

DATE: April 5, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17178

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Robert Herman, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 21, 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 Philip S. Howe issued an unfavorable security clearance decision, dated September 30, 2004.

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 erred by applying the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence's August 16, 2000 memorandum concerning foreign passports; and (2) whether the Administrative Judge erred by concluding that Applicant's ties with family members in Israel raised security concerns under Guideline B (Foreign Influence) that were not mitigated. 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. Whether the Administrative Judge erred by applying the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence's August 16, 2000 memorandum concerning foreign passports. Applicant does not challenge the Administrative Judge findings that: (a) Applicant used an Israeli passport after he became a naturalized U.S. citizen in 1993; (b) Applicant's Israeli passport expired in 2002; and (c) Applicant had not surrendered his Israeli passport. However, Applicant does challenge the Judge's conclusion that application of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence's August 16, 2000 memorandum concerning foreign passports ("ASDC3I memorandum") mandated an adverse decision in his case. In support of this challenge, Applicant relies on decisions by Hearing Office Administrative Judges that hold the ASDC3I memorandum does not apply to expired passports. In its reply brief, Department Counsel asks the Board to decide this appeal without relying on the ASDC3I memorandum.

Applicant's reliance on decisions by Hearing Office Administrative Judges is misplaced. It is a well-settled principle of American jurisprudence that an appellate tribunal is not bound by the decisions of a lower-level tribunal. Although a Hearing Office Judge's decision can be cited as persuasive authority, a party relying on such a decision has the burden of persuading the Board to follow such a decision. ⁽¹⁾

None of the Hearing Office decisions cited by Applicant are persuasive.

First, the decision in ISCR Case No. 02-27337 (March 9, 2004) involves a ruling by a Hearing Office Administrative Judge that explicitly acknowledges it is contrary to prior Board rulings concerning the application of the ASDC3I memorandum. Applicant cannot reasonably expect the Board to follow such a decision. Nothing in the Directive or any generally applicable principle of federal administrative law gives a Hearing Office Judge any authority or discretion to

review Board decisions and decide whether the Judge thinks those decisions are correct. Furthermore, if a Hearing Office Judge's disagreement with a Board decision were sufficient to negate or nullify the Board's decision, then the Board's appeal authority under the Directive would be rendered illusory and meaningless. No party can reasonably rely on a Hearing Office decision that seeks to contradict, or runs contrary to, current Board decisions on point.

Second, the Hearing Office decision in ISCR Case No. 01-24306 (April 10, 2003) is cited by Applicant in support of the proposition that he is in "constructive compliance" with the ASDC3I memorandum. Applicant's reliance on that decision is misplaced. The Judge did not hold that expiration of a foreign passport constitutes "constructive compliance" with the ASDC3I memorandum. Rather, the Judge opined that even if he were to reach such a conclusion, it would not end the analysis of the security significance of the applicant's conduct in that case. And, in any event, the notion that expiration of a foreign passport constitutes "constructive compliance" with the ASDC3I memorandum is not a persuasive one. ⁽²⁾

Accordingly, the Board does not find that Hearing Office decision to be persuasive.

Third, the decision by a Hearing Office Administrative Judge in ISCR Case No. 02-07486 (February 19, 2004) is cited by Applicant for the proposition that surrender of a foreign passport does not provide any greater assurances to the federal government because it is always possible for an individual with dual citizenship to later obtain a new passport. That Hearing Office decision is not persuasive because it is distinguishable from this case. In ISCR Case No. 02-07486, the Judge found that the applicant had surrendered his Irish passport. Accordingly, the language from ISCR Case No. 02-07486 that Applicant cites in this appeal was irrelevant to the issue of the application of the ASDC3I memorandum. Moreover, Applicant relies on the cited language from ISCR Case No. 02-07486 to make a policy argument about the wisdom and efficacy of the ASDC3I memorandum. The wisdom and efficacy of the ASDC3I memorandum are not proper subjects to be litigated in DOHA proceedings. The Directive authorizes the adjudication of an applicant's security eligibility, not the adjudication of the pros and cons of DoD policy, in these proceedings. ⁽³⁾

Any party who wants to argue the pros and cons of DoD policy in an effort to obtain a change or modification of DoD policy must seek relief outside DOHA proceedings.

Fourth, Applicant relies on the various Hearing Office decisions cited in his brief to support his arguments that challenge the wisdom and efficacy of the ASDC3I memorandum. As noted in the preceding paragraph, the wisdom and efficacy of the ASDC3I memorandum is not a proper subject to litigate in these proceedings. The Board is bound to recognize and follow applicable DoD policy, not presume to sit in judgment on that policy. ⁽⁴⁾

Department Counsel's request that the Board decide this appeal without relying on the ASDC3I memorandum is not persuasive. First, the applicability of the ASDC3I memorandum to Applicant's case is an issue on appeal, and the Directive states the Board should address the material issues raised on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Second, Department Counsel's argument relies on a Board decision that is distinguishable from this case because it dealt with the timing of an applicant's surrender of a foreign passport, not the expiration of a foreign passport. Third, Department Counsel's request is based on an argument that relies on a hypothetical set of facts that is easily distinguishable from the facts and circumstances of Applicant's case. Indeed, Department Counsel's brief essentially concedes Applicant's case does not satisfy the hypothetical set of facts it uses in support of its argument. Fourth, Department Counsel's request includes policy arguments that do not fall within the jurisdiction or authority of the Board to address and resolve.

Given the record evidence in this case, it was proper for the Administrative Judge to conclude that the ASDC3I memorandum applied to Applicant's situation.

2. Whether the Administrative Judge erred by concluding that Applicant's ties with family members in Israel raised security concerns under Guideline B (Foreign Influence) that were not mitigated. Applicant contends the Administrative Judge erred by concluding that Applicant's ties with family members in Israel raised security concerns under Guideline B (Foreign Influence) that were not mitigated. Specifically, Applicant asserts that the fact that his daughter is a member of the Israeli military does not provide a rational basis for the Judge to conclude there are security concerns raised under Guideline B because: (a) there has been no showing that Israel has ever actually exploited family members in an attempt

to compromise U.S. national security; and (b) Israel would not exploit its own citizens in an effort to further the goals of espionage.⁽⁵⁾

For the reasons that follow, the Board does not find Applicant's appeal arguments to be persuasive.

As discussed earlier in this decision, the Board is not bound to follow the decisions of Hearing Office Administrative Judges. Moreover, the Hearing Office decision cited by Applicant in support of this appeal issue is not persuasive. The passage in ISCR Case No. 02-27647 (September 15, 2003) relied on by Applicant runs contrary to the well-established proposition that the federal government need not wait until there is a clear and present danger or imminent threat to national security before it can make an unfavorable security clearance decision.⁽⁶⁾

Moreover, the federal government is not precluded from making an unfavorable security clearance decision merely because there has not been a showing that an applicant has been specifically targeted by a foreign intelligence service.⁽⁷⁾

The passage in ISCR Case No. 02-27647 relied on by Applicant is based on implicit reasoning that would limit the DoD to denying or revoking a security clearance only upon an affirmative showing that a foreign intelligence service has in the past, or is likely in the future, sought to target or exploit a specific type of conduct or situation. Nothing in Executive Order 10865 or the Directive indicates or suggests the DoD is so circumscribed in making security clearance decisions.

Finally, Department Counsel argues that the totality of the facts and circumstances of Applicant's case -- not just Applicant's ties with a daughter in the Israeli military -- provide a rational basis for the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence). Reading the decision below in its entirety, the Board concludes the Judge was not basing his adverse conclusions under Guideline B solely on Applicant's ties with a daughter in the Israeli military. Given the Judge's overall findings about Applicant's conduct and circumstances, Department Counsel's argument is persuasive.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated 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. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of Hearing Office decisions). *See also* ISCR Case No. 03-17114 (November 29, 2004) at p. 4 ("Furthermore, the decision of any Hearing Office Judge is not legally binding precedent that the Board has to distinguish, follow, or explain why it does not choose to follow. To the contrary, a party citing a Hearing Office decision as persuasive authority has the burden of persuading the Board that such a decision should be followed.").
2. *See, e.g.*, ISCR Case No. 99-0480 (November 28, 2000) at p. 8 (discussing what constitutes surrender of a foreign passport under the ADSC3I memorandum).
3. *See, e.g.*, ISCR Case No. 02-04237 (August 12, 2003) at p. 4 (neither a Hearing Office Judge nor the Board can review or pass judgment on the wisdom or desirability of the ASDC3I memorandum). *See also* *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (administrative law judges are bound to follow agency policy and cannot reargue or dispute agency policy in their rulings or decisions).
4. Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them. *See, e.g.*, *Croplife America v. Environmental Protection Agency*, 329 F.3d 876, 882 (D.C. Cir. 2003) (administrative law judges cannot ignore agency policy in making rulings); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (administrative law judge is subordinate to head of agency or department in matters of policy); *Mullen v. Bowen*, 800 F.2d 535, 540 n. 5 (6th Cir. 1986)(decisional independence does not relieve administrative law judge of the obligation to apply agency policy). *See also* Directive, Section 5.2.13 (Hearing Office and Board must "have the requisite independence to render fair and impartial decisions *consistent with DoD policy*")(italics added); ISCR Case No. 02-00305 (February 12, 2003) at p. 3 (security clearance decisions must be based on current DoD policy and standards).
5. In support of both arguments, Applicant cites the decision by a Hearing Office Administrative Judge in ISCR Case No. 02-27647 (September 15, 2003).
6. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at p. 5; ISCR Case No. 02-09907 (March 17, 2004) at p. 7.
7. *See, e.g.*, ISCR Case No. 03-16516 (November 26, 2004) at p. 7; ISCR Case No. 02-14995 (July 26, 2004) at pp. 4-5; ISCR Case No. 00-0628 (February 24, 2003) at p. 5.