

DATE: August 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22134

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Charles W. Ware, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated January 24, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision dated February 18, 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 issue has been raised on appeal: whether the Administrative Judge erred by concluding that Applicant failed to extenuate or mitigate the security concerns raised by his family ties with two sisters who are citizens and residents of the People's Republic of China, one sister who is a citizen and resident of Taiwan, and in-laws who are citizens and residents of Taiwan. 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 Issue ⁽¹⁾

Whether the Administrative Judge erred by concluding that Applicant failed to extenuate or mitigate the security concerns raised by his family ties with two sisters who are citizens and residents of the People's Republic of China, one sister who is a citizen and resident of Taiwan, and in-laws who are citizens and residents of Taiwan. The Administrative Judge found the following: (a) two of Applicant's sisters are citizens and residents of the People's Republic of China; (b) Applicant has a sister-in-law who is a citizen and resident of Taiwan; and (c) Applicant's parents-in-law are citizens and residents of Taiwan. The Judge concluded that the facts and circumstances of Applicant's family ties raise security concerns under Guideline B (Foreign Influence), and that Applicant had not extenuated or mitigated those security concerns.

Applicant does not challenge the Administrative Judge's findings of fact. ⁽²⁾ However, Applicant does challenge the Judge's unfavorable conclusions under Guideline B (Foreign Influence), contending that the Judge should have concluded Applicant had extenuated or mitigated the security concerns raised by his family ties with relatives in the People's Republic of China and Taiwan. In support of this contention, Applicant cites to various portions of the record evidence that he contends should have persuaded the Judge to reach favorable conclusions under Guideline B. For the reasons that follow, the Board concludes Applicant has not demonstrated error below.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome merely because an appealing party can cite to record evidence that he or she feels should have been given greater weight by the Judge. *See, e.g.*, ISCR Case No. 02-07757 (March 29, 2004) at p. 4. Furthermore, within the legal constraints of the Directive, an Administrative Judge has broad discretion in writing a security clearance decision. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 2. When writing a decision, a Judge is not required to cite or

discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 98-0247 (January 20, 1999) at p. 2. However, a Judge must make findings of fact and reach conclusions that fairly take into account relevant record evidence and show the Judge did not engage in an arbitrary or capricious analysis. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 4-5; ISCR Case No. 02-00318 (February 25, 2004) at p. 8. If an appealing party wishes to rebut the presumption that the Judge considered all the record evidence, or demonstrate the Judge's decision is seriously deficient because it does not specifically mention or discuss some particular record evidence, the appealing party must articulate a cogent argument in support of such a claim that is supported by the record evidence, applicable legal principles, or both. *See, e.g.*, ISCR Case No. 01-23553 (June 3, 2004) at p. 3 (appealing party failed to articulate any persuasive reason why the Judge's decision was legally defective for not specifically discussing or mentioning various pieces of record evidence).

The presumption that an Administrative Judge considered all the record evidence may be rebutted or overcome when an appealing party identifies significant record evidence that -- as a matter of common sense or practical reasoning -- should have been explicitly acknowledged and expressly taken into account in order for the Judge's analysis to be reasonable and not arbitrary or capricious. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 4-5; ISCR Case No. 02-09907 (March 17, 2004) at p. 5. *Cf.* ISCR Case No. 02-19479 (June 22, 2004) at p. 6 ("... the Judge's decision cannot simply be silent about what, as a matter of common sense, appears to be a relevant factor that could be an important aspect of the case.")(footnote omitted). In this case, some of the record evidence cited by Applicant on appeal was referred to or discussed in the Judge's decision. Furthermore, the record evidence cited by Applicant on appeal that was not specifically referred to or discussed in the Judge's decision does not constitute such significant evidence that it would be arbitrary or capricious for the Judge to not explicitly refer to or discuss it in his decision.

Subject to review for action that is arbitrary, capricious, or contrary to law, the Administrative Judge is responsible for weighing the record evidence, deciding whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reaching a conclusion as to whether an applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15.⁽³⁾ Because there is no presumption of error below, the appealing party must do more than just disagree with the Judge's weighing of the evidence, or just disagree with the Judge's conclusions. Rather, the appealing party has the burden of identifying (a) how or why the Judge's weighing of the record evidence is arbitrary, capricious, or otherwise unreasonable, or (b) how or why the Judge's conclusions are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5. Although Applicant would like the Judge to have given more weight to the specific evidence he cites on appeal, or have interpreted that evidence in a manner favorable to him, Applicant does not articulate any cogent argument for why the Judge erred by not doing so.

As noted earlier in this decision, there is no presumption of error below, the appealing party has the burden of demonstrating error below, and the Board does not review cases *de novo*. Because Applicant does not raise any identifiable challenge to the Administrative Judge's findings of fact, those findings stand on appeal and the Board need not review them. Given the Judge's findings of fact, the Judge's conclusions under Guideline B reflect a reasonable and legally permissible analysis of the overall facts and circumstances of Applicant's case. Although Applicant argues that the Judge should have not reached unfavorable conclusions under Guideline B, Applicant has not articulated any argument indicating how or why the Judge's conclusions under Guideline B are arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

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

2. Applicant's appeal brief lists fourteen factual assertions (with references to the hearing transcript). The Board does not review the record evidence *de novo* and make findings of fact on appeal. Because Applicant's brief does not make specific, identifiable claims of factual error by the Administrative Judge, the Board construes Applicant's recitation of factual assertions as arguments in support of his contention that the Judge should have concluded Applicant has extenuated or mitigated the security concerns raised by the facts and circumstances of his family ties.

3. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigating facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."