

DATE: February 18, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12760

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 November 15, 2002, 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 Roger E. Willmeth issued a decision, dated July 28, 2004, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge ignored record evidence that was favorable to Applicant; (2) whether the Administrative Judge wrongfully analyzed the foreign influence portion of the case under Guideline B Disqualifying Condition 1 and Guideline B Mitigating Condition 1; (3) whether the Administrative Judge erred by not applying the "whole person" concept; and (4) whether the case should be remanded for a reopening of the record to allow Applicant to provide information that would support application of Guideline B Mitigating Condition 1. 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 [\(1\)](#)

In his appeal brief, Applicant makes reference to several prior decisions of DOHA Hearing Office Administrative Judges to support appeal arguments. A decision of a Hearing Office Administrative Judge is not legally binding precedent on other Hearing Office Judges or the Board. Applicant's ability to cite favorable Hearing Office decisions in other cases that have some factual similarities to his case does not demonstrate the Administrative Judge's decision in this case is arbitrary, capricious, or contrary to law. Furthermore, the Board has no obligation to follow the Hearing Office decisions cited by Applicant, and no obligation to reconcile the Judge's decision below with the Hearing Office decisions cited by Applicant. *See, e.g.*, ISCR Case No. 02-15358 (July 22, 2003) at p. 3.

1. Whether the Administrative Judge ignored record evidence that was favorable to Applicant. On appeal, Applicant asserts the following: (a) the Administrative Judge erred by merely accepting the wording of the SOR when finding that Applicant had weekly to monthly telephonic contact with his in-laws in Israel and when finding that Applicant had close friends in Israel, while ignoring Applicant's responses to the SOR and to the File of Relevant Material (FORM); and (b) the Judge did not diligently address the entire record when concluding Applicant had failed to mitigate the concerns raised by the presence in Israel of his Israeli national in-laws and his Israeli national friends. The Board construes these arguments as raising the issue of whether the Administrative Judge ignored record evidence that was favorable to Applicant.

There is a rebuttable presumption that an administrative judge has considered all the record evidence in a case, unless he or she specifically states otherwise. In this case, Applicant has failed to rebut that presumption. Moreover, after a review of the Judge's decision and the record evidence, the Board concludes that the Administrative Judge's findings of fact do

not merely mimic the SOR and do not ignore pertinent evidence of record. The Judge's findings are reasonably supported by the record evidence. Applicant has failed to demonstrate error concerning the Judge's findings of fact.

2. Whether the Administrative Judge wrongfully analyzed the foreign influence portion of the case under Guideline B Disqualifying Condition 1 and Guideline B Mitigating Condition 1. Applicant also asserts the following: (a) the Administrative Judge's characterization of Applicant's relationships with his in-laws in Israel and certain friends in Israel is erroneous; (b) Applicant's only close relationships and close ties of affection and obligation are with his immediate family residing in the United States, to the exclusion of his in-laws and his friends; and (c) the Administrative Judge erred by extending the circle of "immediate family" beyond the clear definition of Guideline B Mitigating Condition 1. The Board construes these arguments as raising the issue of whether the Administrative Judge wrongfully analyzed the foreign influence portion of the case under Guideline B Disqualifying Condition 1 ⁽²⁾ and Guideline B Mitigating Condition 1 ⁽³⁾.

The Administrative Judge concluded that Department Counsel met its burden of establishing a case under Guideline B Disqualifying Condition 1 and that Applicant had failed to meet his burden of proof in establishing the applicability of Guideline B Mitigating Condition 1. Applicant's argument concerning the application of Guideline B Disqualifying Condition 1 and Guideline B Mitigating Condition 1 is predicated upon his assertion that the Administrative Judge erroneously found that he had a close relationship with his in-laws and certain friends who reside in Israel. Applicant insists that he is only close to his immediate family members living in the United States. This argument overlaps previous arguments made by Applicant concerning the Judge's findings of fact. As indicated earlier, after a review of the record evidence, the Board determines that the Judge's findings that Applicant has close ties of affection or obligation to his mother-in-law, father-in-law, brother-in-law, sister-in-law and friends who live in Israel is reasonably supported by the record evidence. Given those findings, it was appropriate for the Judge to conclude that Guideline B Disqualifying Condition 1 applied to the case. Having concluded that disqualifying condition applied to the case, it was then appropriate for the Judge to evaluate any potential mitigation within the framework of Guideline B Mitigating Condition 1.

Applicant argues that there are no in-laws or friends mentioned in Guideline B Mitigating Condition 1, and the Judge erred by extending the circle of "immediate family" beyond the language in Mitigating Condition 1. Applicant's assertion is not persuasive. Foreign connections based on marriage, as opposed to birth, can raise security concerns under Guideline B. Accordingly, the Administrative Judge's application of Guideline B Disqualifying Condition 1 and his analysis of any potential mitigation under Guideline B Mitigating Condition 1 are not rendered arbitrary, capricious, or contrary to law because Applicant's relationships with Israeli citizens living in Israel are based on his marriage. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 4. (Administrative Judge can consider security significance of evidence that an applicant's wife is a foreign citizen with family members living in foreign country). Additionally, the Judge did not err when considering the circumstances of Applicant's close friends in Israel when analyzing potential mitigation under Mitigating Condition 1. Mitigating Condition 1 includes the term "associate(s)" as well as the term "immediate family member(s)." In-laws and close friends are reasonably contemplated by the term "associate(s)."

Closely aligned with his argument concerning Guideline B Mitigating Condition 1 is Applicant's argument that the Administrative Judge should have applied Guideline B Mitigating Condition 3 ⁽⁴⁾ to the facts of this case. Applicant's argument is predicated upon his assertion that the evidence establishes that Applicant's contacts with foreign nationals are casual and infrequent. As noted earlier in this decision, the Administrative Judge made sustainable findings that Applicant maintains regular contact with his in-laws in Israel and is close to certain friends in Israel. Therefore, the Judge's decision not to apply Guideline B Mitigating Condition 3 in this case was not error.

3. Whether the Administrative Judge erred by not applying the "whole person" concept. Applicant's argument concerning the "whole person" concept is similar to his earlier argument that the Administrative Judge ignored favorable record evidence. He points to favorable evidence when arguing that a common sense approach to his case would lead to the conclusion that his circumstances and behavior, viewed as a whole, should sufficiently mitigate the remote concern of the theoretical pressure exerted on remote relatives and acquaintances in an attempt to affect his conduct. Applicant's ability to point to favorable record evidence and his ability to argue for an alternate interpretation of the record evidence fail to establish error on the part of the Administrative Judge. It is the responsibility of the Administrative Judge to

weigh both the favorable and the unfavorable evidence when reaching the ultimate decision in a case. The Board will not disturb the Judge's weighing of the evidence absent a showing that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. On appeal, the Applicant has not met his burden of establishing that the Judge failed to apply properly the "whole person" concept.

4. Whether the case should be remanded for a reopening of the record to allow Applicant to provide information that would support application of Guideline B Mitigating Condition 1. Applicant asks the Board to remand the case to reopen the record for the limited purpose of providing information that would fully support application of Guideline B Mitigating Condition 1. Applicant chose to have his case processed through the vehicle of a FORM, rather than a full hearing. He exercised his right to respond in writing to the FORM submitted by Department Counsel. On appeal, he offers no reason as to why he was not given an adequate opportunity to present his case during the proceedings below. Accordingly, Applicant is not now entitled to an opportunity to submit matters that he could have submitted below.

Conclusion

Applicant has failed to satisfy his burden of demonstrating error. Therefore, the Board affirms the Administrative Judge's security clearance decision.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made favorable formal findings under Guideline C (Foreign Preference), specifically subparagraphs 1.a through 1.g, and one allegation under Guideline B (Foreign Influence), specifically subparagraph 2.a. These favorable formal findings are not at issue on appeal.

2. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."

3. "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."

4. "Contact and correspondence with foreign citizens are casual and infrequent."