

DATE: January 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10215

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 December 18, 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 Elizabeth M. Matchinski 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 issues are raised on appeal: (1) whether the Administrative Judge was not fair or impartial; (2) whether the SOR was insufficiently detailed to satisfy the requirements of the Directive; (3) whether Department Counsel and the Administrative Judge failed to ask Applicant sufficient questions at the hearing about his conduct and circumstances; (4) whether the Administrative Judge failed to properly weigh the record evidence; and (5) whether the Administrative Judge's conclusions under Guideline B 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 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⁾

The Administrative Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 1.d. That favorable formal finding is not at issue on appeal.

1. Whether the Administrative Judge was not fair or impartial. Applicant asserts the Administrative Judge's decision is not fair or impartial. Applicant's assertion appears to be predicated on the assumption that the Judge's decision is not fair or impartial because of the various errors he claims the Judge committed. Applicant's contention is not persuasive.

The right to a fair and impartial adjudication is an important one. *See* Directive, Section 4.1; Section 6.3; Additional Procedural Guidance, Item E3.1.10. *See also* ISCR Case No. 99-0519 (February 23, 2001) at p. 7 ("A fair and impartial adjudication is an important right that touches upon the basic integrity of DOHA proceedings."). There is a rebuttable presumption that an Administrative Judge is fair and impartial, and a party seeking to rebut or overcome that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 5. Generalized claims of unfairness are insufficient to overcome or rebut the presumption. *See, e.g.*, DISCR Case No. 90-0279 (June 9, 1994) at p. 5. Furthermore, even if a party is successful in identifying factual or legal error by the Judge, such a showing is not sufficient to demonstrate the Judge was biased or unfair. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5. Finally, any challenge to a Judge's fairness and impartiality is not measured or evaluated in terms of a party's personal beliefs about the Judge's conduct and rulings, but rather in terms of whether there is anything in the record below that indicates a basis to reasonably question the fairness or impartiality of the Judge. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 5.

Applicant's strong disagreement with the Administrative Judge's decision is not sufficient to rebut or overcome the

presumption that the Judge acted in a fair and impartial manner. Moreover, none of Applicant's appeal arguments rebuts or overcomes the presumption that Judge carried out her duties in a fair and impartial manner. Applicant's brief sets forth no argument that provides a basis, in fact or law, to reasonably question the Judge's fairness and impartiality.

2. Whether the SOR was insufficiently detailed to satisfy the requirements of the Directive. Applicant asserts that: (a) the SOR issued to him was not detailed; (b) there was a "lack of substance of the issues/concerns in the SOR"; and (c) an SOR should never been issued in his case. Applicant's arguments fail to demonstrate any error below.

The Board does not have jurisdiction or authority to review the actions of DOHA personnel who draft and issue SORs. Furthermore, neither a Hearing Office Administrative Judge nor the Board has the authority to strike or dismiss an SOR. *See, e.g.*, ISCR Case No. 99-0481 (November 29, 2000) at p. 4. However, the Board does have the jurisdiction and authority to consider claims that an applicant's right to a fair hearing was prejudiced by an inadequate SOR.

An SOR is an administrative pleading that does not have to satisfy the strict requirements of a criminal indictment. All that is required is that an SOR place an applicant on adequate notice of the allegations being made against the applicant so that the applicant can respond to those allegations and present evidence on his or her behalf for consideration by the Administrative Judge deciding the case. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. In this case, the SOR issued to Applicant placed him on adequate notice of the allegations against him so that he could respond to those allegations and present evidence on his behalf for consideration by the Judge. Applicant's dissatisfaction with the SOR allegations does not demonstrate the SOR in this case prejudiced his right to a fair hearing.

3. Whether Department Counsel and the Administrative Judge failed to ask Applicant sufficient questions at the hearing about his conduct and circumstances. Applicant asserts that: (a) he expected that Department Counsel and the Administrative Judge would ask him questions at the hearing about his case so that he could "prove his trustworthiness and loyalty to the U.S."; (b) neither Department Counsel nor the Judge asked him any questions about his family's finances; and (c) "[i]f the Judge or Department Counsel thought it was necessary to explore aspects of the Applicant's life beyond what was identified in the SOR then they should have posed questions at the hearing." The Board construes these assertions as raising the issue of whether Department Counsel and the Judge failed to ask Applicant sufficient questions at the hearing about his conduct and circumstances.

To the extent that Applicant's brief can be construed as indicating he was expecting Department Counsel or the Judge to develop the record evidence for Applicant's benefit, it fails to show error below. DOHA proceedings are adversarial in nature and Department Counsel is under no obligation to act as an advocate on behalf of applicants. Indeed, if Department Counsel were to try to do so, then Department Counsel would place themselves in a conflict of interest situation. Furthermore, although a Judge is entitled to ask questions at a hearing, a Judge cannot act as a surrogate advocate for either an applicant or Department Counsel. *See, e.g.*, ISCR Case No. 96-0869 (September 11, 1997) at p. 2 (Administrative Judge may ask questions of an applicant or any witness as long as the Judge does so in a fair and impartial manner). If a Judge were to try to act as a surrogate advocate for an applicant or Department Counsel, then the Judge would be acting in a manner that violates the Judge's obligation to act in a fair and impartial manner.

Both the Directive (Additional Procedural Guidance, Item E3.1.15) and the prehearing guidance sent to Applicant placed him on adequate notice that he was responsible for preparing for the hearing and presenting documentary or testimonial evidence "to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel..." ⁽²⁾ Furthermore, at the hearing, the Administrative Judge told Applicant: (a) he was responsible for representing himself during the hearing; (b) she could not act as an advocate for either party; and (c) the hearing was his opportunity to present evidence for his case (Hearing Transcript at pp. 5-6, 10). Moreover, when Applicant indicated that he had no further evidence to present, the Judge cautioned Applicant that the hearing was his last opportunity to present evidence and then asked him if he had anything further to present. Applicant responded that he did not have anything further to present (Hearing Transcript at p. 85). Considering all the circumstances, Applicant was on adequate notice that he was responsible for presenting evidence on his behalf. Applicant cannot fairly complain that neither Department Counsel nor the Judge acted on his behalf to develop the record evidence for his benefit.

To the extent Applicant's brief can be construed as indicating he believes the Administrative Judge erroneously reached adverse conclusions about him because Department Counsel or the Judge did not ask more questions, it fails to show

error below. As noted in the preceding two paragraphs, DOHA hearings are adversarial in nature and Applicant was on adequate notice that he was responsible for presenting evidence on his behalf. A Judge must make findings of fact and reach conclusions based on the evidence before the Judge. If a party fails to present evidence for the Judge to consider, that party is not in a strong position to complain that the Judge should have made different findings or reached different conclusions. Furthermore, as discussed later in this decision, the Board concludes Applicant has not shown the Judge reached conclusions under Guideline B that are arbitrary, capricious, or contrary to law.

4. Whether the Administrative Judge failed to properly weigh the record evidence. At the hearing, Department Counsel asked the Administrative Judge to take administrative or official notice of two documents. The Judge indicated that she would take administrative or official notice of those two documents (Hearing Transcript at pp. 37-38).⁽³⁾ On appeal, Applicant argues the two documents are dated, do not apply to him, and do not provide support for the Judge's adverse conclusions about him. The Board construes Applicant's arguments as raising the issue of whether the Judge gave undue weight to the two documents. Furthermore, Applicant takes exception with the Judge's weighing of the record evidence submitted by Applicant, which he claims supports his case and undercuts the Judge's adverse conclusions. The Board construes these various arguments as raising the issue of whether the Judge failed to properly weigh the record evidence.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. An appealing party's strong disagreement with a Judge's weighing of the record evidence is not sufficient to rebut or overcome that presumption. Applicant's ability to cite to favorable record evidence that he believes the Judge should have given more weight to is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3.

Furthermore, the Board will not disturb an Administrative Judge's weighing of the evidence unless there is a showing that the Judge did so in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-01494 (May 28, 2003) at p. 3. A party's ability to argue for an alternate weighing of the record evidence, standing alone, is not sufficient to demonstrate the Judge weighed the evidence improperly. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 4. None of Applicant's appeal arguments persuades the Board that the Judge acted in a manner that is arbitrary, capricious, or contrary to law when she considered and weighed the record evidence in this case.

5. Whether the Administrative Judge's conclusions under Guideline B are arbitrary, capricious, or contrary to law. Applicant also contends: (a) there are favorable security clearance decisions by Hearing Office Judges in other DOHA cases that show he should have received a favorable decision from the Judge; (b) the Judge failed to consider the evidence that Applicant has had access to classified information for 18 months and proven to be honest, trustworthy, and "fully committed to executing his security responsibilities"; (c) Taiwan is a country that has friendly ties with the United States; (d) Applicant's contacts with his sister (and her husband) in Taiwan have been casual and infrequent; (e) the Judge should have applied Foreign Influence Mitigating Condition 1 in his favor; (f) the Judge's decision is not based on common sense; (g) the Judge drew unreasonable, illogical, and baseless inferences and conclusions; (h) the government's case against him "is totally lacking in substance"; (i) there is no evidence to support the Judge's adverse conclusions under Guideline B; (j) Applicant has demonstrated he "has earned and is entitled to" the privilege of having a security clearance; and (k) he would promptly report to proper U.S. authorities "all contacts, requests, or threats from persons or organizations" seeking sensitive information related to his employment.⁽⁴⁾ The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse conclusions under Guideline B are arbitrary, capricious, or contrary to law.⁽⁵⁾

(a) The decisions by Hearing Office Administrative Judges in other DOHA cases are not precedents that are legally binding on the Judge in this case, and they are not legally binding on the Board in any case. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions issued by Hearing Office Judges). Applicant's ability to cite favorable security clearance decisions in other DOHA cases is not sufficient to demonstrate the Judge's decision in this case is arbitrary, capricious, or contrary to law.

(b) As discussed earlier in this decision, there is a rebuttable presumption that an Administrative Judge has considered all the record evidence unless the Judge specifically states otherwise. And, in any event, although the absence of any security violations weighs in an applicant's favor it is not dispositive. The federal government is not required to wait

until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Even in the absence of any security violations, the federal government can deny or revoke access to classified information if an applicant's conduct and circumstances raise security concerns.

(c) Nothing in Guideline B (Foreign Influence) indicates that it is limited to countries that are hostile to the United States. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 12. Accordingly, the existence of friendly ties between Taiwan and the United States does not preclude the Administrative Judge from rendering an adverse decision in this case.

(d) The Administrative Judge concluded that Applicant's contacts with his sister (and her husband) in Taiwan are casual and infrequent (Decision at p. 8).⁽⁶⁾ That favorable conclusion did not preclude the Judge from reaching adverse conclusions under Guideline B based on the overall facts and circumstances of Applicant's family ties with other immediate family members in Taiwan. *See, e.g.*, ISCR Case No. 02-14990 (March 3, 2003) at p. 3 (the mere presence of favorable record evidence does not compel an Administrative Judge to make a favorable decision; the Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*).

(e) Applicant's argument concerning Foreign Influence Mitigating Condition 1⁽⁷⁾ is predicated on the assumption that the Administrative Judge should have applied it in his favor unless Department Counsel presented evidence that precluded its applicability. Applicant's argument is based on a misperception about the burdens of proof involved in his case. Department Counsel has the burden of presenting evidence to prove facts alleged in the SOR that have been controverted. Directive, Additional Procedural Guidance, Item E3.1.14. An applicant has the burden of "presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's burden of persuasion extends to presenting evidence that would support application of an Adjudicative Guidelines mitigating condition. Accordingly, Department Counsel has no burden or obligation to affirmatively disprove the applicability of Foreign Influence Mitigating Condition 1. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5; ISCR Case No. 00-0484 (February 1, 2002) at p. 3. Therefore, Applicant's argument on this aspect of the case fails to demonstrate the Judge erred.

Applicant's argument concerning Foreign Influence Mitigating Condition 1 also relies heavily on his claim that none of his family members in Taiwan are agents of a foreign power. Because Foreign Influence Mitigating Condition 1 is bifurcated in nature, an applicant is not entitled to have it applied merely because there is no evidence that an applicant's family members overseas are agents of a foreign power. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 10 (discussing bifurcated nature of Foreign Influence Mitigating Condition 1). Accordingly, although the Judge specifically found that Applicant's family members in Taiwan were not agents of a foreign government (Decision at p. 7), that finding did not require the Judge to apply Foreign Influence Mitigating Condition 1 in Applicant's favor.

(f), (g), (h), and (i) Applicant takes strong exception with the Administrative Judge's analysis of his case. However, Applicant's disagreements with the Judge's analysis do not identify any action by the Judge that is arbitrary, capricious, or contrary to law given the record evidence before her. To the extent that Applicant argues the facts and circumstances of his case do not raise any security concerns under Guideline B, the Board notes that an applicant's opinion as to the security significance of his or her conduct and circumstances is not dispositive and does not preclude a Judge from evaluating the security significance of the applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at pp. 4-5. Given the record evidence in this case, it was legally permissible for the Judge to conclude that the facts and circumstances of Applicant's case raised security concerns under Guideline B, and that Applicant failed to meet his burden of persuasion to rebut or overcome those security concerns.

(j) There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Furthermore, a prior decision to grant a security clearance does not give an applicant a vested right or entitlement to continued possession of a security clearance. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at p. 7. Applicant's personal belief that he has earned the privilege of holding a security clearance does not demonstrate any error by the Administrative Judge in this case.

(k) Applicant's assertion that he would report to the proper U.S. authorities any effort by others to gain access to sensitive information about his employment does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant's assertion was not conclusive or binding on the Judge. *See, e.g.*, ISCR Case No. 02-26826 (November 12, 2003) at pp. 5-6 ("An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in an identical or similar manner in the past under identical or similar circumstances. As a matter of common sense, a person's stated intention to engage in future conduct that is identical or similar to the person's past conduct is entitled to be given more weight than a person's stated intention to engage in future conduct of a kind that the person has never engaged in before.").

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Separate Opinion of Administrative Judge Michael Y. Ra'anan

I agree with the majority opinion but I wanted to add another thought.

Applicant's appeal discusses two documents which were admitted on into evidence by administrative notice. Applicant is *pro se* and not a native English speaker so I am inclined to interpret his brief more broadly than I might otherwise be. The two items were taken notice of without Applicant having an opportunity to object. At the beginning of the hearing the Judge advised Applicant "Okay. Just like you will have an opportunity to voice any objections to her documents." (Transcript, p. 10). Later, Department Counsel presented the two documents and her reasoning for seeking notice of the documents. The Judge then turned to Applicant and told him she was taking notice of the documents and that since Applicant has relatives in Taiwan, the burden is on him to demonstrate that the relatives do not put him at risk for security purposes. She concluded with "You understand that?" (Transcript, pp. 37-38). I do not know if Applicant would have objected if offered the opportunity. I will not speculate if any objections (which the majority construes as going to the weight given to the documents) would have prevented the Judge from taking notice of the documents. I am troubled that he was never given the opportunity to object.

This is not the first case where someone has seemed inclined to view or treat documents subject to administrative notice as fundamentally different from evidence. (In this case the two documents were also not placed in the evidentiary file.) While such a distinction may have some theoretical value, in practice it is fraught with difficulties.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains various factual assertions which seek to supplement, and elaborate on, the evidence developed during the proceedings below. Such factual assertions constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
2. Under Directive, Additional Procedural Guidance, Item E3.1.15, an applicant also "has the ultimate burden of persuasion as to obtaining a favorable clearance decision." That burden of persuasion is a heavy one because a favorable security clearance decision requires a determination that it is "clearly consistent with the national interest" to grant or continue a security clearance for a particular applicant. *See* Executive Order 10865, Section 2; Directive, Section 4.2 and Additional Procedural Guidance, Item E3.1.25.
3. Copies of the two documents are in the case file, but neither one was marked as an exhibit.
4. Some of Applicant's brief focuses on individual sentences or brief passages in the Administrative Judge's decision. The Board does not review individual sentences in a Judge's decision in isolation, but rather views a decision in its entirety to ascertain what findings the Judge made and what conclusions the Judge reached. *See, e.g.*, ISCR Case No. 00-0311 (March 8, 2001) at p. 2. Furthermore, the Board is required to address "the *material* issues raised by the parties." Directive, Additional Procedural Guidance, Item E3.1.32 (emphasis added). Some of Applicant's arguments take issue with sentences and passages in the decision below that are not factually or legally material to the relevant issues under Guideline B (Foreign Influence). No useful purpose would be served by discussing those arguments beyond noting they have been considered by the Board and are deemed not material to this appeal.
5. Applicant also takes exception with an assertion that Department Counsel made during closing argument at the hearing. Applicant's disagreement with Department Counsel's argument is irrelevant to the merits of the Administrative Judge's decision and raises no material issue on appeal.
6. Applicant also takes issue with footnote 2 of the Administrative Judge's decision. Applicant's argument about that footnote fails to demonstrate the Judge erred. The Judge's brief discussion of Foreign Influence Mitigating Condition 3 in footnote 2 is consistent with prior Board rulings concerning that mitigating condition. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5; ISCR Case No. 98-0592 (May 4, 1999) at p. 7.
7. "A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States."