

DATE: February 5, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11499

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 September 26, 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 Joan Caton Anthony issued an unfavorable security clearance decision dated July 18, 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 decision is arbitrary, capricious, or contrary to law. 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 Issue

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant makes several arguments which taken together the Board construes as a claim that the Administrative Judge's decision is arbitrary, capricious or contrary to law. Applicant argues: (1) He had initiated necessary arrangements for his mother to join him in the United States and, in September 2003, Applicant applied for his mother to acquire permanent residence status and he anticipates her arriving in the United States by the end of 2003; (2) Applicant's siblings in Sierra Leone are not related to him by blood, he has not been in contact with them since 1985, and his feelings of kinship and affection for them have eroded owing to the passage of time; (3) Although Applicant does not see why it is an issue, he is willing immediately to stop sending his mother \$300 a year; (4) Applicant would not share classified information with his fiancée who has applied for United States citizenship; (5) Applicant is prepared to not travel to Sierra Leone for the duration of time he holds a security clearance even though he does not see why his travel is a security problem; and (6) Applicant challenges the Judge's negative credibility determination about him. Additionally, in his prayer for relief, Applicant seeks reversal of the Judge's decision and a grant of a temporary security clearance for one year, or in the alternative, he requests that his clearance be suspended for six months until his mother arrives in the United States.

Applicant's arguments 1, 3, 4 and 5 all rely on a proposal to adjudicate Applicant's foreign ties on the basis of future facts and circumstances he anticipates creating or finding himself in rather than those that existed at the close of the record evidence. To the extent that Applicant introduces evidence not previously in the record, it is new evidence that the Board cannot consider. *See*, Directive, Additional Procedural Guidance, Item, E3.1.29. To the extent that his proposals regarding his future conduct constitute a request for a conditional security clearance, Applicant cites no authority for such a method of adjudication and the Board is not aware of any. The Board cannot conclude that the Administrative Judge erred by failing to adopt such a method of adjudication. Indeed the Board has held that a Judge must consider the actual conduct and circumstances of applicants with foreign ties. *See, e.g.*, ISCR Case No. 00-0633, October 24, 2003, at p.8 ("A Judge needs to consider whether an applicant's conduct and circumstances place him in a position of vulnerability even if there is no evidence that a foreign country has in fact sought to exploit that vulnerability.")

Applicant's second argument also relies on new evidence. The Board cannot consider new evidence on appeal, as noted above.

Applicant's sixth argument fails for two reasons. The Board must give deference to the credibility determinations of the Administrative Judge. *See*, Directive, Additional Procedural Guidance, Item E3.1.32.1. Applicant has offered no basis for the Board to disturb the Judge's credibility determination in light of the required deference. Moreover, the Judge's security clearance decision is sustainable without reference to her credibility determination.

Regarding Applicant's prayer at the end of his brief, the Board cannot grant Applicant the resolutions he seeks. First of all, for the reasons discussed in preceding paragraphs of this decision, Applicant has not presented a basis for reversal. Additionally, the Board is not authorized to grant Applicant's alternative remedies of a temporary or suspended clearance.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's decision. Therefore the Judge's July 18, 2003 decision is affirmed.

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board