

DATE: February 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10349

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 25, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge John G. Metz, Jr., issued an unfavorable security clearance decision, dated July 1, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge demonstrated bias against Applicant; (2) whether the Administrative Judge erred by concluding the record evidence showed Applicant has a foreign preference under Guideline C; and (3) whether the Administrative Judge erred by concluding the record evidence shows Applicant is vulnerable to foreign influence under Guideline B. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; 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. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge demonstrated bias against Applicant. Applicant contends the Administrative Judge "is completely biased" because the Judge "refuses to accept the testimony" from a government witness that is favorable to Applicant. For the reasons that follow, the Board concludes Applicant's claim demonstrates error by the Judge, but not bias.

The Administrative Judge drew the inference that Applicant was a security risk because he was not given "a clean bill of health" after being the subject of a counterintelligence investigation (Decision at p. 4). Given the record evidence in this case about that investigation (including the testimony of a government witness), the Judge did not have sufficient record evidence to draw adverse inferences about Applicant's security eligibility based on his opinion as to the result of that investigation. Applicant's challenge to the Judge's adverse inference is persuasive. However, proof of error by the Judge does not translate into proof of bias.

There is a rebuttable presumption that quasi-judicial officials carry out their duties in a fair and impartial manner, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. Bias is not demonstrated because a party believes that the Judge is biased. Rather, the standard is whether there is any indication in the record of the proceedings below that would lead a disinterested person to reasonably question the Judge's fairness and impartiality. *See, e.g.*, ISCR Case No. 02-33169 (September 23, 2004) at p. 5. Proof of error by the Judge is not sufficient to demonstrate the Judge is biased. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5. Accordingly, Applicant's personal belief is not sufficient to demonstrate the Judge is biased. Similarly, Applicant's ability to identify error by the Judge is not sufficient to demonstrate bias.

2. Whether the Administrative Judge erred by concluding the record evidence showed Applicant has a foreign preference under Guideline C. The Administrative Judge entered formal findings against Applicant with respect to Guideline C (Foreign Preference). Applicant contends the Judge erred by concluding he has a foreign preference. In support of this contention, Applicant argues: (a) the Judge ignored the significance of his relinquishment of Israeli citizenship; (b) Applicant did not show a preference for Israel by holding Israeli citizenship, or by using an Israeli passport when required to do so by Israeli law; (c) there is no evidence supporting the Judge's finding that Applicant sought to expedite the process of renouncing his Israeli citizenship; (d) it was arbitrary and capricious for the Judge to conclude a foreign preference was shown by Applicant's compliance with Israeli regulations about entering Israel with an Israeli passport; (e) the Judge erred by concluding Applicant's conduct was lawful, but not sanctioned by the U.S. government; and (f) the Judge erred by concluding possible future actions by Israel show Applicant has a foreign preference under Guideline C

2(a). Applicant makes the following arguments in support of his contention that the Administrative Judge ignored the significance of his relinquishment of Israeli citizenship: (i) the Judge made unwarranted assumptions about Applicant's future conduct; (ii) the Judge made unwarranted assumptions about Israel's future conduct; and (iii) the Judge gave undue weight to the financial incentive Applicant has in a security clearance. For the reasons that follow, the Board concludes Applicant's arguments have mixed merit.

2(a)(i). Security clearance decisions involve predictive judgments about an applicant's possible future behavior based on past and present conduct and circumstances. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Therefore, it is legally permissible for an Administrative Judge to make predictive judgments about an applicant's possible future behavior. However, any predictive judgments made by a Judge must have a rational basis in the record evidence. *See, e.g., ISCR Case No. 02-14995* (July 26, 2004) at p. 6. To the extent Applicant challenges the Judge's authority to make predictive judgments about him, Applicant's argument fails. However, to the extent Applicant challenges the Judge's predictive judgments for lack of record evidence to support them, his argument cannot be simply dismissed. The Judge found that Applicant relinquished his Israeli citizenship and surrendered his Israeli passport, which clearly meets or exceeds the standards of Foreign Preference Mitigating Condition 4 ("Individual has expressed a willingness to renounce dual citizenship"). However, the Judge has some discretion in deciding how much weight to give the mitigating condition, given the totality of facts and circumstances in the case. In any case, it is well settled that the application of any one disqualifying or mitigating condition is not normally dispositive.

2(a)(ii). The Administrative Judge failed to articulate any rational basis for drawing inferences or reaching conclusions about Applicant's preference for Israel (under Guideline C) based on possible future conduct by Israel. As a practical matter, actions that Israeli government officials might take in the future have no meaningful probative value as to whether Applicant has a preference for Israel. Moreover, the record evidence in this case about past actions that Israeli government officials have taken with respect to Applicant is not sufficient to permit the Judge to draw any reasonable inference or reach any reasonable conclusion about whether Applicant has a preference for Israel. ⁽²⁾

Of course, it is legally permissible for the Judge to consider record evidence about Applicant's actions in order to draw inferences or reach conclusions about whether Applicant has exhibited a preference for Israel.

2(a)(iii). Applicant does not challenge the Administrative Judge's finding that he has a financial incentive in obtaining a security clearance. However, Applicant does assert the Judge gave undue weight to that finding. The Board will not disturb a Judge's weighing of the record evidence unless the appealing party demonstrates the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g., ISCR Case No. 03-06770* (September 9, 2004) at p. 5. Considering the record as a whole, Applicant has failed to demonstrate that the Judge gave undue weight to the evidence showing that he has a financial incentive in obtaining a security clearance.

2(b). The Board does not find persuasive Applicant's argument that the Administrative Judge could not find that he exhibited a foreign preference under Guideline C based on his holding Israeli citizenship or his use of an Israeli passport. The possession and use of a foreign passport are conditions that could raise a security concern and may be disqualifying. *See Directive, Adjudicative Guidelines, Item E2.A3.1.2.2.* It is evidence of the exercise of the rights and privileges of foreign citizenship, and provides a rational basis for a Judge to infer that the applicant in question exhibits a foreign preference within the meaning of Guideline C. *See, e.g., ISCR Case No. 00-0489* (January 10, 2002) at pp. 11-

12.

Furthermore, as Department Counsel notes (Reply Brief at pp. 6-7), the Administrative Judge found Applicant worked in a sensitive position with a defense lab run by the Israeli Ministry of Defense. Applicant's work in that position raises significant questions that the Judge legitimately had to consider. *See* ISCR Case No. 02-05988 (December 18, 2003) at p. 4 n.3 ("Prior involvement with a foreign country's defense industry or prior access to a foreign country's sensitive military projects raises significant questions that require scrutiny in evaluating an applicant's security eligibility.").

2(c). It is untenable for Applicant to argue there is no evidence supporting the Administrative Judge's finding that he sought to expedite the process of renouncing his Israeli citizenship. Applicant testified that he sought to expedite the process of renouncing his Israeli citizenship. *See* Hearing Transcript at p. 285.

2(d). The Administrative Judge's conclusions under Guideline C are not arbitrary or capricious because Applicant presented evidence that he was complying with Israeli regulations about entering Israel with an Israeli passport. After the issuance of the ASDC3I memo on foreign passports, [\(3\)](#)

the Board held that its prior rulings on legal necessity as extenuation or mitigation were no longer viable and were superseded by the ASDC3I memo. *See, e.g.*, ISCR Case No. 99-0457 (January 3, 2001) at p. 5. Therefore, no error is shown by this argument by Applicant.

2(e). The Board does not find persuasive Applicant's argument that the Administrative Judge should have concluded Applicant's conduct was sanctioned by the U.S. government because it was lawful. The mere fact that conduct is legally permissible does not mean that such conduct has been affirmatively sanctioned or approved by the U.S. government. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at p. 5. Moreover, the legality of an applicant's actions does not preclude the Judge from considering the security significance of those actions. *See, e.g.*, ISCR Case No. 00-0516 (December 7, 2001) at p. 5. Therefore, this claim of error lacks merit.

2(f). As discussed earlier in this decision, the Administrative Judge erred by concluding possible future actions by Israel show Applicant has a foreign preference under Guideline C.

3. Whether the Administrative Judge erred by concluding the record evidence shows Applicant is vulnerable to foreign influence under Guideline B. The Administrative Judge entered formal findings against Applicant with respect to Guideline B (Foreign Influence). Applicant contends the Judge erred by concluding he is vulnerable to foreign influence. In support of this contention, Applicant argues: (a) the Judge improperly shifted the burden of proof to Applicant rather than Department Counsel; (b) the Judge failed to give proper weight to record evidence that Applicant disclosed to the United States all his contacts with Israeli representatives, and that he relinquished his Israeli citizenship; (c) the record evidence does not support the Judge's conclusion that Applicant's mother is in a position to be exploited; (d) the Judge gave undue weight to evidence that Applicant was the subject of a U.S. counterintelligence investigation; and (e) the Judge erred by concluding he is not satisfied that Applicant is not an Israeli intelligence officer.

3(a). With one exception discussed later in this decision, [\(4\)](#)

the Board does not accept Applicant's argument that the Administrative Judge improperly shifted the burden of proof to Applicant. Department Counsel is obligated to present evidence to prove controverted facts. *See* Directive, Additional Procedural Guidance, Item E3.1.14. However, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." *See* Directive, Additional Procedural Guidance, Item E3.1.15. Apart from the exception noted earlier in this paragraph, Applicant has failed to demonstrate the Judge's decision violates the burdens set by Directive, Additional Procedural Guidance, Items E3.1.14 and E3.1.15.

3(b). As noted earlier in this decision, absent a showing that the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the evidence. Applicant's claim of error is not persuasive because it merely reflects Applicant's disagreement with the Judge's weighing of the record evidence

without a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-22134 (August 19, 2004) at pp. 4-5.

3(c). Given the record evidence in this case (including statements by Applicant about his concerns for his mother in Israel), it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Applicant's mother is in a position where she could be exploited to exert influence or pressure on Applicant. The Judge's conclusion reflects a reasonable interpretation of the record evidence as a whole.

3(d). As discussed earlier in this decision, the Administrative Judge did not have sufficient record evidence to draw an adverse inference about Applicant's security eligibility based on his opinion about the results of a counterintelligence investigation.

3(e). The Administrative Judge committed clear error when he stated that he was not satisfied that Applicant was not an Israeli intelligence officer (Decision at p. 10). The SOR did not allege that Applicant is now, or was in the past, an Israeli intelligence agent. Department Counsel offered no evidence showing Applicant is now, or was in the past, an Israeli intelligence agent. Unless Department Counsel presents evidence supporting a controverted SOR allegation, an applicant is not required to disprove such a controverted SOR allegation. *See, e.g.*, ISCR Case No. 97-0184 (June 16, 1998) at p. 5 n.4. *A fortiori*, Applicant is not required to disprove an allegation that was not made against him in the SOR. Moreover, the specific reasons given by the Judge do not provide a sustainable basis for his implicit finding that Applicant is an Israeli intelligence agent. It was arbitrary, capricious, and contrary to law for the Judge to make this finding and hold it against Applicant.

Conclusion

Applicant has demonstrated errors by the Administrative Judge in this case. However, as discussed earlier in this decision, the Board will consider whether errors identified on appeal are harmful or harmless. Considering the Judge's sustainable findings and conclusions in light of the totality of the record evidence in this case, the Board concludes that the errors identified by Applicant, viewed individually or taken cumulatively, do not warrant remand or reversal. Accordingly, the Board affirms the Judge's unfavorable security clearance decision.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made findings and reached conclusions in favor of Applicant with respect to Guideline E (Personal Conduct). Those favorable findings and conclusions are not at issue on appeal.

2. Department Counsel's argument in support of the Administrative Judge's challenged inferences and conclusions on this aspect of the case (Reply Brief at p. 6 n.18) lacks merit. First, the Board decision cited by Department Counsel does not support its argument in this case. Indeed, the Board decision cited by Department Counsel uses language that runs contrary to Department Counsel's argument. Second, Department Counsel's reliance on Government Exhibit 5 is misplaced. Nothing in Government Exhibit 5 supports the proposition that Department Counsel claims it does. Indeed, there is *no* record evidence that supports the proposition that Department Counsel claims is shown by Government Exhibit 5. The Board is confounded by the reference to faith in this context.

3. August 16, 2000 memorandum by Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline."

4. *See* discussion under section 3(e) of this decision.