

DATE: June 30, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-22606

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Rita C. O'Brien, Esq., Department Counsel

#### **FOR APPLICANT**

Kevin P. Connelly, Esq.

Applicant has appealed the January 29, 2003 decision of Administrative Judge Claude R. Heiny, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 Administrative Judge's decision is arbitrary, capricious, or contrary to law because it differs from decisions by Hearing Office Administrative Judges in other cases; (2) whether the Administrative Judge's formal findings under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law; (3) whether the Administrative Judge's adverse formal findings under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law; and (4) whether the Board should make a statement about Applicant's future eligibility for a security clearance. 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 April 1, 2002. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence).

A hearing was held on September 17, 2002. At the hearing, the SOR was amended by taking the allegations made under SOR subparagraphs 1.f and 1.g and moving them under SOR paragraph 2 and renumbering them SOR subparagraphs 2.e and 2.f.

The Administrative Judge issued a written decision, dated January 29, 2003, 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 adverse 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<sup>(1)</sup>

1. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it differs from decisions by Hearing Office Administrative Judges in other cases. Applicant contends the Administrative Judge's decision in this case is not consistent with decisions by Hearing Office Judges in other cases. Specifically, Applicant argues that decisions in other DOHA cases which he cites "offer persuasive support" for the proposition that the Judge's adverse findings with respect to SOR subparagraphs 2.a and 2.b "lacked a rational basis and [were] arbitrary and capricious."

An appealing party may cite decisions by Hearing Office Administrative Judges as persuasive authority. However, a decision by a Hearing Office Judge is not legally binding precedent on other Hearing Office Judges in other cases. Furthermore, no decision by a Hearing Office Judge is legally binding on the Board. Accordingly, even if the Board were to conclude that the Judge's decision in this case was not consistent with decisions by his colleagues in other DOHA cases that are cited by Applicant, such a conclusion would not require the Board to hold the Judge's decision in this case was arbitrary, capricious, or contrary to law.

The Board could end its discussion of this appeal issue at this point. However, further discussion is warranted because of the recurring nature of the kind of argument made by Applicant. Although the Board has indicated that a party may cite decisions by Hearing Office Administrative Judges as persuasive authority, it has not made any ruling or articulated any standard that would give parties guidance on when they can rely on Hearing Office Judge decisions as persuasive authority. What follows is a discussion intended to provide some guidance for future appeals.<sup>(2)</sup>

A party should not cite a Hearing Office Administrative Judge's decision as persuasive authority when there are Board decisions which are relevant or pertinent to the argument the party wants to make or a position the party wishes to take. A party should cite a Judge's decision as persuasive authority only after ascertaining that there are no Board decisions on point with respect to the argument the party wishes to make or a position the party wishes to take. It is not good or persuasive advocacy to ignore Board decisions that are on point.<sup>(3)</sup>

If a Hearing Office Administrative Judge's decision was affirmed by the Board on appeal, a party should not simply assume that the Judge's decision can be cited as persuasive authority. Under the Directive, the Board does not have to agree with a Judge's decision to affirm it. Indeed, the Board has affirmed decisions on appeal because:

neither party challenged portions of the Judge's decision that were factually or legally erroneous;

neither party raised a particular issue with sufficient specificity to enable the Board to address it;

the appealing party failed to demonstrate the Judge's errors were harmful under the particular facts and circumstances of that case; or

the nonappealing party persuasively argued that the Judge's decision could be affirmed on alternate grounds (*i.e.*, grounds other than those relied on by the Judge).

A Hearing Office Administrative Judge's decision is not persuasive authority merely because the Judge ruled in a particular way or reached a particular result in another case. Because the decisions of Hearing Office Judges are not legally binding precedent in other cases, neither a Hearing Office Judge nor the Board is legally required to distinguish them or justify why they are not considered to be persuasive authority. Rather, the burden of persuasion rests on the party citing a Hearing Office Judge's decision to show why the cited decision should be accepted as persuasive authority. Accordingly, when asking the Board to accept a Hearing Office Judge's decision as persuasive authority, the party relying on the cited decision has the burden of articulating sound reasons why it should be followed. In making such an argument, the party should show:

the issues in the cited decision are identical or similar to the issues in the current case;

the relevant facts of that case are identical or similar to the relevant facts in the current case;

the cited decision articulates a rational basis for its conclusions;

the cited decision relies on reasoning or analysis that can be applied to the facts and circumstances of the current case;

the cited decision relies on reasoning or analysis that is consistent with pertinent provisions of Executive Order 10865 or the Directive;

the cited decision relies on reasoning or analysis that is consistent with pertinent legal rulings by federal courts or the Board; or

there are other sound reasons why the Board should apply or follow the reasoning of the cited decision.

Finally, even if a party can make such arguments persuasively, a party cannot rely on a cited decision as persuasive authority if its reasoning or rationale has been overruled, superseded, or undercut by: (a) a change in the Directive; (b) a change in pertinent DoD policies, practices, or standards; or (c) a change in other applicable law.

2. Whether the Administrative Judge's formal findings under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. The Administrative Judge entered formal findings against Applicant under Guideline B (Foreign Influence) based on his conclusion that Applicant had failed to meet his burden of showing that he is not at risk of being vulnerable due to family ties with his mother and younger sister (both dual citizens of the United Kingdom and Israel who live in Israel) and his older sister (a dual citizen of the United States and Israel who lives in Israel). Applicant contends the Judge erred with respect to Guideline B because:

(a) it was arbitrary and capricious for the Judge not to apply Foreign Influence Mitigating Condition 1;

(b) it was arbitrary and capricious for the Judge not to apply Foreign Influence Mitigating Condition 3;

(c) it was arbitrary and capricious for the Judge to conclude Applicant's communications with his mother and sisters in Israel had negative security significance; and

(d) the Judge failed to take into account significant evidence showing Applicant has a preference for the United States over Israel.

Applicant's contentions are interrelated and overlap to some degree.

Applicant's contentions are based, in part, on the argument that the Administrative Judge's adverse conclusions about the security significance of Applicant's mother and two sisters are inconsistent with decisions by Hearing Office Judges in other DOHA cases. As discussed earlier in this decision, the mere fact that Applicant can cite to Judge decisions in other cases does not demonstrate the Judge's conclusions in this case are arbitrary, capricious, or contrary to law. Furthermore,

upon reviewing the decisions cited by Applicant as persuasive authority, the Board concludes some of those decisions are distinguishable on their facts, some of those decisions are based on erroneous reasoning (including reasoning that has been rejected by the Board), and some of those decisions fail to articulate reasons that the Board finds persuasive.

The Board does not find persuasive Applicant's argument that the Administrative Judge erred by impermissibly turning Foreign Influence Mitigating Condition 1 <sup>(4)</sup> into a disqualifying condition. Given the record evidence in this case, it was reasonable for the Judge to conclude that Applicant's ties with immediate family members in Israel raise security concerns under Guideline B and that Foreign Influence Disqualifying Condition 1 <sup>(5)</sup> applied. That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[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." Directive, Additional Procedural Guidance, Item E3.1.15. A Judge's conclusion that an applicant has failed to satisfy his or her burden of persuasion with respect to a particular Adjudicative Guidelines mitigating condition is not the equivalent of the Judge turning that mitigating condition into a disqualifying condition. To use an analogy: If the plaintiff in a civil proceeding has met its burden of presenting evidence sufficient to require the defendant to present an affirmative defense, the trier of fact is entitled to consider whether the defendant has met its burden of presenting evidence sufficient to support its affirmative defense. If a trier of fact concludes that a defendant has failed to meet its burden of persuasion with respect to its affirmative defense, it does not follow that the trier of fact is impermissibly using the defendant's failure of proof as the equivalent of the plaintiff proving its case against the defendant.

Applicant asserts, in a conclusory manner, that the record evidence in this case would support the application of Foreign Influence Mitigating Condition 1 to his mother and two sisters. Given the record evidence in this case, the Applicant's conclusory assertion is not sufficient to show it was arbitrary or capricious for the Judge not to apply Foreign Influence Mitigating Condition 1 to Applicant's mother and two sisters.

The Board does not find persuasive Applicant's arguments concerning the security significance of his communications with his mother and two sisters in Israel and the applicability of Foreign Influence Mitigating Condition 3. <sup>(6)</sup> Given the record evidence in this case, it is not tenable for Applicant to argue his contacts with his mother and two sisters in Israel (about once every two or three weeks) are casual and infrequent within the meaning of Foreign Influence Mitigating Condition 3. *See* ISCR Case No. 00-0628 (February 24, 2003) at p. 5 (noting that the totality of an applicant's contacts with foreign citizens must be taken into account, not just the frequency of contacts with individual foreign citizens); ISCR Case No. 01-17496 (October 28, 2002) at p. 6 (in case where Judge found applicant had weekly telephone contact with sister and mother-in-law in foreign country and visited them occasionally, the Board concluded it was arbitrary and capricious for Judge to apply Foreign Influence Mitigating Condition 3); ISCR Case No. 00-0484 (February 1, 2002) at p. 5 (there is a rebuttable presumption that contacts with an immediate family member are not casual in nature). <sup>(7)</sup> Moreover, it is untenable for Applicant to argue that the Judge's adverse conclusions under Guideline B "[are] premised solely on the extent of Applicant's communications with his mother and sisters." Although the Judge's decision is not a model of clarity, the Board does not read it as concluding Applicant poses a security risk under Guideline B solely because of his contacts with his mother and sisters in Israel. The Judge discussed Applicant's contacts with his mother and sisters in Israel in light of the overall facts and circumstances of Applicant's past and current ties with Israel, and that analysis is consistent with the whole person concept.

Applicant also argues the Administrative Judge's adverse conclusions under Guideline B are erroneous because the Judge "failed to weigh significant factors demonstrating Applicant's preference for the United States over Israel." There is a rebuttable presumption that a 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. Applicant's ability to cite to record evidence that he contends the Judge should have given greater weight is not sufficient to overcome that rebuttable presumption. Merely because a Judge does not give greater weight to record evidence cited by the appealing party, it does not follow that the Judge simply ignored that evidence. Moreover, to the extent Applicant's argument can be construed as challenging the Judge's weighing of the record evidence, it fails to persuade the Board that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge's adverse formal findings under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law. The Administrative Judge entered formal findings against Applicant under Guideline C (Foreign Preference) based on Applicant's exercise of the rights and privileges of Israeli citizenship to protect his right to an inheritance in Israel and by possessing and using an Israeli passport. Applicant contends the Judge erred with respect to Guideline C because:

- (a) It was arbitrary and capricious for the Judge to draw adverse conclusions based on Applicant's performance of mandatory military service with the Israeli military;
- (b) It was arbitrary and capricious for the Judge to conclude Foreign Preference Mitigating Condition 2 did not apply to Applicant's past Israeli military service;
- (c) It was arbitrary and capricious for the Judge to draw adverse conclusions based on Applicant's use of an Israeli passport because Applicant had surrendered it;
- (d) The Judge's adverse formal finding with respect to SOR subparagraph 1.c is inconsistent with the Judge's favorable formal findings with respect to SOR subparagraphs 1.h, 1.i, and 1.j; and
- (e) It was arbitrary and capricious for the Judge to draw adverse conclusions based on Applicant's interest in inherited property in Israel.

The Board will address Applicant's contentions in turn.

Applicant's first two contentions are moot. The Administrative Judge entered a favorable formal finding with respect to the SOR subparagraph pertaining to Applicant's past military service for Israel. Given that favorable formal finding, no useful purpose would be served by addressing the merits of Applicant's first two contentions.

Even though Applicant surrendered his Israeli passport, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to take into account Applicant's possession and use of that passport. Security clearance decisions involve predictive judgments based on an applicant's past conduct and current circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Under the whole person concept, an applicant's present conduct and circumstances cannot reasonably be evaluated without considering them in light of the applicant's past conduct and circumstances. Applicant's past possession and use of an Israeli passport did not become nonexistent or irrelevant for purposes of evaluating his security eligibility just because he surrendered it four days prior to the hearing. Applicant's surrender of his Israeli passport did not preclude the Judge from considering the security significance of the facts and circumstances of Applicant's possession and use of that passport in light of the overall facts and circumstances of Applicant's past and present ties with Israel.

It is understandable for Applicant to argue that the Administrative Judge's adverse formal finding with respect to SOR subparagraph 1.c is inconsistent with his favorable formal findings with respect to SOR subparagraphs 1.h, 1.i, and 1.j. Given the record evidence in this case, the Judge did not provide an adequate explanation for why he entered formal findings with respect to SOR subparagraphs 1.h, 1.i, and 1.j. However, faced with favorable formal findings that are not adequately explained, the Board declines to rely on such formal findings to conclude the Judge erred with respect to SOR subparagraph 1.c. *Cf.* ISCR Case No. 00-0377 (November 19, 2001) at pp. 4-5 (where appealing party demonstrated the Administrative Judge reached two conclusions that are inconsistent and cannot be reconciled, the Board declined to accept the Judge's unexplained legal conclusion rather than reject the Judge's articulated conclusion). Even though this contention has some merit, the Judge's failure to adequately explain his favorable formal findings concerning SOR subparagraphs 1.h, 1.i, and 1.j did not prejudice Applicant and does not warrant remand or reversal.

It was not arbitrary or capricious for the Administrative Judge to draw adverse conclusions from Applicant's inherited interest in property in Israel. *See* Foreign Preference Disqualifying Condition 6. <sup>(8)</sup> Given the record evidence in this case, the facts and circumstances of Applicant's inherited interest in property in Israel raise security concerns when viewed, under the whole person concept, in light of Applicant's overall conduct and circumstances. Applicant's reliance on a Hearing Office Judge's decision in ISCR Case No. 97-0764 (March 20, 1998) is misplaced. As discussed earlier, the Judge's decision in this case is not rendered arbitrary, capricious, or contrary to law merely because a Judge ruled

differently in another case. Furthermore, after reading the Judge's decision in ISCR Case No. 97-0764, the Board concludes that decision fails to articulate a rational basis for the Judge's favorable conclusions about the applicant's retention of foreign citizenship rights in connection with substantial inheritance rights abroad. Accordingly, the Judge's decision in ISCR Case No. 97-0764 is not persuasive authority. Finally, Applicant's reliance on his stated intention to renounce his Israeli citizenship after resolution of the inheritance issues is misplaced. It is not arbitrary or capricious for a Judge to give little or no weight to an applicant's promise to take future remedial action. *Cf.* ISCR Case No. 01-06266 (September 23, 2002) at p. 5 ("A promise or offer to take action in the future does not constitute evidence of reform, rehabilitation, or changed circumstances.").

4. Whether the Board should make a ruling about Applicant's future eligibility for a security clearance. Applicant asks the Board to rule that his past conduct will not preclude him from holding a security clearance in the future. The Board declines to make such a ruling. Although security clearance decisions are predictive judgments, they must be based on an evaluation of an applicant's security eligibility under applicable DoD security clearance standards and policies. Any ruling about Applicant's future security eligibility would require the Board to speculate both about the future status of DoD security clearance standards and policies, and Applicant's future personal situation. The Board declines to express any opinion as to how Applicant's security eligibility might be evaluated at some indeterminate future time.

### **Conclusion**

Applicant has failed to demonstrate error 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. The Administrative Judge's formal findings in favor of Applicant with respect to SOR subparagraphs 1.b, 1.d, 1.h, 1.i, 1.j, and 2.c through 2.f have not been challenged on appeal. However, to the extent that Applicant argues some of the Judge's favorable formal findings are inconsistent with some of the Judge's unfavorable formal findings, the Board will consider those favorable formal findings in evaluating Applicant's appeal arguments.

2. Redacted DOHA decisions issued after November 1, 1996 can be researched online at <http://ogc.osd.mil/doha/isp.html> . Redacted DOHA decisions issued before that date can be researched online at Westlaw.

3. It is within the bounds of legitimate advocacy for a party to make a good faith argument for why the Board should

modify or even overrule prior Board rulings. It is not within the bounds of legitimate advocacy for a party to simply ignore or disregard prior Board rulings that run contrary to a party's argument or position.

4. "A determination that the immediate family member(s)(spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States."

5. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."

6. "Contact and correspondence with foreign citizens are casual and infrequent."

7. Applicant cites to some Administrative Judge decisions that suggest a contrary result under similar circumstances. The Board does not find the reasoning of those decisions persuasive or sound.

8. "Using foreign citizenship to protect financial or business interests in another country."