

DATE: July 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-14995

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated June 13, 2003 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 Charles D. Ablard issued a favorable security clearance decision dated February 6, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 favorable conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses 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 Issue⁽¹⁾

Whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. The Administrative Judge concluded that the facts and circumstances of Applicant's immediate family members living in Iran raised security concerns under Guideline B, but then concluded that Applicant had mitigated those security concerns because: (1) Applicant's immediate family members living in Iran (a brother and sister) are not agents of the Iranian government; (2) Applicant's immediate family members living in Iran do not constitute an unacceptable security risk; (3) Applicant is likely to successfully resist any effort by the Iranian government to pressure her through her immediate family members living in Iran; (4) Applicant's immediate family members in Iran do not know about her employment or her access to classified information; and (5) Applicant's testimony was credible.

Department Counsel contends the Administrative Judge's favorable conclusions under Guideline B are arbitrary, capricious, or contrary to law because: (a) the record evidence in this case does not support the Judge's application of Foreign Influence Mitigating Condition 1; and (b) the Judge failed to articulate a rational basis for his conclusion that Applicant's immediate family members living in Iran do not pose a security risk. Applicant argues the Board should affirm the Judge's favorable security clearance decision because: (i) she has held a security clearance for many years without violating security; (ii) the U.S. government did not tell her before this proceeding that her contacts with family members in Iran posed a security risk; (iii) there is no evidence that the Iranian government is aware of her access to classified information; (iv) her family members living in Iran would not ask her to betray U.S. classified information for the benefit of the Iranian government; (v) the Judge's decision is based on a reasonable interpretation of the record evidence; and (vi) the Judge properly considered and evaluated all the factors in this case.⁽²⁾

Three of Applicant's arguments raise threshold issues that warrant preliminary discussion. First, the absence of any allegation or evidence that Applicant has engaged in any security violations does not preclude the federal government

from considering whether the totality of the facts and circumstances of Applicant's ties with immediate family members living in Iran raises security concerns. The federal government is not required to wait until an applicant has mishandled or failed to protect classified information before it can decide whether the facts and circumstances of an applicant's case raises security concerns. ⁽³⁾

Second, Applicant's lack of awareness that the federal government could consider her ties with immediate family members in Iran as raising security concerns did not preclude the federal government from considering the security significance of those family ties. The objective of a security clearance adjudication is not to control or regulate an applicant's conduct or circumstances, but rather to decide whether an applicant's conduct or circumstances pose a security risk that precludes a determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant. ⁽⁴⁾ Furthermore, the federal government is not required to formally advise an applicant that certain conduct or circumstances raise security concerns and then allow an applicant the opportunity to stop such conduct or change his or her circumstances before the federal government can seek to deny or revoke access to classified information. The federal government can deny or revoke access to classified information without first giving an applicant the functional equivalent of a warning with an opportunity to change his or her conduct or circumstances. ⁽⁵⁾

Third, Applicant's belief about whether the Iranian government knows about her access to classified information, however sincere, is not very probative as to whether the Iranian government does or does not know about her access to classified information. ⁽⁶⁾ And, even if Applicant's belief were correct, it does not prove that the Iranian government cannot or will not become aware of her access in the future. Moreover, the federal government is entitled to evaluate Applicant's security eligibility without having to prove that the Iranian government currently is aware of her access to classified information. As Department Counsel correctly notes, the federal government is not required to wait until it has proof that an applicant has been specifically targeted by a foreign government before it can decide whether the applicant's conduct and circumstances pose a security risk. ⁽⁷⁾ Security clearance decisions can be based on predictive judgments about the security concerns raised by an applicant's conduct and circumstances, and are not limited to situations where there is an imminent threat to national security. ⁽⁸⁾

The Administrative Judge's application of Foreign Influence Mitigating Condition 1 ⁽⁹⁾ was problematic for two reasons. First, when referring to that mitigating condition, the Judge used language from an earlier version of it, ⁽¹⁰⁾ not the current version. It was arbitrary, capricious, and contrary to law for the Judge to rely on an earlier version of the mitigating condition. ⁽¹¹⁾ Second, Foreign Influence Mitigating Condition 1 is bifurcated in nature and cannot be applied unless there is sufficient credible record evidence that an applicant's family members, cohabitant or associates in question are (a) not agents of a foreign power, *and* (b) not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States. ⁽¹²⁾ By applying Foreign Influence Mitigating Condition 1 based solely on a finding that Applicant's immediate family members in Iran are not agents of the Iranian government, the Judge ignored the plain meaning of that mitigating condition.

Given the record evidence in this case, the Administrative Judge failed to articulate a rational basis for his conclusion that Applicant is likely to successfully resist any effort by the Iranian government to pressure her through her immediate family members in Iran. The record evidence cited by the Judge concerning the travails of Applicant's brother, cousin and niece at the hands of Iranian authorities does not have probative value concerning Applicant's conduct, in the past or in the future. There is no record evidence: (a) that the travails of Applicant's brother, cousin, and niece placed Applicant in a position of having to make a choice of any kind; (b) about how Applicant acted, reacted, or otherwise dealt with the travails of her brother, cousin, and niece; (c) whether the travails of Applicant's brother, cousin, and niece had any particular effect on, or consequence for, Applicant; or (d) that would otherwise shed light on how Applicant might react to actions of the Iranian government taken to pressure or influence her, directly or indirectly, because of her ties with immediate family members living in Iran. Although a Judge must make predictive judgments in these cases, such predictive judgments must have a rational basis in the record evidence. ⁽¹³⁾ A Judge's responsibility to weigh the record evidence does not mean that the Judge is at liberty to draw whatever inferences or conclusions the Judge wants to draw; rather, the Judge must draw reasonable inferences and reach reasonable conclusions that fairly take into account the totality of the record evidence and evaluate the security significance of the facts and circumstances of an applicant's case

in a manner that is consonant with the "clearly consistent with the national interest" standard.⁽¹⁴⁾ In this case, the Judge failed to articulate a basis for his favorable conclusions under Guideline B that is supported by the record evidence and reasonable inferences drawn from it.

Department Counsel also challenges the Administrative Judge's reliance on his conclusion that Applicant was a credible witness. That challenge has merit. A credibility determination is not a substitute for record evidence,⁽¹⁵⁾ and it does not relieve an Administrative Judge from the obligation to consider what inferences or conclusions reasonably could be reached in light of the record evidence as a whole. The sincerity and veracity of a witness's testimony are separate and distinct from what weight reasonably can be given to that testimony,⁽¹⁶⁾ and what inferences and conclusions reasonably can be reached based on considering that testimony in light of the evidence as a whole.⁽¹⁷⁾ Accordingly, although the Judge found Applicant's testimony to be credible, such a credibility determination did not relieve the Judge of the obligation to consider the substance of Applicant's testimony in light of the record evidence as a whole and weigh it in a reasonable manner in evaluating the security significance of Applicant's ties to immediate family members living in Iran. The Judge's conclusion that Applicant was a truthful witness is not a substitute for record evidence that might provide a rational basis for the Judge's favorable conclusions under Guideline B.

Applicant's argument that her family members living in Iran would not ask her to betray U.S. classified information for the benefit of the Iranian government does not have the significance Applicant places on it. There is no record evidence that Applicant's family members living in Iran have asked her to disclose classified information. However, the security concerns under Guideline B are not limited to situations where an applicant's family members seek to obtain unauthorized access to classified information. Rather, the typical security concerns under Guideline B include the security risks posed by the vulnerability of an applicant to coercion, pressure, or influence brought to bear on an applicant, directly or indirectly, by a foreign government or entity because of the applicant's ties with family members living abroad.⁽¹⁸⁾

Conclusion

Department Counsel has met its burden of demonstrating harmful error below. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

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 entered formal findings in favor of Applicant with respect to Guideline C (Foreign Preference). Those favorable formal findings are not at issue on appeal.
2. Applicant's appeal brief contains some factual assertions that seek to supplement the record evidence. Such assertions constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
3. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).
4. *See, e.g.*, ISCR Case No. 02-06928 (September 17, 2003) at p. 4; ISCR Case No. 00-0516 (December 7, 2001) at p. 5.
5. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 6.
6. A witness's opinion or belief about what another person or entity knows -- if not based on the witness's personal knowledge or experience, or supported by other credible evidence -- is nothing more than speculation or surmise about what another person or entity knows, and as such, is entitled to no weight.
7. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 7.
8. *Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975).
9. "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, Adjudicative Guidelines, Item E2.A2.1.3.1).
10. "A determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk."
11. *See* ISCR Case No. 02-24254 (June 29, 2004) at p. 7; ISCR Case No. 99-0480 (November 28, 2000) at p. 5.
12. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p. 6; ISCR Case No. 02-26826 (November 12, 2003) at pp. 4-5; ISCR Case No. 01-03120 (February 20, 2002) at p. 4; ISCR Case No. 99-0511 (December 19, 2000) at p. 10.
13. *See, e.g.*, ISCR Case No. 02-24254 (June 29, 2004) at p. 8.
14. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at pp. 13-14. *See also* ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6 (explaining why security clearance decisions are not left to the unfettered discretion of security clearance adjudicators)
15. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 6.
16. A witness may truthfully testify as to what the witness believes to be the facts, yet cross-examination or other record evidence may show, *inter alia*, that: (a) the witness did not actually see, hear, or otherwise perceive the event or thing about which the witness testified; (b) the witness did not have a good opportunity to see, hear, or otherwise perceive the event or thing about which the witness testified; (c) the witness saw, heard or otherwise perceived only part of the event or thing about which the witness testified; (d) the witness misperceived or misunderstood what the witness saw, heard, or otherwise perceived; (e) the witness's testimony is based on assumptions or conclusions about the meaning or significance of what the witness saw, heard or otherwise perceived; (f) the witness is not a good observer, has a poor memory, or has difficulty in accurately communicating about the events or things the witness saw, heard, other otherwise perceived; (g) the witness has a tendency to exaggerate or be careless in describing events or things they see, hear or otherwise perceive; (h) the witness is innocently mistaken about what the witness saw, heard or otherwise perceived; or (i) the witness's testimony is inconsistent with, or contradicted by, other credible or reliable evidence.
17. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 6-7; ISCR Case No. 99-0511 (December 19, 2000) at pp.

8-9 n.3.

18. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 5-6; ISCR Case No. 99-0424 (February 8, 2001) at p. 11.