

DATE: September 15, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06723

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 October 25, 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 Martin H. Mogul issued an unfavorable security clearance decision dated June 4, 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 decision is arbitrary, capricious, or contrary to law. 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 Issue

Applicant has made assertions in his appeal brief that go beyond the record below and constitute new evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. The Board will limit its consideration of Applicant's brief to those arguments that are not based on new evidence.

Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law. On appeal Applicant asserts: (a) contrary to the conclusion of the Administrative Judge, Applicant does not think he has close contact with his parents, who live in the People's Republic of China; (b) there is no chance that a foreign power can use his parents and relatives to make him do things harmful to the United States; and (c) he considers the United States his homeland, he has lived in this country for eighteen years and he has a clear record that proves his reliability and trustworthiness. The Board construes these arguments as an assertion that the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

The Administrative Judge made a finding that Applicant traveled to the People's Republic of China on five occasions between 1994 and 2000 to visit his parents. The Judge also found that Applicant contacted his parents by telephone approximately two times a month. The Judge concluded based on these facts that Applicant's contacts with his parents were more than casual or infrequent. Notwithstanding Applicant's assertions to the contrary on appeal, the Board concludes that there is adequate support in the record for the Administrative Judge's conclusion that Applicant's contacts with his parents were of sufficient magnitude to be of unmitigated security concern.

By asserting that none of his relatives in the People's Republic of China could be used by a foreign government to make him to harmful things to the United States, Applicant is merely drawing an alternate set of conclusions from the record evidence that differ from the conclusions reached by the Administrative Judge. The ability to formulate a different interpretation of the record evidence from that adopted by the Administrative Judge is insufficient to demonstrate that the Judge committed error. *See* ISCR Case No. 02-15383 (July 29, 2003) at pp. 3-4. The Board concludes, after a review of the totality of the record, that the Administrative Judge's ultimate conclusion that Applicant's relationship with his

relatives living in the People's Republic of China poses an unacceptable risk of foreign influence is sustainable.

Applicant points to his eighteen years of residence in the United States, his pronounced support for this country and his clean record as evidence that his relationship with his relatives in the People's Republic of China does not pose a potential threat to the security of this country. The favorable evidence cited by Applicant is evidence that the Administrative Judge was required to consider. The Judge is responsible for weighing the evidence of record, both favorable and unfavorable before making his ultimate security clearance determination. Absent a showing that the Judge did so in a manner that was arbitrary, capricious or contrary to law, the Board will not disturb the Judge's weighing of the evidence. In this case, Applicant's disagreement with the Judge's assessment of the relative strength and weakness of the favorable and unfavorable evidence is not sufficient to persuade the Board that the Judge acted in a manner that is arbitrary, capricious or contrary to law. Accordingly, the Judge's adverse conclusions are 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board