

DATE: December 18, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05988

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

Rita O'Brien, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 23, 2002 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 E (Personal Conduct), and Guideline L (Outside Activities). Administrative Judge Elizabeth M. Matchinski issued a favorable security clearance decision, dated ay 8, 2003.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the issue of whether the Administrative Judge's favorable decision was based on piecemeal analysis and was therefore arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses 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⁾

Department Counsel's appeal presents the issue of whether the Administrative Judge's favorable decision was based on piecemeal analysis and was therefore arbitrary, capricious, or contrary to law. The Board has previously held that a piecemeal analysis is inconsistent with a whole person analysis as required by the Directive. *See, e.g.*, ISCR Case No. 98-0476 (December 14, 1999).

The Administrative Judge's pertinent findings of fact include the following: Applicant was born in Russia in 1959 and emigrated to the United States in 1994 for religious reasons. Applicant was a member of a Communist youth organization in Russia⁽²⁾

and received military education in her high school. Applicant's first husband, her daughter, and her current husband were all born in Russia. Applicant and her current husband held Russian security clearances until the late 1980s. Applicant's brother and father still live in Russia and their relationships with Applicant are distant. Applicant's father who was a Soviet military officer until retired in the 1970s and may still be a member of the Communist Party did not approve of Applicant's emigration. Applicant's brother worked for the Soviet Navy as a civilian electrical engineer until 1988. Since then, he has been engaged in buying and selling of goods, including by barter, at local markets, as well as working as a driver for the President of a Russian company. Applicant's sister-in-law continues to live in Russia. Applicant and her daughters have acquired United States citizenship but her husband has not succeeded in acquiring US citizenship. Applicant allowed her Russian passport to expire in December 1998 and has not renewed it. Applicant denied any interest in returning to Russia even for a visit. Applicant denied any contact with the Russian government since 1994 and expressed a willingness to relinquish her Russian citizenship. Applicant prepared a security clearance

application in 2000, in which she answered incorrectly "No" to the question "Are you now or have you ever been employed by or acted as a consultant for a foreign government, firm, or agency?" Applicant's incorrect "No" answer was not a falsification.

Department Counsel correctly points out that the Administrative Judge evaluated the facts of the case, especially Applicant's foreign life experiences, in such a way as to remove some important and pertinent facts from the Judge's analysis of Applicant's case under Guideline B (Foreign Influence). The Administrative Judge analyzed Applicant's work for the Russian government under Guideline L (Outside Activities) but did not address it in her analysis under Guideline B despite the fact that the Guideline L allegations pertaining to Applicant's work on sensitive projects in Russia were also alleged under Guideline B (SOR paragraph 1.i). The Administrative Judge analyzed Applicant's incorrect answer on her security clearance application under Guideline E (Personal Conduct) but not under Guideline B.

Applicant's entire life in Russia was pertinent to an analysis of Applicant's potential to be exploited or otherwise subject to foreign influence and should have been considered by the Administrative Judge for that purpose. Perhaps most important, the fact that Applicant and her husband held Russian security clearances in the 1980s should have been highly pertinent to the Judge's analysis of Applicant's susceptibility to foreign influence.⁽³⁾

At the time Applicant and her husband held Russian security clearances, the adversarial relationship between the United States and Russia was open and notorious. Therefore, the fact that Applicant and her husband were capable of holding Russian security clearance in the 1980s, adds to the already significant burden of demonstrating that Applicant's immediate family members (and others to whom she may be obliged: her sister-in-law and her ex-husband) living in Russia as well as her husband (who does not hold U.S. citizenship) are not in a position to be exploited in a way that could force Applicant to choose between her loyalty to those individuals and her newfound loyalty to the U.S. Although Applicant has taken some laudatory steps (*e.g.*, moving to the U.S. and acquiring American citizenship), in light of the totality of the facts and circumstances of Applicant's history and that of her family, the Administrative Judge failed to articulate a rational basis for her conclusion that Applicant's susceptibility to foreign influence through Applicant's family was mitigated. The Judge's failure to address an important aspect of this case reflects arbitrary and capricious action that fatally undercuts her favorable conclusions under Guideline B.

Department Counsel also challenges the Administrative Judge's handling of Applicant's explanations for her incorrect answers on her security clearance application. However, Department Counsel appears to make the challenge for the purpose of appealing the Administrative Judge's implied credibility determination, rather than challenging the Administrative Judge's ultimate conclusions on that allegation. In light of the analysis in the preceding paragraph, the Board need not address Department Counsel's challenge to the Judge's credibility determination.

Conclusion

Department Counsel has met its burden on appeal of demonstrating harmful error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's May 8, 2003 favorable decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Separate opinion of Chairman Emilio Jaksetic, concurring:

I concur with the majority's analysis for the most part, and with its decision to reverse the Administrative Judge's favorable security clearance decision. I write separately to indicate my disagreement with one aspect of the majority's analysis.

Department Counsel's argument concerning the Administrative Judge's findings and conclusions about Applicant's alleged falsification of a security clearance application (Appeal Brief at pp. 17-18) is somewhat confusing. The majority's characterization of Department Counsel's argument is a reasonable one. Furthermore, the majority's choice to not address Department Counsel's argument is a reasonable one, given the resolution of the other appeal arguments. However, Department Counsel's argument could be construed as also raising a challenge not only to the Judge's favorable credibility determination concerning Applicant, but also to the Judge's finding that Applicant did not falsify the security clearance application. As such, it warrants further comment.

The Administrative Judge's finding that Applicant did not falsify a security clearance application rests on the Judge's acceptance of Applicant's explanation as credible. Although the Judge's credibility determination is not immune from review, it is entitled to deference on appeal. Directive, Additional Procedural Guidance, Item E3.1.32.1. Department Counsel's brief fails to offer an argument that overcomes the deference owed to the Judge's credibility determination. Given the Judge's favorable credibility determination, the Judge's finding that Applicant did not falsify the security clearance application is sustainable. Therefore, to the extent that Department Counsel seems to be challenging the Judge's finding that Applicant did not falsify the security clearance Applicant, its argument fails to demonstrate the Judge erred.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Applicant's appeal brief takes issue with much of Department Counsel's characterization of the record evidence. Applicant correctly notes that the Board relies on the record evidence itself, not a party's characterization of that evidence, when considering appeal issues. *See* ISCR Case No. 00-0628 (February 24, 2003) at p. 3.
2. For purposes of this decision, the term Russia includes the former Soviet Union.
3. Prior involvement with a foreign country's defense industry or prior access to a foreign country's sensitive military projects raises significant questions that require scrutiny in evaluating an applicant's security eligibility.