

DATE: May 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11570

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Scott M. Badami, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated March 7, 2003 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 October 17, 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: (1) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it does not follow or ignored DOHA precedent; (2) whether the Administrative Judge erred by failing to apply Foreign Influence Mitigating Condition 1 and Foreign Influence Mitigating Condition 3; and (3) whether the Administrative Judge failed to apply the whole person concept in reaching her decision. 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⁾

1. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it ignored DOHA precedent. Applicant contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it ignored DOHA precedent pertinent to his case. In support of this contention, Applicant's appeal arguments cite decisions by both Hearing Office Administrative Judges and the Board

Applicant's reliance on decisions by Hearing Office Administrative Judges is misplaced. It is well settled that decisions by Hearing Office Judges are not legally binding on their colleagues in other cases, and are never binding precedent on the Board. ⁽²⁾ Although Applicant can cite decisions by Hearing Office Judges as persuasive authority, it is untenable for Applicant to contend the Judge erred by not following decisions by her colleagues in other cases. Furthermore, since the decisions cited by Applicant are not binding on the Board, the Board is not required to follow those decisions, distinguish them, reconcile any of its own decisions with them, or justify why it chooses not to follow them. Rather, the burden rests on the party citing Hearing Office decisions to make cogent arguments and present sound reasons for why the Board ought to accept such decisions as persuasive authority. ⁽³⁾

Of course, Applicant can cite and rely on Board decisions in support of his appealing arguments. However, Applicant has not shown how the Administrative Judge's decision in this case is contrary to the Board decisions cited by Applicant. Applicant cites two Board decisions that discuss Guideline B in the context of countries hostile to the United States, and argues those cases support his interpretation of Guideline B in the context of countries not hostile to the United States. If the Board had never addressed Guideline B issues in cases involving a country not hostile to the United States, Applicant's approach would be understandable. However, the Board has addressed Guideline B issues in cases involving countries not hostile to the United States. Applicant's argument is unpersuasive because it does not distinguish

those Board decisions from this case, or explain how his argument is consistent with the reasoning of those Board decisions.

2. Whether the Administrative Judge erred by failing to apply Foreign Influence Mitigating Condition 1 and Foreign Influence Mitigating Condition 3. Applicant contends the Administrative Judge should have applied Foreign Influence Mitigating Condition 1 and Foreign Influence Mitigating Condition 3, and should have concluded that neither Applicant's contacts with his mother nor Applicant's contacts with his brother are disqualifying under Guideline B (Foreign Influence). In support of this contention, Applicant argues:

the Judge erred by not taking into account the fact that Greece is a member of NATO and an ally of the United States;

the Judge should have applied Foreign Influence Mitigating Condition 1 because Greece is a country that is not hostile to the United States and not likely to use threatening or coercive pressure against Applicant's immediate family members living in Greece;

the Judge erred by assuming Applicant's mother has continuing contacts with officials at the Greek Department of State;

Applicant presented evidence supporting the application of Foreign Influence Mitigating Condition 1 and Foreign Influence Mitigating Condition 3; and

the Judge's decision "improperly fails to distinguish between the Applicant's mother and brother by grouping together all of the Applicant's foreign contacts without distinction," and it was error for the Judge not to analyze Applicant's contacts with his mother and his brother separately.

For the reasons that follow, the Board concludes Applicant has not demonstrated error below.

During the proceedings below, Applicant did not: (i) offer evidence concerning the nature or status of foreign relations between Greece and the United States; (ii) ask the Administrative Judge to take administrative or official notice of the nature or status of foreign relations between Greece and the United States; or (iii) ask the Judge to take administrative or official notice of any document, publication, or official Internet Web site of the U.S. Government that described or otherwise stated the nature or status of foreign relations between Greece and the United States.⁽⁴⁾ The Board has held that a party that does not ask a Judge to take administrative or official notice of a specific matter has a heavy burden on appeal of demonstrating the Judge's inaction was arbitrary, capricious, or contrary to law.⁽⁵⁾ Applicant fails to meet that burden in this case. Furthermore, to the extent that Applicant seeks to supplement the record on appeal by making factual assertions about the nature or status of foreign relations between Greece and the United States, Applicant is seeking to supplement the record on appeal as a basis to claim the Judge erred. Applicant cannot fairly claim the Judge erred by not considering matters that he did not present for the Judge to consider during the proceedings below.⁽⁶⁾

Applicant also argues the Administrative Judge erred by not applying Foreign Influence Mitigating Condition 1⁽⁷⁾ because Greece is a country that is not hostile to the United States and not likely to use threatening or coercive pressure against Applicant's immediate family members living in Greece. Applicant's argument does not demonstrate the Judge erred.

First, nothing in Guideline B (Foreign Influence) indicates or suggests that it is limited to countries that are hostile to the United States.⁽⁸⁾ The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it,⁽⁹⁾ regardless of whether that person, organization, or country has interests inimical to those of the United States.⁽¹⁰⁾ The United States is entitled to ensure that persons entrusted with classified information are not at risk of failing to properly handle and safeguard such information because of potential conflicts of interest due to foreign family ties.

Second, the Board decisions cited by Applicant do not support his argument that the Administrative Judge should have given favorable weight to the fact that Greece is a country that is not hostile to the United States. The Board has warned "against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases

under Guideline B." (11) Applicant properly acknowledges that Board decision and seeks to distinguish his case from it, but does not do so persuasively. History shows that foreign countries not considered to be hostile to the United States have obtained unauthorized access to United States classified information. (12) Furthermore, the security concerns under Guideline B are not limited to situations involving vulnerability to coercion or blackmail. (13) The national security of the United States can be at risk whether a person with foreign family ties is vulnerable to coercion or blackmail, or is vulnerable to noncoercive influence. Indeed, the history of espionage against the United States shows many cases without any indication of coercion or blackmail being brought to bear on the individuals involved in spying.

Third and significantly in this case, there is no dispute that Applicant's brother is a member of the Greek State Department. As such, Applicant's brother is an agent of a foreign power. By its plain meaning, Foreign Influence Mitigating Condition 1 is not applicable if an applicant's immediate family member is an agent of a foreign power. It is untenable for Applicant to argue that the Administrative Judge should have applied a mitigating condition contrary to its plain meaning. (14)

Applicant's argument concerning Foreign Influence Mitigating Condition 3 (15) is not persuasive. There is a rebuttable presumption that an applicant's contacts with immediate family members are not casual. (16) Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant's contacts with his mother and brother were such that they did not warrant application of Foreign Influence Mitigating Condition 3. Applicant's arguments to the contrary are not persuasive.

The Administrative Judge was not required to consider Applicant's contacts with his mother separately from his contacts with his brother. It is entirely proper for the Judge to consider the totality of Applicant's contacts with his mother and his brother, rather than analyze them separately in a piecemeal manner. (17) Indeed, Applicant's argument on this point is inconsistent with his argument concerning the applicability of the whole person concept. Finally, given the record evidence in this case, the Judge drew a permissible inference about the contacts Applicant's mother has had with members of the Greek government. (18)

Applicant's strong disagreement with the Administrative Judge's inferences and conclusions is not sufficient to demonstrate the Judge engaged in an analysis under Guideline B that is arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge failed to apply the whole person concept in reaching her decision. Applicant contends the Administrative Judge's decision does not reflect application of the whole person concept. (19) In support of this contention, Applicant argues: (a) he poses no threat to the national security; (b) he is talented and is making a significant contribution to the well being and defense of the United States; and (c) failure to apply the whole person concept "will impede the Applicant from further service to his country."

(a) Applicant's first argument is predicated on his other challenges to the Administrative Judge's adverse findings and conclusions under Guideline B. Since those challenges fail to demonstrate the Judge erred, they added no independent support to this argument. Furthermore, Department Counsel is not required to prove that an applicant is a clear and present danger to national security before a Judge can make an unfavorable security clearance decision. (20)

(b) Applicant's talents and ability to make a contribution to the defense effort of the United States do not demonstrate the Administrative Judge failed to apply the whole person concept. Whether Applicant is able to contribute to the national security is not relevant or material to assessing his security eligibility. An applicant's technical expertise (or lack thereof) is not a measure of whether the applicant demonstrates the high degree of judgment, reliability, and trustworthiness that must be possessed by persons entrusted with classified information. In deciding whether to grant or continue access to classified information, the government must consider whether an applicant's conduct and circumstances pose a risk of deliberate or inadvertent disclosure of classified information. An applicant's technical expertise and contribution to defense programs do not make the applicant less likely to deliberately or inadvertently disclose classified information; an applicant's lack of technical expertise and absence of any contribution to defense programs do not make the applicant more likely to deliberately or inadvertently disclose classified information. (21)

Applicant's talents and ability to make a contribution to the defense effort of the United States do not have probative

value as to whether Applicant has extenuated or mitigated the security concerns raised under Guideline B.

(c) Similarly, the adverse effect that an unfavorable security clearance decision could have on Applicant does not demonstrate the Administrative Judge failed to apply the whole person concept. A Judge must evaluate an applicant's conduct and circumstances to assess the applicant's judgment, reliability, and trustworthiness and reach a conclusion as to whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. The possibility of adverse job or career consequences following from an unfavorable security clearance decision is not relevant or material to the Judge's assessment of the applicant's security eligibility.⁽²²⁾ An applicant is not made more or less suitable for a security clearance based on how a security clearance decision might affect the applicant.⁽²³⁾ The possible adverse effects that an unfavorable security clearance decision might have on Applicant's job or career do not have any probative value as to whether Applicant has extenuated or mitigated the security concerns raised under Guideline B.

Viewed individually or collectively, Applicant's arguments do not demonstrate the Administrative Judge failed to apply the whole person concept.

Conclusion

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

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's formal findings in favor of Applicant with respect to SOR paragraphs 1.c and 1.d are not at issue on appeal.

2. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at p. 3 (discussing precedential value of decisions by Hearing Office Judges).

3. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5.

4. The Board has noted that "[p]ronouncements about the relationship between the United States and any given foreign country are committed to the President of the United States, the Secretary of State, and other duly authorized Executive

Branch officials." ISCR Case No. 02-09907 (March 17, 2004) at p. 3.

5. *See* ISCR Case No. 01-08565 (March 7, 2003) at p. 3.

6. *See, e.g.*, ISCR Case No. 01-25571 (March 10, 2004) at p. 3 ("Applicant cannot fairly challenge the Judge's findings based on a proffer of evidence that she did not present for the Judge's consideration.").

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" (Directive, Enclosure 2, Item E2.A2.1.3.1).

8. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6; ISCR Case No. 00-0489 (January 10, 2002) at p. 12.

9. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).

10. *See, e.g.*, ISCR Case No. 97-0699 (November 24, 1998) at p. 3. *Cf. also* National Industrial Security Program Operating Manual, DoD 5220.22-M, Chapter 10 (identifying and discussing restrictions on disclosure of classified information to foreign governments, foreign entities, and foreign nationals).

11. ISCR Case No. 00-0317 (March 29, 2002) at p. 6.

12. *See, e.g., United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 915 (1988). Furthermore, countries hostile to the United States have exploited penetrations of governments friendly to the United States to gain unauthorized access to classified United States information. *See, e.g.*, Kim Philby (a high-ranking member of British intelligence who spied for the Soviet Union) and Donald Maclean (member of British Embassy in Washington, D.C. who spied for the Soviet Union). Such penetrations can allow a country hostile to the United States to take advantage of the friendly relations between the United States and the country whose government was penetrated. Furthermore, a hostile country could try to use a "false flag" operation to induce cooperation from a person who might be open to cooperating with a friendly country in the belief that such cooperation would help the friendly country without harming the United States. The FBI has used "false flag" operations to identify and capture spies. *See, e.g., United States v. Squillacote*, 221 F.3d 542, 550 (4th Cir. 2000)(referring to FBI use of a "false flag" operation as part of its espionage investigation). If the FBI can use "false flag" operations to identify and catch spies, then it would be implausible to assume that a foreign country would balk at trying to use "false flag" operations as part of its intelligence gathering.

13. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6. In cases involving Guidelines other than Guideline B, the Board has noted that the evidence of vulnerability to coercion or blackmail is not required before an unfavorable security clearance decision can be made. *See, e.g.*, ISCR Case No. 02-06303 (August 7, 2003) at p. 3 (case involving Guidelines E and J); ISCR Case No. 01-08410 (May 8, 2002) at p. 3 (case involving Guideline F). Nothing in the Directive requires such evidence in a Guideline B case.

14. *See, e.g.*, ISCR Case No. 01-20906 (January 10, 2003) at p. 7 n. 11 (an Administrative Judge cannot ignore the plain meaning of a provision of the Adjudicative Guidelines).

15. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Enclosure 2, Item E2.A2.1.3.3).

16. *See* ISCR Case No. 00-0484 (February 1, 2002) at p. 5.

17. *See, e.g.*, ISCR Case No. 01-22693 (September 22, 2003) at p. 7 (rejecting argument that an Administrative Judge should analyze security significance of each of the applicant's family members living abroad on an individual, piecemeal basis).

18. Under the substantial evidence standard applicable in these proceedings, an Administrative Judge's findings must be based on more than a scintilla of evidence, but they can be based on less than a preponderance of the evidence. *See, e.g.*,

ISCR Case No. 01-10301 (December 30, 2002) at p. 5 n.3.

19. Security clearance adjudications must be based on consideration of the record evidence as a whole and the whole person concept. *See* Directive, Section 6.3 and Enclosure 2, Items E2.2.1 and E2.2.3.

20. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 7.

21. *See* ISCR Case No. 02-04237 (August 12, 2003) at p. 3.

22. *See, e.g.*, ISCR Case No. 01-21851 (April 18, 2003) at p. 4.

23. *See, e.g.*, ISCR Case No. 98-0435 (September 16, 1999) at p. 2.