

DATE: October 25, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-06478

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Neil I. Jacobs, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 22, 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). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision, dated May 19, 2003.

Applicant appealed the Administrative Judge's unfavorable security clearance decision. The Board issued an Appeal Board Decision and Remand Order, dated December 15, 2003. The case was remanded to the Judge for further processing consistent with the Board's rulings and instructions.

The Administrative Judge issued an unfavorable remand decision, dated March 16, 2004. Applicant has appealed the Judge's unfavorable remand 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 not granting Applicant's request that the Judge recuse himself; (2) whether the Administrative Judge erred by admitting and considering irrelevant hearsay evidence; and (3) whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's remand 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 Issues

1. Whether the Administrative Judge erred by not granting Applicant's request that the Judge recuse himself. On remand, the Administrative Judge notified the parties in writing that he proposed to take administrative notice of certain facts about the People's Republic of China and proposed to rely on a December 1999 report to Congress from the Director of Central Intelligence and the Director of the Federal Bureau of Investigation about Chinese espionage activities against the United States. Applicant objected to the Judge's administrative notice proposal and requested that the Administrative Judge recuse himself from the case. In support of the request for recusal, Applicant claimed that because of the Judge's actions that resulted in the Board's remand decision and the Judge's administrative notice proposal "the independence of the Court is in question, and the adversarial process blurred" and "[Applicant] is now unable to receive a full, fair and impartial hearing on the issues currently before the Court."<sup>(1)</sup> The Judge denied Applicant's recusal request (Remand Decision at p. 3).

On appeal, Applicant contends the Administrative Judge erred by not granting his recusal request. In support of that contention, Applicant: (a) repeats the arguments he made to the Judge during the proceedings below; and (b) asserts the Judge "took on the role of the Government, and abandoned [his] impartiality" to reach his unfavorable security clearance decision, thereby denying him a fair and impartial adjudication of his security clearance case.

There is a rebuttable presumption that quasi-judicial officials are unbiased and impartial,<sup>(2)</sup> and a party seeking to rebut

that presumption has a heavy burden of persuasion on appeal. <sup>(3)</sup> When the Board considers a claim of bias or lack of impartiality, the standard is not whether the appealing party personally believes that the Judge was biased and not impartial. Rather, the standard is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a disinterested person to question the fairness or impartiality of the Judge. <sup>(4)</sup>

Bias or lack of impartiality is not demonstrated merely because the Administrative Judge made adverse findings or reached unfavorable conclusions in a case. <sup>(5)</sup> Nor is bias or lack of impartiality shown by identifying legal error by the Judge. <sup>(6)</sup> Accordingly, the Judge's adverse findings and unfavorable conclusions in this case do not establish the Judge was biased or lacked impartiality. Furthermore, the Board's conclusion that the Judge committed legal error which warranted remand of this case for further proceedings does not establish the Judge was biased or lacked impartiality.

In addition, Applicant's claim is unpersuasive because it is predicated on an untenable legal premise. As noted in the Board's first decision in this case, the concept of judicial notice, and the analogous concept of administrative or official notice, are well established in the law. <sup>(7)</sup> Applicant's claim in this second appeal is predicated on the unwarranted premise that the Administrative Judge's obligation to be fair and impartial precluded him from taking administrative or official notice of anything. If a Judge were precluded, as a matter of law, from taking administrative or official notice, the Board would not have remanded this case to the Judge on the first appeal. Since it is legally permissible for a Judge to take administrative or official notice in an appropriate case, the mere exercise of that option by the Judge does not constitute a basis for a disinterested person to question the fairness or impartiality of the Judge.

2. Whether the Administrative Judge erred by admitting and considering irrelevant hearsay evidence. Applicant contends the Administrative Judge erred by admitting and considering a 1999 report to Congress because that document: (a) does not satisfy the requirements of Federal Rule of Evidence 201; (b) was irrelevant to the issues before the Judge; (c) contained "subjective hearsay"; and (d) was the same kind of evidence that was rejected by the Board on the first appeal of this case.

Applicant places too much reliance on the Federal Rules of Evidence. The Federal Rules of Evidence specifically apply to federal judicial proceedings, not federal administrative proceedings. <sup>(8)</sup> The Directive does not require that an Administrative Judge strictly apply the Federal Rules of Evidence in these proceedings. To the contrary, Directive, Additional Procedural Guidance, Item E3.1.19 specifically states: "The Federal Rules of Evidence shall serve *as a guide*. Relevant and material evidence may be received subject to rebuttal, *and technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record.*" (italics added) <sup>(9)</sup>

Applicant's relevance objection also is not persuasive. Even under a strict application of the Federal Rules of Evidence, relevance is a broad concept that encompasses evidence that has some probative value without the need for such evidence to be conclusive or even strong. <sup>(10)</sup> Indeed, the broad nature of the concept of relevance was noted by the Board in its December 15, 2003 decision in this case (at p. 5). Accordingly, even if the Board were to assume -- solely for purposes of deciding this appeal -- that Rule 401 of the Federal Rule of Evidence sets the standard for relevance in DOHA proceedings, the 1999 document Applicant objected to during the proceedings below is relevant to the Guideline B (Foreign Influence) issues in the case.

Applicant's hearsay argument is not well founded. The Board specifically noted in its December 15, 2003 decision in this case (at p. 4):

"Furthermore, there is no general prohibition to the admissibility and consideration of hearsay evidence in federal administrative proceedings. *See, e.g.* ISCR Case No. 98-0265 (March 17, 1999) at p. 7 (citing federal cases)."

Applicant has presented no persuasive argument for why the 1999 document should have been excluded on general hearsay grounds.

Finally, the Board does not find persuasive Applicant's argument that the 1999 document "is the same [kind of evidence] as that rejected on the original appeal of the Court's original decision." On the first appeal in this case, the

Board concluded that the Administrative Judge erred by admitting, over Applicant's objection, two op-ed pieces. The 1999 document at issue in this appeal clearly is not an op-ed piece. Official statements or reports made by Executive Branch officials to the U.S. Congress cannot reasonably be equated with op-ed pieces.

3. Whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because: (a) the Administrative Judge engaged in impermissible conjecture and speculation; (b) the Administrative Judge engaged in stereotyping and profiling; and (c) the Administrative Judge failed to justify his conclusion that Applicant did not present sufficient evidence to overcome and mitigate the case presented against him by Department Counsel. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

(a) Applicant's first argument lacks merit. Security clearance decisions are not an exact science and involve predictive judgments. <sup>(11)</sup> The federal government is not required to wait until an applicant poses a "clear and present danger" to national security, or wait until an applicant actually mishandles or fails to safeguard classified information. <sup>(12)</sup> The federal government is entitled to make security clearance decisions in order to avoid or reduce situations that could pose security risks in the future, rather than wait until a security breach is threatened or has occurred. Accordingly, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider the possibility that Applicant could be vulnerable to coercion, exploitation, or pressure based on the totality of the facts and circumstances of his family ties with citizens of the People's Republic of China. <sup>(13)</sup>

(b) Applicant's claim that the Administrative Judge engaged in stereotyping and profiling is conclusory, vague, and fails to set forth any discernable argument for how the Administrative Judge's decision supposedly reflects stereotyping or profiling. As noted earlier in this decision, there is no presumption of error below and the appealing party has the burden of raising claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Applicant's conclusory assertion fails to raise a colorable claim of error. <sup>(14)</sup>

(c) Applicant also contends the Administrative Judge failed to justify his conclusion that Applicant did not present sufficient evidence to overcome and mitigate the case presented against him by Department Counsel. Applicant strongly disagrees with the Judge's unfavorable conclusions under Guideline B (Foreign Influence). But that disagreement is not sufficient to demonstrate the Judge erred. A Judge's decision is not shown to be arbitrary, capricious, or contrary to law merely because the appealing party strongly disagrees with the Judge's decision. Rather, the appealing party must articulate a cogent reason or argument -- based on the record below and applicable principles of law -- that shows how or why the Judge's rulings, analysis, or conclusions are arbitrary, capricious, or contrary to law. <sup>(15)</sup> Applicant has not articulated a cogent reason or argument in support of his claim that the Judge's decision is arbitrary, capricious, or contrary to law.

### Conclusion

Because Applicant has failed to demonstrate error below, the Board affirms the Administrative Judge's remand 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. Applicant's "Answer to Notice of Administrative Notice And Request for Recusal of Administrative Judge," dated March 3, 2004.
2. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982).
3. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4.
4. *See, e.g.*, ISCR Case No. 01-04713 (March 27, 2003) at p. 3.
5. *See, e.g.*, ISCR Case No. 94-0954 (October 16, 1995) at p. 4 (citing *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1047 (7th Cir. 1989)).
6. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5 (citing *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981)).
7. *See* ISCR Case No. 02-06478 (December 15, 2003) at pp. 4-5 (discussing various legal authorities).
8. *See* Federal Rules of Evidence, Rule 101 ("These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions listed in rule 1101."). Nothing in Rule 1101 extends the application of the Federal Rules of Evidence to federal administrative proceedings.
9. The exception referred to in Directive, Additional Procedural Guidance, Item E3.1.19 does not apply to this case. For a discussion of that exception, *see* ISCR Case No. 01-23356 (November 24, 2003) at pp. 7-8.
10. *See* ISCR Case No. 02-04455 (July 31, 2003) at p. 3 (discussing Federal Rule of Evidence 401 and Advisory Committee's Note to that Rule).
11. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988).
12. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).
13. *Cf. Department of Navy v. Egan*, 484 U.S. 518, 528 (1988)(noting a security clearance decision "is only an attempt to predict [a person's] *possible future behavior* and to assess whether, under compulsion of circumstances or for other reasons, [the person] *might compromise sensitive information*")(italics added).
14. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing various reasons why an appealing party must set forth its claims of error with specificity).
15. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5.