

DATE: September 15, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04344

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated February 5, 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), Guideline C (Foreign Preference), and Guideline E (Personal Conduct). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision dated May 29, 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 issues have been raised on appeal: (1) whether the Administrative Judge erred by denying Applicant a security clearance after he had renounced his Israeli citizenship and surrendered his Israeli passport; (2) whether the Administrative Judge erred by holding against the Applicant with respect to the Guideline B (Foreign Influence) allegations; and (3) whether the Administrative Judge erred by finding that the Applicant had intentionally falsified a security clearance application. 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: (1) are 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. Whether the Administrative Judge erred by denying Applicant a security clearance after he had renounced his Israeli citizenship and surrendered his Israeli passport. Applicant contends that Department Counsel led him to believe that if he surrendered his Israeli passport and renounced his Israeli citizenship he would be eligible for a security clearance, and that he was "pressured to give up my dual citizenship." For the reasons that follow, the Board concludes Applicant has not shown the Administrative Judge erred.

In August 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) issued a memorandum entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline" (ASDC3I memorandum). According to the ASDC3I Memorandum, possession and use of a foreign passport is a disqualifying condition and a security clearance must be denied or revoked "unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." On appeal, Applicant does not dispute the Administrative Judge's finding that, as of the date of the hearing, Applicant possessed a valid Israeli passport.

As a preliminary matter, the Board notes that it does not have supervisory jurisdiction or authority over the conduct of Department Counsel or Hearing Office Administrative Judges. However, the Board can review claims that the conduct of a Department Counsel or a Judge violated or prejudiced an applicant's rights under Executive Order 10865 or the Directive. The Board need not express approval of, or agreement with, Department Counsel's conduct or the Judge's conduct during the hearing to conclude the record does not support Applicant's claim. Nothing in the record below indicates Department Counsel made any promise or commitment to Applicant that renunciation of his Israeli citizenship and surrender of his Israeli passport would result in a favorable security clearance decision. Furthermore, the record

evidence shows: (a) Applicant expressed a willingness to renounce his Israeli citizenship and surrender his Israeli passport; (b) the Judge gave Applicant the opportunity to submit documentation after the hearing to show whether he in fact acted on his stated willingness to renounce his Israeli citizenship and surrender his Israeli passport; and (c) the Judge expressly told Applicant "you are not required to do those things" and indicated that she was giving him the opportunity to make a post-hearing submission for the purpose of documenting whether he followed through with the intentions he expressed during the hearing.

Considering the record as a whole, the Board concludes that Applicant has failed to establish this claim of error.

2. Whether the Administrative Judge erred by holding against the Applicant with respect to the Guideline B (Foreign Influence) allegations. Applicant contends that he should not be denied a security clearance merely because he has relatives in a foreign country and that to do so amounts to discrimination. This contention fails to demonstrate the Judge erred.

Given the record evidence in this case, it was reasonable for the Administrative Judge to conclude that Applicant's ties with immediate family members in Israel raised security concerns under Guideline B and that Foreign Influence Disqualifying Condition 1-[\(1\)](#)

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. Given the record evidence as a whole, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that the security concerns under Guideline B had not been mitigated.

Applicant also argues the Administrative Judge's adverse decision under Guideline B is erroneous because the Administrative Judge failed to weigh significant evidence demonstrating Applicant's preference for the United States over Israel--specifically the fact that he has lived permanently in the United States since the age of 7 and has never served in the Israeli Army. 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. Applicant's ability to cite to record evidence that he contends the Administrative Judge should have given greater weight is not sufficient to overcome that rebuttable presumption. Merely because an Administrative 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 Administrative Judge's weighing of the record evidence, it fails to establish that she weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant also contends he is the victim of discrimination because other people with close relatives living in other countries have security clearances and he is being unfairly singled out. This contention fails to demonstrate the Administrative Judge erred. First, there is a rebuttable presumption that agency officials carry out their duties in good faith. That presumption is not rebutted by conclusory, unsubstantiated claims of discriminatory treatment. Second, the security eligibility of other individuals is not at issue in this case. Rather, the issue in this case is Applicant's security eligibility. Third, a decision as to whether or not an applicant with relatives in foreign countries should be granted access to classified information must be adjudicated in light of the facts and circumstances of the applicant's case. A favorable or unfavorable security clearance decision in one case does not set the standard for all other applicants regardless of their particular conduct and circumstances. Fourth, Applicant's personal belief that he is being "singled out" falls far short of demonstrating any discriminatory treatment of him. There is no record evidence supporting Applicant's claim. Furthermore, the Board notes that it has had appeals in numerous cases involving Guideline B and a variety of foreign countries. Moreover, DOHA Administrative Judges have issued written decisions in many cases involving Guideline B and a wide range of foreign countries that have not been appealed.[\(2\)](#)

3. Whether the Administrative Judge erred by finding that the Applicant had intentionally falsified a security clearance application. The Administrative Judge found that Applicant falsified his security clearance application by failing to disclose that he was an Israeli citizen, that he possessed a valid Israeli passport, and that he traveled to Israel in 1995.

On appeal, Applicant argues he did not intentionally falsify his application, and cites to record evidence in support of his argument.

Given the record evidence in this case, the Administrative Judge could have accepted or rejected Applicant's denials of any intent to falsify his security clearance application. In this instance, she elected to reject Applicant's denials. Considering the record as a whole, the Board does not have to agree with the specifics of the Administrative Judge's reasoning to conclude it was not arbitrary, capricious, or contrary to law for her to reject Applicant's denials. Accordingly, her finding of falsification is sustainable.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

Williams S. Fields

Administrative Judge

Member, Appeal Board

1. "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."

2. Redacted copies of DOHA decisions issued since November 1, 1996 are available online at <http://ogc.osd.mil/doha/industrial>.