

DATE: May 24, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07625

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 May 2, 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 Martin H. Mogul issued an unfavorable security clearance decision on January 23, 2004. [\(1\)](#)

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 unfavorable 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 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

The Administrative Judge entered favorable formal findings with respect to the SOR paragraphs under Guideline B (Foreign Influence). Those favorable formal findings are not at issue on appeal.

The Administrative Judge concluded Applicant's possession of a Jordanian passport precluded a favorable security clearance decision because of the terms of the memorandum of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), dated August 16, 2000, concerning foreign passports.

On appeal, Applicant states: (1) he is willing to renounce his Jordanian citizenship; (2) the Jordanian Government makes it extremely difficult for anyone in his position to surrender their Jordanian citizenship; (3) he has not used his Jordanian passport in preference to his United States passport; (4) he is willing to allow his Jordanian passport to expire; and (5) when he became a naturalized United States citizen, he took the Oath of Allegiance. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

Given the terms of the ASDC3I memorandum concerning foreign passports, the Administrative Judge correctly concluded that Applicant's possession of a Jordanian passport precluded a favorable security clearance decision. (2) Nothing in the ASDC3I memorandum indicates that possession of a foreign passport is extenuated or mitigated by any personal hardship that might ensue if an applicant tries to surrender a foreign passport. Furthermore, the ASDC3I memorandum on foreign passports is legally binding on DOHA Administrative Judges and the Board, and neither a Judge nor the Board has the jurisdiction or authority to review or pass judgment on the wisdom or desirability of the ASDC3I memorandum. *See, e.g.*, ISCR Case No. 02-04237 (August 12, 2003) at p. 4.

Finally, Applicant's appeal brief could be construed as offering to take steps in the future to comply with the ASDC3I memorandum. Such an offer fails to demonstrate error below. First, Applicant's offer constitutes new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Second, even if Applicant had

made such an offer during the proceedings below, the result would have been the same. The ASDC3I memorandum requires the surrender of a foreign passport, not a promise to do so at some indeterminate, future date.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's decision in the case file bears the date January 23, 2003. However, a review of the case file shows the reference to "2003" is a typographical error.
2. Under the terms of the ASDC3I memorandum, possession of a foreign passport can be mitigated when there is "official approval for its use from the appropriate agency of the United States Government." There is no record evidence that Applicant received such official approval regarding his possession of a Jordanian passport.