

DATE: March 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-18860

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Robert J. Tuidor, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John G. Metz, Jr. issued a decision, dated September 30, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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

Applicant's appeal presents the following issues: (1) whether the Defense Office of Hearings and Appeals improperly asked the Defense Security Service to check if business competitors of Applicant could testify against him; (2) whether the Administrative Judge ignored record evidence favorable to Applicant; (3) whether certain factual findings by the Administrative Judge are erroneous; and (4) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 18, 2001. The SOR was based on Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). A hearing was held on March 13, 2002. The Administrative Judge issued a written decision, dated September 30, 2002, 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 unfavorable 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. *See* 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 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. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

Appeal Issues

The Administrative Judge based his unfavorable security clearance decision on the following findings and conclusions: (a) Applicant has family ties and financial interests in Syria that pose a security risk; (b) Applicant engaged in acts of falsification in July 1996, June 1999, and November 2000; and (c) Applicant failed to present evidence sufficient to mitigate the security concerns raised by his ties with Syria and his multiple acts of falsification.

1. Whether the Defense Office of Hearings and Appeals improperly asked the Defense Security Service to check if business competitors of Applicant could testify against him. On appeal, Applicant states the following: "Before issuing the SOR, DOHA asked the DSS [Defense Security Service] to check with some of my business competitors if they could testify on behalf of the government against me, considering the events of September 11 for people who come from the middle east (see investigation record and request by DOHA to DSS agent . . .). This really makes me wonder what is the motive behind all this?" The Board construes this as raising the issue of whether the Defense Office of Hearings and Appeals improperly asked the Defense Security Service to check if business competitors of Applicant could testify against him.

As a preliminary matter, Applicant's appeal statement refers to documentation that is not part of the record evidence. As such, Applicant's appeal statement on this point constitutes new evidence, which the Board cannot consider on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. However, Applicant's appeal statement raises a question about the fairness and integrity of DOHA proceedings that the Board cannot simply ignore. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at pp. 2-3 (dealing with similar dilemma).

Even if the Board were to assume, solely for purposes of deciding this appeal, that Applicant had offered as evidence at the hearing the documentation referred to in his appeal brief, Applicant's appeal statement fails to demonstrate any error below. There is a rebuttable presumption that federal officials and employees carry out their duties in good faith, and a party seeking to prove otherwise has a very heavy burden of persuasion. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 5. Applicant's speculation about the motives of DOHA personnel is wholly inadequate to overcome the presumption that they acted in good faith. Finally, whatever the motives of DOHA personnel who might have asked DSS about locating potential witnesses, Applicant has failed to demonstrate how those motives have any bearing on the Judge's conduct of the hearing, the Judge's rulings during the proceedings below, or the Judge's security clearance decision. The only witness that Department Counsel presented at the hearing was a DSS special agent. Therefore, Applicant's concerns about the possibility of business competitors testifying against him are purely speculative and irrelevant to: (a) the way his hearing was conducted by the Judge; (b) the Judge's rulings during the proceedings below; and (c) the Judge's security clearance decision.

2. Whether the Administrative Judge ignored record evidence favorable to Applicant. Applicant cites to various parts of the record evidence that he claims are favorable to him and asserts that the Administrative Judge ignored that evidence in making his decision. Applicant also claims the Judge "knowingly violated the law and mishandled my case by throwing out all the evidence and rubber stamping the claims in the SOR." For the reasons that follow, the Board concludes Applicant's claims of error are, with one exception, not persuasive.

There is a rebuttable presumption that an Administrative Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. An appealing party's ability to cite to favorable record evidence, standing alone, is not sufficient to rebut or overcome that presumption. Furthermore, an

appealing party's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge simply ignored evidence. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at pp. 3-4.

Applicant's arguments also can be construed as challenging the Administrative Judge's weighing of the record evidence. As the trier of fact, an Administrative Judge is responsible for weighing the record evidence, both favorable and unfavorable, and making findings of fact. An appealing party's ability to argue that the Judge should have weighed the record evidence differently does not, standing alone, demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 00-0587 (May 28, 2002) at p. 3.

With one exception, Applicant's appeal arguments, whether viewed individually or collectively, fail to show the Administrative Judge simply ignored record evidence favorable to Applicant, or that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

At the hearing, Applicant offered Exhibit H. Department Counsel objected to Exhibit H as being irrelevant. Applicant responded to the objection by proffering Exhibit H as evidence of his financial worth in the United States to show that he was financially capable of supporting his family and not subject to foreign influence. The Administrative Judge sustained Department Counsel's objection on the ground that Exhibit H was not relevant. *See* Hearing Transcript at pp. 99-101. On appeal, Applicant challenges the Judge's decision to not consider Exhibit H. Applicant's challenge is well-founded. Given SOR subparagraph 1.e, Applicant's foreign financial interests are relevant to this case. In assessing the significance of a foreign financial interest, a Judge must not only consider the dollar amount of the foreign financial interest, but also its value in comparison to the applicant's financial interests in the United States,⁽¹⁾ as well as any other record evidence concerning the facts and circumstances of the applicant's foreign financial interest and foreign ties. Given the issues in this case, Applicant's proffer of Exhibit H was reasonable and entirely proper. The Judge's ruling to exclude Exhibit H was arbitrary and capricious because it prevented Applicant from presenting relevant evidence.

Although the Administrative Judge erred by excluding Exhibit H, the Judge's error is harmless under the particular facts and circumstances of this case. The erroneous exclusion of Exhibit H does not warrant reversal of the Judge's decision because that decision is not based solely on the Judge's conclusions about Applicant's financial interests in Syria. The Judge's erroneous exclusion of Exhibit H would, at most, warrant remand with instructions that the Judge reopen the record to receive and consider that exhibit before issuing a new decision. However, no useful purpose would be served by remanding the case. Even if the Board were to assume, solely for purposes of deciding this appeal, that a remand would result in the entry of a formal finding in favor of Applicant with respect to SOR subparagraph 1.e, such a favorable formal finding would not likely result in an overall favorable security clearance decision, given the Judge's other findings and conclusions in the case. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

3. Whether certain factual findings by the Administrative Judge are erroneous. Applicant contends the Administrative Judge erred by making the following findings: (a) Applicant's brother once held the equivalent of the rank of lieutenant in Syria; (b) Applicant has substantial financial interests in Syria; and (c) Applicant falsified a security clearance application. Applicant argues these findings by the Judge are wrong and should not be upheld by the Board.

(a) In a written statement Applicant gave to a DSS special agent, Applicant indicated that a brother once held the equivalent of the rank of lieutenant in Syria (Government Exhibit 2, p. 11). In response to the SOR and at the hearing, Applicant denied that a brother had ever held such a rank. Applicant's denials constituted a repudiation of a portion of the written statement that he gave to a DSS special agent. The Administrative Judge was obligated to consider Applicant's denials, but he was not required to accept them at face value. As the trier of fact, the Judge had to assess Applicant's denials in light of his assessment of Applicant's credibility and the record evidence as a whole. Given the Judge's negative conclusions about Applicant's credibility, it was not arbitrary, capricious, or contrary to law for the Judge to rely on Government Exhibit 2 instead of Applicant's

repudiation of that part of it dealing with his brother holding the equivalent of the rank of lieutenant in Syria.

(b) Applicant contends the Administrative Judge erred by finding that he has substantial financial interests in Syria. In support of this contention, Applicant argues that a simple comparison of his financial interests in each country shows

that his financial interests in Syria are minor compared to his financial interests in the United States. Applicant's argument has some merit. Whether an applicant's financial interest in a foreign country is "substantial" for purposes of applying Foreign Influence Disqualifying Condition 8⁽²⁾ or "minimal" for purposes of applying Foreign Influence Mitigating Condition 5,⁽³⁾ does not turn simply on consideration of the dollar amount of the applicant's foreign financial interest. As discussed earlier in this decision, in assessing the significance of the foreign financial interest involved, a Judge must not only consider the dollar amount of the foreign financial interest, but also its value in comparison to the applicant's financial interests in the United States, as well as any other record evidence concerning the facts and circumstances of the applicant's foreign financial interest and foreign ties.

The Administrative Judge's erroneous ruling concerning Exhibit H (discussed earlier in this decision) prevented Applicant from presenting relevant evidence on this aspect of the case. Accordingly, the Board declines to affirm the Judge's application of Foreign Influence Disqualifying Condition 8. However, as discussed earlier in this decision, neither reversal nor remand is warranted in connection with the exclusion of Exhibit H. The same reasoning applies with respect to the Judge's application of Foreign Influence Disqualifying Condition 8.

(c) The Administrative Judge found that Applicant falsified material facts on the following documents: (i) a medical insurance coverage application executed by Applicant in July 1996; (ii) a security clearance application executed by Applicant in June 1999; and (iii) a written statement Applicant gave to a DSS special agent in November 2000. On appeal, Applicant strenuously challenges the Judge's findings that he engaged in falsification.

As a preliminary matter, the Board finds no merit in Applicant's argument that the Administrative Judge erred by not considering Applicant's November 2000 written statement as "an integral part" of the security clearance application that Applicant executed in June 1999. The security clearance application Applicant executed in June 1999 is a document that is separate and distinct from his November 2000 written statement. There is no rule of law or logic that supports Applicant's assertion that the two documents must be considered as a single document. It was entirely reasonable and legally sound for the Judge to consider Applicant's answers to questions on the security clearance application (executed in June 1999) as separate and distinct from Applicant's November 2000 written statement.

During the proceedings below, Applicant denied that he had any intent to falsify. The Administrative Judge was not bound to accept Applicant's denials and explanations at face value. Rather, the Judge had to consider them in light of his assessment of Applicant's credibility and the record evidence as a whole. Considering the record as a whole, the Board concludes Applicant's appeal arguments fail to demonstrate the Judge erred by finding Applicant engaged in multiple acts of falsification.

4. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) he has never had a security violation; (b) there is no evidence that Applicant's relatives who live in Syria present a security risk; (c) there is no evidence that he has been subjected to any foreign influence "in any shape or form at any time since I immigrated to the US in 1984"; (d) none of his relatives is employed by the Syrian government or in a position to be exploited by the Syrian government; and (e) his wife is a permanent resident of the United States and will become a U.S. citizen by February 2004. The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

(a) The federal government is not required to wait until an applicant mishandles or fails to safeguard classified information before it can deny or revoke the applicant's access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Accordingly, the absence of any evidence that Applicant has ever committed a security violation did not preclude the Administrative Judge from considering whether the record evidence of Applicant's conduct and circumstances raised security concerns.

(b) Applicant's argument on this point is based on a misperception of the burden of proof in these proceedings. There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). There is no presumption in favor of granting or continuing a security clearance. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Indeed, a security clearance is not to be granted or continued unless there has been an affirmative determination that it would be clearly consistent with the national interest to do so. *See* Executive Order 10865, Section 2.

Department Counsel met its burden of presenting evidence to prove the existence of Applicant's family ties with relatives living in Syria, as alleged in various SOR subparagraphs. The burden of proof then shifted to Applicant to present evidence that extenuated or mitigated the security concerns raised by his family ties with relatives living in Syria. *See* Directive, Additional Procedural Guidance, Item E3.1.15 ("The 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 security clearance decision.").

The record evidence of Applicant's family ties with relatives living in Syria provides a rational basis for the Administrative Judge's conclusion that those ties raise security concerns. Given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant has not presented evidence sufficient to extenuate or mitigate the security concerns raised by his family ties with relatives living in Syria.

(c) The absence of any evidence that Syria or any other foreign government or entity has tried to exert pressure or influence on Applicant since he immigrated to the United States does not have the significance Applicant seeks to attribute to it. The federal government need not wait until a foreign government or entity actually tries to exert pressure or influence on an applicant before it can deny or revoke access to classified information. *See, e.g.*, ISCR Case No. 01-10301 (December 30, 2002) at pp. 8-9. Even in the absence of any evidence that Syria or any other foreign government or entity has tried to exert pressure or influence on Applicant, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider the security significance of Applicant's family ties with relatives living in Syria.

(d) Applicant's assertion that none of his relatives is employed by the Syrian government does not demonstrate the Administrative Judge erred. The absence of evidence that Applicant's immediate family members living in Syria are employed by the Syrian government is not dispositive. Even if an applicant's relatives living abroad are not agents of a foreign government, a Judge must consider whether those relatives are in a position that poses a risk that they could be exploited by a foreign power. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5. An applicant can be subjected to pressure or influence brought to bear on family members who have no ties with a foreign government. *Cf. Scarbeck v. United States*, 317 F.2d 546, 548-549 (D.C. Cir. 1963) (defendant pressured to work for foreign intelligence service through threats made against defendant's paramour), *cert. denied*, 374 U.S. 856 (1963).

Applicant's assertion that his family ties in Syria cannot be exploited also fails to demonstrate the Administrative Judge erred. As discussed earlier in this decision, Applicant has the burden of presenting evidence to rebut, explain, extenuate or mitigate facts and circumstances that raise security concerns. As stated earlier in this decision, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's family ties with relatives living in Syria raise security concerns. Considering the record evidence as a whole, the Board concludes it was not arbitrary or capricious for the Judge to decide that Applicant has not met his burden of overcoming the security concerns raised by his family ties.

(e) The record evidence of the status of Applicant's wife does not demonstrate the Administrative Judge erred. The fact that Applicant's current wife is legally residing in the United States does not reduce or diminish the security significance of Applicant's multiple acts of falsification. The fact that Applicant's current wife is residing legally in the United States does not reduce or diminish the security significance of Applicant's family ties with relatives living in Syria. Furthermore, the legal status of Applicant's current wife does not preclude the Judge from considering the security significance of the fact that she is not yet a naturalized U.S. citizen and the fact that she has family members living in Syria. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 4 (even though the applicant's wife was undergoing process to become a naturalized U.S. citizen, it was not arbitrary or capricious for Administrative Judge to consider security significance of fact that applicant's wife was an Israeli citizen and had family ties with Israeli citizens living in Israel).

Given the Administrative Judge's findings about Applicant's family ties with relatives living in Syria, it was not arbitrary, capricious, or contrary to law for the Judge to conclude those ties raised security concerns under Guideline B. Furthermore, considering the record evidence as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had failed to present evidence that overcame the security concerns raised by his family ties. Applicant's appeal arguments to the contrary lack merit.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. For example, an applicant with financial assets in the United States worth \$200,000 and foreign financial assets worth \$5,000 presents a different picture than an applicant with financial assets in the United States worth \$20,000 and foreign financial assets worth \$5,000.

2. "A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence."

3. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."