

DATE: February 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11402

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated March 20, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Claude R. Heiny issued an unfavorable security clearance decision dated September 9, 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 have been raised on appeal: whether the Administrative Judge's security clearance decision was arbitrary, capricious or contrary to law because (a) Applicant has not committed any security violations; and (b) the Judge erred by basing his security clearance decision on the strength of Applicant's ties with family members in Iran. For the reasons that follow the Board affirms the 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

Whether the Administrative Judge's security clearance decision was arbitrary, capricious or contrary to law because (a) Applicant has not committed any security violations; and (b) the Judge erred by basing his security clearance decision on the strength of Applicant's ties with his family members in Iran.⁽¹⁾

(a) On appeal, Applicant asserts he has taken his security clearance privileges very seriously and has never abused them. The Board construes this assertion as raising the claim that the Administrative Judge's decision is arbitrary, capricious, or contrary to law because Applicant has not committed any security violations. 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). Although evidence that an applicant has committed a security violation would raise serious security concerns, such evidence is not required for an unfavorable security clearance decision. Even if there is no evidence that an applicant has ever committed a security violation, an adverse security clearance decision can be made based on facts and circumstances that raise security concerns that are not shown to be extenuated or mitigated. Accordingly, merely because the SOR issued to Applicant did not allege that he engaged in any security violation, the Administrative Judge was not precluded from making an unfavorable security clearance decision.

(b) Applicant argues that the Administrative Judge erred by relying on the strength of Applicant's ties with his family members in Iran. The Administrative Judge is bound by the Directive. Under the Directive, once it has been demonstrated that Applicant has immediate family members in one or more foreign countries, the burden shifts to Applicant to show that the government's concerns about Applicant's overseas family are mitigated. Directive, Enclosure 2, Item E2.A2.1.2.1. Generally, mitigation is demonstrated by the successful application of the appropriate mitigating condition for the government's concern, in this case Foreign Influence Mitigating Condition 1 (MC1): " 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." *See* Directive, Enclosure 2, Item E2.A2.1.3.1. The Judge concluded that Applicant had not mitigated the government's concern and did not apply MC1 to the relatives in Iran (although he did find it applicable to Applicant's in-laws who now reside in the United States).⁽²⁾ The Board concludes that the record in this case is sufficient to support the Judge's conclusion that the government's concerns about Applicant's immediate family in Iran have not been mitigated. Applicant has not demonstrated on appeal that the Judge should have applied MC1 to his immediate family members in Iran. In his decision the Judge made one reference to the strength of Applicant's ties to his family members and did not apply Foreign Influence Mitigating Condition 3 (casual and infrequent contact) (Directive, Enclosure 2, Item E2.A2.1.3.3. The passage cited by Applicant is insufficient to demonstrate that the Judge's findings of fact, analysis or conclusions were arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating substantial error in the Administrative Judge's decision below. Therefore the Board affirms the Administrative Judge's September 9, 2003 decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Separate Opinion of Chairman Emilio Jaksetic, concurring:

I fully concur with: (a) my colleagues' statement of the case and the issues raised by Applicant's appeal brief; (b) footnote 1 of my colleagues' decision; and (c) my colleagues' discussion concerning Applicant's argument about his security record. I write separately because I would resolve Applicant's other appeal argument differently.

There is no presumption of error below and the appealing party has the burden of demonstrating error below. In these proceedings, Applicant has the burden of presenting 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 clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15. Given the record evidence in this case, the Administrative Judge had a rational basis for concluding that Applicant's ties with immediate family members in Iran raised security concerns under Guideline B (Foreign Influence) and that Applicant had failed to satisfy his burden of persuasion.

Although Applicant clearly disagrees with the Administrative Judge's weighing of the record evidence and the Judge's adverse conclusions, Applicant fails to show that the Judge's analysis of the case under Guideline B involves factual or legal error, or involves reasoning that is arbitrary, capricious, or contrary to law. If an appealing party challenges a Judge's weighing of the record evidence, that party must not simply disagree with the Judge's weighing of the record evidence, but rather must articulate a cogent reason or argument for how the Judge erred in weighing the record evidence. Applicant's strong disagreement with the Judge's adverse conclusions is not sufficient to demonstrate they are arbitrary, capricious, or contrary to law. If an appealing party challenges a Judge's conclusions, that party must not simply disagree with the Judge's conclusions, but rather must articulate a cogent reason or argument for how the Judge's

conclusions are arbitrary, capricious, or contrary to law.

For all the foregoing reasons, I concur with my colleagues that the decision below should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Applicant also cites error in the Judge's finding that Applicant came to the United States in 1997 instead of 1977, and in finding that Applicant commenced his work with the contractor in December 2001. The Judge's reference to 1997 was in error, but is likely a typographical error because the Judge also found that Applicant was naturalized in 1991 and makes references to events in 1979, 1983, and 1992 that show the Judge was aware that Applicant was in the United States before 1997. A typographical error is harmless error that does not require reversal. *See, e.g.*, ISCR Case No. 99-0500 (May 19, 2000) at p. 3. The Judge's reference to a December 2001 employment commencement is correct in so far as it pertains to Applicant's current period of employment and is generally not germane to the issues involved under Guideline B (Foreign Influence).

2. In this regard, the Judge made a formal finding in Applicant's favor (SOR paragraph 1.b), which is not at issue in this appeal.