

DATE: January 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26347

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Bradley M. Lown, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated January 8, 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). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision dated August 21, 2003.

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's adverse security clearance decision is arbitrary, capricious or contrary to law.

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

On appeal Applicant contends that the Administrative Judge (1) failed to weigh and analyze pertinent parts of the Directive, and (2) failed to properly apply two mitigating factors under Guideline B that would result in a decision in favor of the Applicant. The Board construes these arguments as an assertion that the Administrative Judge's decision was arbitrary, capricious and contrary to law.

(1) Applicant cites various passages from Guideline B of the Directive and asserts that the Administrative Judge failed to weigh the various conditions and mitigating factors and also failed to analyze the facts and mitigating circumstances "at all." Applicant also asserts that the Administrative Judge rigidly applied the facts to determine a security risk existed. With the exception of the two mitigating factors discussed in following paragraphs, the Applicant does not specifically identify which conditions were improperly weighed and which facts were improperly analyzed. Applicant provides no detail as to how the facts of the case were too rigidly applied by the Judge.

An applicant must raise issues on appeal with enough specificity to enable the Board to properly evaluate the merits of the claim of error. Here, with regard to the application of facts to Guideline B generally, the Applicant has failed to provide sufficient specificity in his argument and the Board will not speculate as to the parameters of Applicant's claim of error. Applicant has not met his burden of establishing that the Administrative Judge erroneously weighed the disqualifying conditions and the mitigating conditions under Guideline B or that the Judge completely failed to analyze the facts and the mitigating conditions.

(2) Applicant argues that Foreign Influence Mitigating Conditions 1 ⁽¹⁾

and 3, ⁽²⁾

when applied, mitigate in his favor. Regarding Mitigating Condition 1, he argues that it is "indisputable" that his wife, a naturalized citizen of the United States who was born in the Philippines and previously held Philippine citizenship, is

not an agent of a foreign power and is not in a position to be exploited by a foreign power. He asserts no evidence was presented that could lead to any other conclusion. Further, Applicant argues that his own contact with foreign citizens, in this case his wife's immediate family members residing in the Philippines, is clearly casual and infrequent. He argues that Foreign Influence Mitigating Condition 3 properly applies only to his own contacts with his wife's immediate family and does not apply to the contacts of the wife, which he insists are nonetheless also casual and infrequent.

Regarding the applicability of Foreign Influence Mitigating Condition 1, Applicant has failed to establish error on the part of the Administrative Judge. While there is evidence that Applicant's wife is not an agent of a foreign power, there is evidence that her father has held political office in the Philippines and has had difficulties with political rivals that have significantly affected his personal life. The Administrative Judge concluded that the possible foreign influence or exploitation of Applicant through the circumstances of a parent of his wife remains an unmitigated security concern. This conclusion is supported by the record.

Regarding the applicability of Foreign Influence Mitigating Condition 3, Applicant erroneously argues that the degree of his contact with his Philippine in-laws, as opposed to the degree of contact between his wife and her family, is all that is relevant in this case. It was not arbitrary or capricious for the Administrative Judge to consider the nature and strength of the Applicant's wife's ties to her family members in the Philippines and assess the possible effect those ties may have on Applicant's conduct under the Foreign Influence Guideline. Thus, the Judge acted in a legally permissible manner by considering Applicant's wife's ties to the Philippines in determining the applicability of Foreign Influence Mitigating Condition 3. *See* ISCR Case No. 01-02452 (November 21, 2002) at p. 8. In the alternative, Applicant argues that his wife's contacts with her immediate family members in the Philippines are casual and infrequent. A review of the record evidence indicates that, notwithstanding Applicant's assertion, the Administrative Judge's decision not to apply Foreign Influence Mitigating Condition 3 in Applicant's favor is sustainable.

Applicant cites to numerous decisions by DOHA Administrative Judges for the proposition that many cases exist where security clearances have been granted to applicants who had contact with family members in foreign countries. The decision in another DOHA case cited by Applicant on appeal does not demonstrate error by the Administrative Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases even if Applicant establishes close factual similarities between the cited cases and the instant case (which Applicant has not done here). The cited cases are not legally binding precedent on the Board in any case. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decisions by Hearing Office Administrative Judges).

Conclusion

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

Williams S. Fields

Administrative Judge

Member, Appeal Board

1. "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."
2. "Contact and correspondence with foreign citizens are casual and infrequent."