October 25, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIIEW

IN THE MATTER OF: P[redacted] A[redacted]

This is an appeal from a decision of the Assistant Secretary of State for Consular Affairs, Department of State, dated February 10, 1988, sustaining the denial of appellant's application for a passport.

Following a proceeding held on October 15, 1987, before a hearing officer of the Department of State ("Department") to establish the basis of the Department's denial of passport facilities to appellant, P[redacted] A[redacted] the hearing officer recommended to the Assistant Secretary for Consular Affairs that the adverse passport action be upheld. The Assistant Secretary approved the hearing officer's findings of fact and recommendation, and notified appellant of her decision. Appellant appeals.

We have concluded for the reasons given below that the administrative record before us is incomplete and defective, and we remand the appeal to the Department for further proceedings in compliance with the regulations.

I

In December 1979, the Department revoked the passport of P[redacted] A[redacted], a United States citizen and former employee of the Central Intelligence Agency ("CIA") residing in West Germany, under the provisions of sections 51.70(b)(4) and 51.71(a) of Title 22, Code of Federal Regulations. 1/ The

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1/ 22 CFR 51.70(b)(4) reads:

> See. 51.70 Denial of passports.
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> ...
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> (b) A passport may be refused in any case in which:
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> ...
>
> (4) The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States; or.. .

22 CFR 51.71(a) provides:

Department's action was predicated upon a determination made by the Secretary of State ("Secretary") that [redacted] activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States. The principal reason given for that determination was [redacted] "stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States." [redacted] was provided with a statement of reasons for the Secretary's determination and advised of his right to an administrative hearing. In lieu of that option, he filed suit against the Secretary challenging the revocation of his passport on both statutory and constitutional grounds, and seeking declaratory and injunctive relief. On June 29, 1981, the Supreme Court of the United States upheld in Haig v. [redacted] 453 U.S. 280 (1981) the authority of the Secretary to revoke [redacted] passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States.

On October 2, 1980, the United States District Court for the District of Columbia issued a permanent injunction enjoining [redacted] from "further violation" of the terms of his Secrecy Agreement with the CIA and, in particular, from disseminating, or causing to be disseminated, any information or material relating to the CIA, its activities, or intelligence activities generally, without the express written consent of the Director of the Central Intelligence Agency or his representative. 2/

1/ Cont'd.

51.71 Revocation or restriction of passports.

A passport may be revoked, restricted or limited where:

(a) The national would not be entitled to issuance of a new passport under sec. 51.70; or

...

2/ As a condition of his employment with the Central Intelligence Agency, [redacted] signed a Secrecy Agreement on July 22, 1957. He undertook not to publish or participate in the publication of any information or material relating to the CIA, its activities or intelligence activities generally, either during or after the term of his employment by the CIA without specific prior approval by the CIA.

[redacted] v. Central Intelligence Agency, Civ. No. 79-2788, USDC, D.C. (Oct. 2, 1980). The court modified the permanent injunction on November 21, 1980, by adding the following order:

> (2) That extemporaneous oral remarks that consist solely of personal views, opinions, or judgments on matters of public concern, and that do not contain, or purport to contain, any direct or indirect reference to classified intelligence data or activities, are not subject to this injunction: ...

On January 21, 1987, [redacted] submitted an application for a new passport to the United States Embassy at Madrid. The Department denied the passport application on April 28, 1987, under the provisions of section 51.70(b)(5) of the passport regulations. 3/ That section provides that a passport may be refused in any case in which the applicant has been the subject of a prior adverse action under section 51.70 **or** section 51.71 and has not shown that a change in circumstances since such adverse action warrants issuance of a passport. The Department's denial action was based on the fact that [redacted] was the subject of a passport revocation in December 1979 and that he had not demonstrated that his activities abroad since that time had changed to warrant issuance of a passport.

3/ 22 **CFR** 51.70(b)(5) reads:

> See, 51.70 Denial of passports.
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> ...
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> (b) A passport may be refused in any case in which:
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> ...
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> (5) The applicant has been subject of a prior adverse action under this section or sec. 51.71 and has not shown that a change in circumstances since the adverse action warrants issuance of a passport.
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> ...

The Department advised [redacted] that he might submit evidence of a change in circumstances since the prior adverse action and also informed him of his right to a proceeding before a hearing officer. 4/ By letter dated April 30, 1977, counsel for [redacted] submitted evidence purporting to show the requisite change of circumstances to warrant issuance of a passport. Counsel also gave notice of [redacted] request for a hearing if a passport were not issued [redacted] on his submission.

On June 29, 1987, the Department informed counsel for [redacted] that the Secretary had determined that the evidence submitted "does not support the contention that circumstances have changed since Mr. Agee's passport was revoked in 1979." By letter dated August 17, 1987, the Department provided counsel a statement of reasons for the Secretary's decision. In response to counsel's demand of August 25, 1987, for production prior to the hearing, of documents and information referred to in the Department's letter of August 17, 1987, the Department, on October 7, 1987, provided "as a matter of discretion", copies of only

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4/ 22 CFR 51.81 provides for a hearing to review an adverse passport action. It reads:

> Sec. 51.81 Time limits on hearing to review adverse action.
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> A person who has been the subject of an adverse action with respect to his or her right to receive or use a passport shall be entitled, upon request made within 60 days after receipt of notice of such adverse action, to require the Department or the appropriate Foreign Service post, as the case may be, to establish the basis for its action in a proceeding before a hearing officer. If no such request is made within 60 days, the adverse action will be considered final and not subject to further administrative review. If such request is made within 60 days, the adverse action shall be automatically vacated unless such proceeding is initiated by the Department or the appropriate Foreign Service post, as the case may be, within 60 days after request, or such longer period as is requested by the person adversely affected and agreed to by the hearing officer.

eight of the twelve items enumerated therein that were "publicly available." The Department stated that it considered the information that has been furnished [redacted] counsel provided "more than adequate notice of the factual basis for the Secretary's decision" and, therefore, the Department "will provide no additional prehearing information."

The hearing to review the Department's adverse passport action was held on October 15, 1987, at the Department of State, and, as requested by appellant's counsel, was open to the public. [redacted] appeared in person accompanied by counsel. The Department also was represented by counsel.

The Department's hearing counsel introduced into the record twenty five (25) exhibits. Five (5) of the exhibits, consisting of cables exchanged between the Department and the **U.S.** Embassy at Madrid, Spain, and the **U.S.** Consulate General at Hamburg, West Germany, were offered to establish that [redacted] applied for a passport. Sixteen (16) exhibits consist of copies of correspondence between [redacted] counsel and the Department concerning appellant's passport case. One (1) exhibit consists of a letter from [redacted] to the Consulate General at Hamburg: another one (1) is an internal memorandum informing the hearing officer that the Department did not intend to present any witnesses at the hearing. The remaining two (2) exhibits consist of a letter of Harry L. Coburn, Deputy Assistant Secretary, Passport Services, dated June 3, 1987, to William H. Webster, Director, Central Intelligence Agency (**Exh.** 10), and an Action Memorandum from the Assistant Secretary for Consular Affairs to the Secretary, dated June 26, 1987, with six attachments (Exh. 11).

Counsel for [redacted] introduced (as Respondent Exh. A) a copy of his letter, dated December 13, 1984, to Paul Schilling, Publications Review Board, Central Intelligence Agency, enclosing a manuscript of [redacted] for CIA review, a copy of a letter, dated December 27, 1984, from Anne Fischer, Associate Legal Adviser, Publications Review Board confirming receipt of the manuscript, and a copy of her letter of January 16, 1985, informing [redacted] counsel that the Publications Review Board has found no security objection to the publication of the submitted material.

At the hearing appellant's counsel made several objections for the record. He objected to the entire proceeding on the ground that sections 51.70(b)(4) and 51.70(b)(5) are unconstitutional because the regulations

violate [redacted] First Amendment right of free speech. 5/ Counsel also objected to the admissibility of seven of eight attachments to the Department's letter of October 7, 1987 (Exh. 23), that were furnished him in partial response to his demand for the production of certain documents. 6/ The attachments consisted of certain published reports of speeches, interviews, conferences, and television appearances relating to [redacted] conduct and public statements on intelligence matters since the revocation of his passport. Counsel argued that the attachments were inadmissible essentially because they lacked proper identification and were unauthenticated.

Counsel for Agee further objected to the admissibility of the Action Memorandum to the Secretary, dated June 26, 1987 (Exh. 11), by approving which the Secretary determined that Agee had not shown a material change of circumstances since 1979 that would warrant issuance of a passport. 7/ There was attached to the Action Memorandum a letter from William H. Webster, Director of the CIA, dated June 20, 1987, in response to the request of Harry L. Coburn, Deputy Assistant Secretary for Passport Services, seeking information and evidence regarding Agee's activities. The Director stated that the CIA believed that "there is evidence that Mr. Agee's efforts to disrupt, discredit, and frustrate the effectiveness of our nation's intelligence activities have subsequently continued unabated" and that the continued denial of a passport was warranted. An accompanying appendix to the Director's letter listed Agee's pubiic statements on intelligence matters. Counsel for Agee characterized the letter a farce, based on hearsay, unsubstantiated information and unauthenticated documents. 8/

Appellant's counsel also contended that the hearing was unlawful in that the Department violated section 51.85

5/ Transcript of Hearing on Passport Denial In the Case of: Philip B.F. Agee, Department of State, October 15, 1987 (hereafter referred to as "TR"). 18.

6/ TR 44-52.

7/ TR 64.

8/ TR 65.

of the passport regulations. 9/ That section provides that the person adversely affected shall be entitled to be informed of all the evidence before the hearing officer and of **the** source of such evidence, and shall be entitled to confront and cross-examine any adverse witness. [redacted] counsel argued that the Department failed to identify the sources of the evidence adversely affecting [redacted] and to afford the latter the opportunity to [redacted] and cross-examine any adverse witness. 10/ Counsel requested that the Department produce the Director of the CIA as a witness subject to cross-examination. 11/

Counsel for [redacted] maintained that the Department failed entirely "to sustain the burden which they have to justify the refusal of the Secretary of State to issue a passport. That nothing they have introduced requires an answer because none of it is competent. None of it is admissible." 12/

9/ **22 CFR** 51.85 reads:

> Sec. 51.85 Proceedings before the hearing officer.
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> The person adversely affected may appear and testify in his or her own behalf and may himself, or by his or her attorney, present witnesses and offer other evidence and make argument. **If** any witness whom the person adversely affected wishes to call is unable to appear in person, the hearing officer may, in his or her discretion, accept an affidavit **by** the witness or order evidence to be taken **by** deposition. **The** person adversely affected shall be entitled to be **informed** of **all** the evidence before the hearing officer and of the source of such evidence, and shall be entitled to confront and cross-examine any adverse witness. The person **shall,** upon request by the hearing officer, confirm his or her oral statements in an affidavit for the record.

10/ **TR** *69, 70.*

11/ **TR 71,** 77, **78,** 80.

12/ **TR** 90.

Agee did not testify at the hearing, but made a statement, which, at the request of the hearing officer, he later confirmed in an affidavit. Subsequent to the hearing, the Department informed the hearing officer, by letter dated November 16, 1987, that it would not submit a memorandum of law. On November 23, 1987, [redacted] submitted his affidavit for the record, and on December 2, 1987, his counsel submitted a aemorandum of law.

On February 9, 1988, the Department hearing officer made her findings of fact and recommendation to the Assistant Secretary for Consular Affairs. The hearing officer recommended that the denial of passport facilities be upheld. Upon review of the record, including the transcript of the hearing proceedings, the Assistant Secretary concluded that the Department's action in denying passport facilities was proper. On February 10, 1988, the Assistant Secretary notified Agee's counsel of her adverse decision and of [redacted] right to appeal that decision to the Board of Appellate Review. 13/ In response to demands made by [redacted] counsel, the Assistant Secretary, on March 11, [redacted] further explained the reasons for her adverse decision and enclosed with her letter a copy of the hearing officer's findings of fact and recommendation. This appeal followed.

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The jurisdiction of the Board of Appellate Review is strictly circumscribed with respect to appeals taken

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13/ 22 C.F.R. 51.89 provides:

> Sec. 51.89 Decision of Assistant Secretary for Consular Affairs; notice of right to appeal.
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> The person adversely affected shall be promptly notified in writing of the decision of the Assistant Secretary for Consular Affairs and, if the decision is adverse to him or her, the notification shall state the reasons for the decision and inform him or her of the right to appeal the decision to the Board of Appellate Review (Part 7 of this chapter) within 60 days after receipt of notice of the adverse decision. If no appeal is made within 60 days, the decision will be considered final and not subject to further administrative review.

from decisions of the Assistant Secretary for Consular Affairs denying, revoking, restricting or invalidating a passport. The Board's review is limited solely to the record on which the Assistant Secretary's decision was based. 14/ The Board is precluded from receiving or considering evidence or testimony not presented at the hearing held to establish the basis for such adverse passport action unless it is satisfied that such evidence or testimony was not available or could not have been discovered by the exercise of reasonable diligence prior to such hearing.

The Board is enjoined from considering argument challenging the constitutionality of any law or of any regulation of the Department. 15/ In the instant case, however, the constitutionality of the Secretary's power to deny passports has already been upheld by the Supreme Court, although all of the Department's relevant procedures affecting passports have not been equally authoritatively settled. 16/

Although the provisions of the Administrative Procedure Act have not been replicated by the Department's regulations for review of adverse passport actions, the

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14/ 22 CFR 7.7 reads:

> Sec. 7.7 Passport cases.
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> (a) Scope of review. With respect to appeals taken from decisions of the Assistant Secretary for Consular Affairs denying, revoking, restricting, or invalidating a passport under sections 51.70 and 51.71 of this chapter, the Board's review, except as provided in paragraph (b) of this section, shall be limited to the record on which the Assistant Secretary's decision was based.
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> (b) Admissibility of evidence. The Board shall not receive or consider evidence or testimony not presented at the hearing held under sections 51.81-51.89 of this chapter unless it is satisfied that such evidence or testimony was not available or could not have been discovered by the exercise of reasonable diligence prior to such hearing.

15/ 22 CFR 7.5(j).

16/ Haig v. [redacted] 453 U.S. 280 (1981).

principal procedural requirements mandated by that Act are found in the governing passport regulations. 17/ The regulations include the following requirements of "due process of law": a requirement that the Department establish the basis for its adverse action in a proceeding before a hearing officer, the right of the parties to appear with counsel at the hearing, the right of the person adversely affected to present oral and written evidence, to be informed of all the evidence before the hearing officer and of the source of such evidence, and the right to confront and cross-examine any adverse witness. The regulations also provide that if any witness whom the person adversely affected wishes to call is unable to appear in person, "the hearing officer may, in his or her discretion, accept an affidavit by the witness or order evidence to be taken by deposition." 18/

As to admissibility of evidence, the regulations prescribe that the parties may introduce such evidence as the hearing officer deems proper. While formal rules of evidence shall not apply, the regulations state that "reasonable restrictions shall be imposed as to relevancy, competency and materiality of evidence presented." 19/

In this case, appellant [redacted] applied for a new passport on January 21, 1987, thus raising the issue whether, having previously been denied a passport because the Secretary had determined his activities abroad were causing or were likely to cause serious damage to the national security or the foreign policy of the United States, he had shown that a change in circumstances since that denial warranted issuance of a passport. 20/

As we have seen, the Department on April 28, 1987, advised [redacted] attorney that the passport was being denied because such a change of circumstances had not been shown. By reply letter of April 30, 1987, appellant's counsel asserted that appellant had not exposed any CIA clandestine activities and personnel, and that he had complied with his Secrecy Agreement and all applicable CIA

17/ 5 U.S.C. 551-559.

18/ 22 CFR 51.85. See supra, n.9.

19/ 22 CE'R 51.86.

20/ 22 CFR 51.70(b)(4) and (5). See supra, n. 1 and n.3.

policy statements since the U.S. District Court permanent injunction was issued on October 2, 1980. Copies were appended to that letter of applications for pre-publication clearance from the CIA and of such clearances extending through December 30, 1986. Responding to the Department's request for advice, the Director of the CIA by letter of June 20, 1987, stated that [redacted] had persisted in violating the terms of his Secrecy Agreement and of the permanent injunction of October 2, 1980 (modified November 21, 1980) not to disseminate or cause to be disseminated information or material relating to the CIA, its activities or intelligence in general. The Director's allegations were supported by the enumeration of twelve instances of appellant's conduct during this period, attached as an appendix to the letter.

It is these twelve citations of conduct, and the Department's treatment of them, which form the core of the issues before this Board. They were attached to and supported the Action Memorandum of June 26, 1987, from the Assistant Secretary for Consular Affairs to the Secretary, recommending denial of [redacted] application for a passport on the grounds he had not demonstrated changed circumstances warranting issuance of a passport, with which recommendation the Secretary agreed. The Department's brief in this appeal states that "The Secretary's decision was based entirely upon the information and documents submitted to him by the June 26, 1987 memorandum." While there were other attachments, the twelve citations enumerated by the Director of the CIA, were the principal, indeed the exclusive, substantive support. The Department's letter of August 17, 1987 to appellant's counsel again cited these twelve allegations as the specific reasons for the Secretary's decision.

The same twelve citations of conduct formed the essence of the Department's presentation at the hearing held in the Department on October 15, 1987, under the governing regulations for review of adverse passport actions. Although counsel for appellant repeatedly requestex&-production of the Director of the CIA and opportunity to cross-examine him regarding the sources and accuracy of the twelve allegations, this opportunity was not provided. The Department's counsel rested his case on the Action Memorandum to the Secretary as the sole basis for the Secretary's decision, drawing an apparent distinction between that memorandum and its supporting documentation.

Parenthetically, we note that, although adequate opportunity was offered before and during the above departmental hearing for appellant to present witnesses to

support his contention of changed circumstances warranting issuance of a passport, his counsel did not do so. He did provide copies of correspondence with the CIA's Publications Review Board to support his contention that [redacted] did furnish material for pre-publication approval between 1980 and 1986, but he did not present witnesses to support his claim of changed circumstances.

By letter of February 10, 1988, the Assistant Secretary of State for Consular Affairs advised appellant's counsel that on examining the transcript of the hearing, the hearing officer's findings, and the case record, she had concluded the Department's action in denying [redacted] passport was proper and the adverse action was upheld. By letter of March 11, 1988, tne Assistant Secretary provided further specification of the reasons for this conclusion and enclosed a copy of the hearing officer's findings and recommendation. These findings and recommendation again relied strongly upon the same twelve citations attached to the letter of the Director of the CIA.

Of these twelve citations, nine involved publication of articles or interviews or advice to foreign publications, foreign television programs, or foreign public meetings. 21/ One charged appellant with having a Nicaraguan passport — as replacement for an earlier passport revoked by the current government in Grenada; two alleged appellant had advised the intelligence services of Cuba for pay, had trained Nicaraguan officials to detect U.S. intelligence personnel and activities, and had trained Grenadian Revolutionary Army and intelligence personnel regarding alleged CIA activities and personnel covers. 22/ In five of the citations involving appellant's writings or statements appearing in foreign publications or on foreign television, he was alleged to have identified CIA personnel by name or given the locations of CIA offices. 23/

It should be reiterated here that the essence of the June 20, 1987 letter of the Director of the CIA is that appellant has persisted in violating the terms of his Secrecy Agreement and the provisions of the district court's injunction not to disseminate or cause to be

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21/ Nos. 1, 2, 3, 4, 5, 6, 9, 10 and 12.

22/ Nos. 7, 8 and 11.

23/ Nos. 2, 4, 6, 9 and 10.

disseminated information or material relating to the CIA, its activities or intelligence in general. The twelve citations or enumerations were intended to support those conclusions. Appellant, however, submitted to the Department the pages from his manuscript "100 Questions and Answers About the CIA" and the clearance from the CIA for publication, which his counsel stated clearly demonstrated that the first of the specific reasons supporting the denial of passport was without foundation, in that the cited article in the West German magazine Geheim was simply a translation into German of the material previously cleared by the CIA's Publications Review Board. 24/ Appellant's counsel also submitted many copies of his correspondence with that Board and the Board's pre-publication clearance, which indicated that a wide range of written material about CIA activities was in fact cleared in accordance with the Secrecy Agreement and the injunction, although no copies of any part of the cleared material were submitted, merely the titles. 25/ Moreover, the injunction, as modified on November 21, 1980, specified that contemporaneous oral remarks that consisted solely of personal views, opinions or judgments on matters of public concern and did not contain any direct or indirect reference to classified intelligence data or activities were not subject to that injunction.

We do not here address the question whether appellant, by presenting to the Department the above

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24/ In her findings of fact and recommendation to the Assistant Secretary for Consular Affairs, the hearing officer acknowledged that appellant's counsel presented sufficient evidence at the hearing to show that the article in the West German magazine Geheim had been submitted for pre-publication review to the CIA. Memorandum of Department hearing officer, Michele E. Truitt, to the Assistant Secretary for Consular Affairs, Joan M. Clark, dated February 9, 1988.

25/ For example, November 25, 1980, "Destabilization in Jamaica"; January 14, 1981, "Naming Names - Why"; July 6, 1982, "The CIA in Western Europe"; January 17, 1983, untitled article on the British security service; April 5, 1983, "Questions and Answers About the CIA"; April 14, 1983, "A Friendly Interview"; December 9, 1983, "The CIA in Post-Bishop Grenada"; September 21, 1983, "Subversion Failed, Nicaragua Revisited"; September 25, 1984, "Prologue"; October 17, 1984, "Uncloaking the CIA'; January 30, 1986, "On the Attack"; Various chapters of "100 Questions and Answers About the CIA" in 1985 and 1986.

described material, has met his burden of showing "that a change in circumstances since the adverse action warrants issuance of a passport" in accordance with section 51.70(b)(5) of the regulations. We are of the view, rather, that by presenting this material appellant indicated that so much pre-publication clearance had been provided by CIA as to warrant careful examination of each of the twelve citations in appropriate confrontational manner, particularly in light of the careful Limitation of the above modified injunction's ambit. As noted previously, the regulations clearly state that if any witness whom the adversely-affected person wishes to call "is unable to appear in person, the hearing officer may, in his or her discretion, accept an affidavit by the witness or order evidence to be taken by deposition. The person adversely affected shall be entitled to be informed of all the evidence before the hearing officer and of the source of such evidence, and shall be entitled to confront and cross-examine any adverse witness." 26/

At the hearing, appellant's counsel repeatedly requested that the Director of the CIA be produced for testimony and cross-examination regarding the sources and accuracy of the twelve citations of appellant's conduct which formed the basis for the Secretary's decision to deny issuance of a passport. Not only were counsel's requests denied; no opportunity was provided to have such testimony taken through means of depositions based on written interrogatories, well within the discretion of the hearing officer. In view of the evidence presented by appellant, without regard to the level of its evidentiary value or to the fact no witnesses were called on appellant's behalf, we believe that there was adequate reason at least to turn the allegations of the twelve citations in the Director's letter into evidentiary proof in accordance with the provisions of the Department's own rules of procedure in such cases.

We concur with the contention of counsel for appellant, in his letter of June 22, 1988, that the Department failed to follow its own regulations. In this connection, we find apposite the citation by counsel in his memorandum on appeal dated March 3, 1988 of the Supreme Court's decision in Vitarelli v. Seaton, 359 U.S. 535 (1959). There, Mr. Justice Harlan said (359 U.S. at 540):

26/ 22 CFR 51.85. See supra, n. 9.

> Preliminarily, it should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities. For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a cause being tried in a court of law before trained judges, scrupulous observance of departmental safeguards is clearly of particular importance.

The CIA doubtless has ample means to protect against unwarranted disclosure of intelligence sources and methods, within the broad terms of Executive Order 12356, April 2, 1982, on Classification and Declassification of National Security Information. It is for the Department to observe its regulations affording rights to appellant in proceedings before the hearing officer. It did not do so adequately.

Due in part to the fact that appellant did not present witnesses and offer other evidence to support his claim of changed circumstances, and as a consequence of the Department's failure to inform appellant of the source of all the evidence before the hearing officer and to accord him the opportunity to confront and cross-examine adverse witnesses regarding the sources and accuracy of the twelve allegations of appellant's conduct, we are presented with an incomplete record. While this Board's scope of review is limited to the record on which the decision of the Assistant Secretary for Consular Affairs was based, the matter before us cannot, in our opinion, be resolved on the basis of an incomplete and defective record. The Department, in our view, has an affirmative duty to develop an adequate administrative record to support its passport decision.

Under the regulations, this Board is authorized, within its jurisdictional scope, to "take any action it considers appropriate and necessary to the disposition of cases appealed to it." 27/ Accordingly, we hereby remand this appeal to the Department for further proceedings to develop an adequate record and to cure the defects of the hearing in compliance with the requirements of section 51.85 of the regulations. 28/.

Thereafter, the Board will be prepared to consider and determine this appeal.

Alan G. James, Chairman

Edward G. Misey, Member

Edward G. Misey, Mem

Howard Meyers, Member

27/ 22 CFR 7.2(a). The Legal Adviser of the Department of State, in a legal opinion rendered on December 27, 1982, stated:

> ...The Board's authority under section 7.2(a) should be understood as the authority to fashion remedies appropriate to a given case.

28/ See supra, n.9.