as the original case file, the following Findings of Fact are made:

1. The Applicant submitted a Security Clearance Application to the Defense Security Service (DSS) on March 21, 2002. (Joint Stipulation Exhibit 1.)
2. A Statement of Reasons was issued concerning the Applicant on September 26, 2002. (Joint Stipulation Exhibit 2.)
3. The Applicant submitted an Answer to the Statement of Reasons on October 7, 2002, requesting a decision without a hearing. (Joint Stipulation Exhibit 3.)
4. On October 31, 2002, Department Counsel submitted a File of Relevant Material (FORM) to the Applicant. Pursuant to Section E3.1.7 of DoD Directive 5220.6, the Applicant had 30 days to submit information in rebuttal to the FORM.
5. The Applicant did not respond to the FORM. Rather, his employer decided that the Applicant no longer required a security clearance. On December 10, 2002, the Applicant's application for a security clearance was withdrawn by his employer using the electronic version of the DoD Form 562 (Clearance Change Notification). (Joint Stipulation Exhibit 5.) This form is used to administratively change the security clearance status of people like the Applicant. That document states under section 1, "Type of Change - Administrative Termination // Effective Date - 2002/12/10 // Termination Status - Pending Clearance." Submission of a Form 562 to administratively terminate a clearance is not a punitive action.
6. The Applicant confirmed that the Form 562 had been submitted electronically to DSS on December 1, 2002.
7. The Defense Industrial Security Office (DISCO) received the Applicant's electronically filed DISCO Form 562 on or about December 10, 2002.
8. Due to an apparent administrative error within DISCO the Applicant's Form 562 was not forwarded to DOHA (or, if forwarded, was not properly processed by DOHA personnel). As such, on or about January 3, 2003, the Applicant's security clearance application was inadvertently forwarded to me for decision.
9. The properly filed Form 562 was not made part of the FORM by Department Counsel. The fact of the Applicant's administrative termination was also not commented on by the Department Counsel or the Applicant. Accordingly, based on the available record, on April 23, 2003, I issued a Decision denying the Applicant's request for a security clearance. The subject appeal followed.

### POLICIES

In pertinent part, DoD Directive 5220.6 states the following:

#### 4. POLICY

It is DoD policy that:

4.4. 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.

#### ADDITIONAL PROCEDURAL GUIDANCE

E3.1.10. The Administrative Judge may rule on questions of procedure, discovery and evidence and shall conduct all proceedings in a fair, timely, and orderly manner.

#### CONCLUSIONS

The Applicant's need for access to classified information was terminated by his employer on December 10, 2002. On that same date, the employer fulfilled its responsibilities by forwarding Form 562 to DISCO. The parties have stipulated that DISCO received Form 562, thereby completing the employer's and the Applicant's responsibilities.

Based on that proper filing, I find that the Applicant's case should have been terminated at that time because he no longer had a need for access to classified information as of December 10, 2002. That is because it is DoD policy that, "Actions pursuant to this Directive *shall cease upon termination of the applicant's need for access to classified information.*" (Paragraph 4.4, Directive.) (Emphasis supplied.) The Applicant's case does not meet any of the exceptions. I specifically find that Exception 4.4.2 does not apply because Form 562 was issued before my Decision.

Accordingly, the Decision of April 23, 2003, should not have been issued because DOHA no longer had jurisdiction over the Applicant. That Decision is null and void and will be vacated.

#### DECISION AND ORDER

In light of all the circumstances presented by the record in this case, the security clearance Decision in this case dated April 23, 2003, is **NULL AND VOID** and hereby **VACATED**.

Appropriate administrative action shall be taken in conformance with this Decision and Order.

**IT IS SO ORDERED.**

Wilford H. Ross

Administrative Judge