

DATE: July 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04455

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the February 10, 2003 decision of Administrative Judge John G. Metz, Jr., 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, dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by admitting two exhibits into evidence over Applicant's objections; (2) whether the Administrative Judge's findings of fact are supported by substantial record evidence; (3) whether the Administrative Judge misapplied various provisions of the Adjudicative Guidelines; and (4) whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated April 10, 2002. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on December 5, 2002. The Administrative Judge issued a written decision, dated February 10, 2002, in which the Judge 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 security clearance 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⁽¹⁾

1. Whether the Administrative Judge erred by admitting two exhibits into evidence over Applicant's objections. At the hearing, Applicant objected to the admissibility of two exhibits (Government Exhibit 3 and Government Exhibit 4) offered by Department Counsel. The Administrative Judge admitted the two exhibits over Applicant's objections. On appeal, Applicant contends the Judge erred by admitting the two exhibits. In support of this contention, Applicant argues that: (a) Government Exhibit 3 is hearsay and irrelevant to a security clearance decision; and (b) Government Exhibit 4 is hearsay, is from a biased newspaper, and contains only a single quote relating to South Korea.

In DOHA proceedings, the Federal Rules of Evidence are a guide, not strictly applied, and technical rules of evidence may be relaxed to permit the development of a full and complete record. *See* Directive, Additional Procedural Guidance, Item E3.19. Accordingly, Applicant's claims of error concerning the Administrative Judge's rulings on the admissibility of Government Exhibits 3 and 4 will not be evaluated in terms of a strict application of the Federal Rules of Evidence.

In federal administrative law, there is no general bar against the admissibility of hearsay evidence. Indeed, hearsay evidence may be admitted in an administrative proceeding. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 7 (citing federal cases). Accordingly, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to overrule Applicant's hearsay objections to Government Exhibits 3 and 4.

Applicant's relevance objections to Government Exhibits 3 and 4 also are not persuasive. Apart from the fact that technical rules of evidence are not strictly applied in these proceedings, relevance is a broad concept that encompasses evidence that has probative value. *See* Federal Rule of Evidence 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence in the determination of the action more probable or less probable than it would be without the evidence."). *See also* Advisory Committee's Note to Federal Rule of Evidence 401. Evidence does not need to be conclusive or even strong to be relevant. Government Exhibits 3 and 4 contain relevant evidence and, therefore, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to admit them into evidence over Applicant's relevance objections.⁽²⁾

To the extent Applicant's arguments go to the weight of Government Exhibits 3 and 4, those arguments do not demonstrate the Administrative Judge erred by admitting those exhibits into evidence. The admissibility of an exhibit is separate and distinct from how much weight can be given to it by the Judge. However, the fact that exhibits are admissible as evidence does not relieve the Judge from the obligation to weigh them in a reasonable manner. Applicant's argument concerning Government Exhibit 4 raises an important question as to what weight can reasonably be given to a newspaper account of a government report. A newspaper article probably could be sufficient to establish the fact that a government report on a particular topic or subject was issued by an identified component of the government on a particular date. As a practical matter, the actual text of a government report would be more reliable and probative of the contents of the government report than a newspaper account of the government report. Apart from the possibility that a newspaper article could contain an inaccurate or misleading characterization of the contents of a government report, a newspaper article is likely to contain only a summary of or brief extracts from a government report, which could raise a serious question as to evidentiary completeness. *See* Federal Rule of Evidence 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.").

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2. Whether the Administrative Judge's findings of fact are supported by substantial record evidence. Applicant contends the Administrative Judge made various erroneous findings of fact. Specifically, Applicant argues the Judge erred by finding: (a) Applicant's sister lives in South Korea; (b) Applicant has half-siblings (plural) living in South Korea; (c) Applicant remains indebted to his father in South Korea for the value of certain property; (d) Applicant has "good friends" from college; (e) Applicant's friends who worked with the South Korean Embassy in the United States are involved in foreign policy; and (f) Applicant is "legendary" in a South Korean ministry because of his educational exploits.

On appeal, the Board reviews the record evidence as a whole to determine whether an Administrative Judge's challenged findings of fact are supported by substantial record evidence. As noted earlier in this decision, 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. Finally, under the substantial evidence standard applicable to these proceedings, the Judge's findings must be supported by more than a scintilla of evidence, but can be based on less than a preponderance of the evidence. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

Considering the record evidence as a whole, the Board concludes the Administrative Judge erred by finding: (a) Applicant's sister lives in South Korea; (b) Applicant has more than one half-sibling living in South Korea; (c) Applicant's friends from college are "good friends"; and (d) Applicant is "legendary" in a South Korean ministry because of his educational exploits. Some of those findings are contrary to the record evidence; some of them lack sufficient record evidence to reflect a reasonable, plausible interpretation of the evidence as a whole. All of them are not sustainable under Directive, Additional Procedural Guidance, Item E3.1.32.1.

Considering the record evidence as a whole, the Board has difficulty discerning a rational basis for the Administrative Judge's finding that Applicant remains indebted to his father in South Korea for the value of certain property. The Judge's discussion of this aspect of the case is unclear and difficult to understand. *Cf.* ISCR Case No. 00-0621 (January 30, 2002) at p. 3 (although Administrative Judge has broad discretion in how to write a decision, the Judge must make findings of fact and reach conclusions with sufficient specificity and clarity to allow the parties and the Board to discern what the Judge is finding and concluding). If the Board is unable to understand a Judge's findings or conclusions, then the Board would be hard-pressed to conclude that such findings or conclusions should be sustained in the face of a cogent argument by a party challenging such findings or conclusions. Considering the record evidence as a whole, Applicant's appeal argument raises serious doubt whether the Judge made a sustainable finding that Applicant remains indebted to his father in South Korea.

Considering the record evidence as a whole, the Administrative Judge erred by finding that Applicant's friends who worked with the South Korean Embassy in the United States are involved in foreign policy. However, Applicant's appeal argument goes too far to the extent it suggests that those friends performed duties that were unrelated to the diplomatic mission of the South Korean Embassy in the United States.

Viewing the Administrative Judge's factual errors in light of the Judge's decision as a whole, the Board cannot conclude the Judge's errors are harmless in nature. The Judge's factual errors affect his analysis of Applicant's case under the Adjudicative Guidelines, as well as the general factors of Directive, Section 6.3. Considering the totality of the Judge's factual errors, the Board concludes that a remand is warranted.

On remand, the Administrative Judge must issue a new decision that does not repeat the factual errors identified in this decision. Furthermore, in the new decision, the Judge should either clarify or amend his finding about whether Applicant is indebted to his father in South Korea.

3. Whether the Administrative Judge misapplied various provisions of the Adjudicative Guidelines. Applicant makes several arguments in support of his contentions that the Administrative Judge should have applied Foreign Influence Mitigating Conditions 1, ⁽⁴⁾

3, ⁽⁵⁾

and 5. (6)

As discussed in the preceding paragraph, a remand is warranted for correction of the Judge's factual errors. Correction of those factual errors could impact the Judge's analysis of the case under the Adjudicative Guidelines. Accordingly, with one exception, it would be premature for the Board to address Applicant's claims concerning these mitigating conditions.

In connection with Foreign Influence Mitigating Condition 5, Applicant argues that the Administrative Judge erred by failing to consider Applicant's financial interests in South Korea in relation to Applicant's total wealth, which he asserts is mostly in the United States. Applicant's argument has merit to the extent it contends his financial interests in South Korea must be considered in the context of his total wealth. *See* ISCR Case No. 01-18860 (March 17, 2003) at p. 4 ("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, as well as any other record evidence concerning the facts and circumstances of the applicant's foreign financial interest and foreign ties.") (footnote omitted). Although the Administrative Judge cited Foreign Influence Mitigating Condition 5 in his decision, it is not clear whether the Judge evaluated Applicant's financial interest in South Korea in relation to Applicant's total wealth, or what significance (if any) the Judge placed on his reference to Foreign Influence Mitigating Condition 5. On remand, the Judge should make findings and reach conclusions about this aspect of the case that show he evaluated Applicant's financial interests in South Korea in a manner consistent with the Board's ruling in ISCR Case No. 01-18860.

4. Whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. In addition to the claims of error already discussed, Applicant contends the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law because: (a) the Judge erred by failing to consider record evidence that demonstrates Applicant's assimilation into American society, his good character, his honesty, and his reliability; (b) the Judge failed to apply the whole person concept when evaluating Applicant's security eligibility; (c) the Judge's adverse decision violates Applicant's right to equal protection; and (d) South Korea is a democratic country that has friendly relations with the United States.

Applicant's equal protection argument is based on factual assertions that go beyond the record evidence in this case. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, Applicant cannot fairly challenge the Judge's decision based on a proffer of evidence that was not presented for the Judge's consideration. Finally, Applicant's equal protection argument rests on unadorned assumptions concerning the facts and circumstances under which other, unnamed individuals may have had their security eligibility adjudicated.

To the extent that Applicant's appeal argument about the nature of South Korea suggests that an Administrative Judge could never make an adverse security clearance under Guideline B (Foreign Influence) when the foreign country involved has friendly relations with the United States, it lacks merit. Nothing in the Directive limits Guideline B (Foreign Influence) just to countries that are hostile to the United States.

Because the case is being remanded to the Administrative Judge for issuance of a new decision after correction of the errors identified in this decision, it would be premature to address the rest of Applicant's claims of error.

Conclusion

Applicant has met his burden of demonstrating error below that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with instructions to issue a new decision that is consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

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. Department Counsel did not file a reply brief. Accordingly, the Board must address the appeal issues raised by Applicant without the benefit of Department Counsel's views.
2. Applicant's argument about the relevance of Government Exhibit 3 is significantly undercut by the fact that Government Exhibit 3 refers to "classic human intelligence operations," not just gathering economic information from open sources.
3. There may be situations when a summary or extract from a voluminous government report may be properly admitted, subject to the entire report being available to both parties and the Administrative Judge to ensure that the summary or extract fairly reflects relevant portions of the report. *See* Federal Rule of Evidence 1006 ("Summaries").
4. "A determination that the immediate family member(s) (spouse, father, mothers, 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. "Contact and correspondence with foreign citizens are casual and infrequent."
6. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."