

DATE: December 19, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-12733

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

Diane B. Hinch, Esq.

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 B (Foreign Influence) and Guideline C (Foreign Preference). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision dated August 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 issues have been raised on appeal: (1) whether the Board can consider evidence concerning Applicant's conduct after the date of the Administrative Judge's decision; and (2) whether the Administrative Judge should have made a favorable security clearance decision because Applicant's possession and use of a British passport were for purposes of convenience only. 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<sup>(1)</sup>

1. Whether the Board can consider evidence concerning Applicant's conduct after the date of the Administrative Judge's decision. On appeal, Applicant does not challenge any of the Administrative Judge's findings of fact concerning his possession and use of a British passport. However, Applicant offers a letter that post-dates the Administrative Judge's decision and contends the letter shows that he has followed through with a prior statement (contained in the record evidence before the Judge) that he was willing to relinquish his British citizenship and willing to surrender his British passport. The Board is barred from considering new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. The Board cannot consider the new evidence offered by Applicant on appeal.

2. Whether the Administrative Judge should have made a favorable security clearance decision because Applicant's possession and use of a British passport were for purposes of convenience only. Applicant also argues that he should get a favorable security clearance decision because his actions to relinquish his British citizenship and surrender his British passport, plus the fact that his use of a British passport was for purposes of convenience only, show that he has demonstrated a preference for the United States over the United Kingdom.

As noted earlier in this decision, Applicant's new evidence cannot be considered on appeal. Furthermore, Applicant has not challenged the Administrative Judge's finding that Applicant still possessed a British passport even though he had knowledge that possession of a foreign passport was grounds for an adverse security clearance decision under an August 16, 2000 memorandum issued by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline"). Given that finding, the Judge properly concluded that Applicant's possession of a British passport precluded a favorable security clearance decision. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p.6 (discussing why Hearing Office Administrative Judges and the Board are bound to apply the August 16, 2000 memorandum concerning foreign passports).

Applicant's argument concerning possession of a British passport for purposes of convenience is not persuasive. The August 16, 2000 memorandum concerning foreign passports specifically indicates that possession of a foreign passport for personal convenience is not mitigating. Apart from the August 16, 2000 memorandum concerning foreign passports, the Board has noted that possession of a foreign passport still raises security concerns under Guideline B even if the applicant possesses such a passport for reasons of personal convenience. *See, e.g.*, ISCR Case No. 01-01331 (February 27, 2002) at p. 3.

Applicant's reliance on a Hearing Office decision in another case is misplaced. In that case, (ISCR Case No. 01-21238, February 10, 2003), the Administrative Judge issued a favorable decision based, in part, on the finding that the applicant had already surrendered his British passport. In this case, there was no record evidence that Applicant had surrendered his British passport. Accordingly, whatever persuasive authority the Judge's decision in ISCR Case No. 01-21238 might have, it is distinguishable on its facts.

### **Conclusion**

Applicant has failed to demonstrate the Administrative Judge committed any factual or legal error. Therefore, the Board affirms the Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline B (Foreign Influence). Those favorable formal findings are not at issue on appeal.