

DATE: September 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06928

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 January 6, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Joseph Testan issued an unfavorable security clearance decision dated June 25, 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 adverse conclusions under Guideline C are 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 Issues

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline B (Foreign Influence). Those favorable formal findings are not at issue on appeal.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his living in Israel from 1976 to 1996, his obtaining Israeli citizenship, his employment with an Israeli defense contractor for approximately 14 years, his receipt of a pension based on his employment with the Israeli defense contractor, and his family ties with Israel. However, Applicant argues: (1) he strongly believes that he was serving the interests of the United States when he worked for an Israeli defense contractor because Israel has been and is an ally of the United States; (2) when he was drafted into the Israeli military, he was told by the U.S. Consul that he "was in no danger of losing [his] U.S. citizenship"; (3) he has "never put [his] U.S. citizenship as secondary"; (4) he is reluctant to give up his Israeli pension because he is "reluctant to endanger the security that will help [him] in [his] Senior years"; (5) he did not know about the ASDC3I memorandum concerning foreign passports⁽¹⁾ when he accepted employment with a U.S. defense contractor; (6) when he became aware of the ASDC3I memorandum, he called the Israeli Consulate to inquire about relinquishing his Israeli passport and sought information how he could visit Israel if he gave up his Israeli citizenship; and (7) the evidence "clearly indicates" he has a preference for the United States, and shows he is not a security risk.

As a preliminary matter, the substance of Applicant's argument concerning the ASDC3I memorandum need not be addressed. The Administrative Judge concluded the security concerns raised by Applicant's possession of an Israeli passport were removed by his surrender of that passport to Israeli officials. Given that favorable conclusion by the Judge, Applicant's argument about the ASDC3I memorandum is moot.

The Board construes Applicant's remaining arguments as raising the issue of whether the Administrative Judge's adverse conclusions under Guideline C are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate error below.

Applicant's opinions as to the meaning and significance of his conduct may be relevant evidence concerning his intent or state of mind when he engaged in such conduct. However, Applicant's opinions are not binding on the Administrative Judge as to the security significance of Applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 01-18445 (April 9, 2003) at pp. 3-4. The Administrative Judge had to apply the pertinent provisions of the Directive and reach his own reasoned conclusions about the security significance of Applicant's conduct and circumstances. Applicant's ability to put forth an alternate interpretation of the significance of his conduct and circumstances does not demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law.

There is no record evidence as to what advice, if any, Applicant received from the U.S. Consulate about what effect serving in the Israeli military through compulsory conscription might have on his U.S. citizenship. Therefore, Applicant's argument is based on factual assertions that constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Applicant's argument about his Israeli pension does not demonstrate error below. Nothing in the Administrative Judge's decision indicates or suggests the Judge was requiring Applicant to make any particular decision about his Israeli pension. When adjudicating security clearance cases, a Judge is evaluating the security significance of an applicant's conduct and circumstances, not ordering an applicant to make decisions about conducting his or her personal life. *See, e.g.*, ISCR Case No. 02-06806 (February 25, 2003) at p. 3; ISCR Case No. 00-0516 (December 7, 2001) at p. 5. However, Applicant's freedom to make decisions about his personal life does not preclude the federal government from deciding whether the choices Applicant makes raise security concerns. And, in any event, nothing in the Administrative Judge's decision indicates or suggests that the Judge concluded Applicant's decision about keeping his Israeli pension was pivotal to the Judge's analysis. As will be discussed later in this decision, Applicant's security eligibility must be evaluated in light of the totality of his conduct and circumstances.

The favorable record evidence cited by Applicant does not demonstrate the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The presence of favorable evidence does not preclude a Judge from reaching an unfavorable security clearance decision. The Judge must consider the record evidence as a whole, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. Absent a showing that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 02-01494 (May 28, 2003) at p. 3. Applicant's disagreement with the Judge's weighing of the record evidence, standing alone, is not sufficient to demonstrate the Judge weighed it improperly.

The Administrative Judge acted properly by considering the totality of the facts and circumstances of Applicant's conduct and his ties with Israel. The Judge's analysis was consistent with the whole person concept. *See* Directive, Section 6.3; Enclosure 2, Item E2.2.1. Given the record evidence in this case, the Judge articulated a rational basis for why he had unresolved doubts about the security significance of Applicant's overall conduct and ties with Israel. Given those unresolved doubts, the Judge properly resolved them in favor of the national security. *See* Directive, Enclosure 2, Item E2.2.2 ("Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.").

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: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. 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 emorandum).