

DATE: February 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18668

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Victor Schwanbeck, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated December 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 Joseph Testan issued a favorable security clearance decision dated June 11, 2003.

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 issues have been raised on appeal: (1) whether the Administrative Judge erred by refusing to take administrative or official notice of three documents; and (2) whether the Administrative Judge erred by concluding that Applicant's ties with immediate family members in Taiwan were mitigated sufficiently to warrant a favorable security clearance decision. For the reasons that follow, the Board reverses the Judge's security clearance 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 refusing to take administrative or official notice of three documents. At the hearing, Department Counsel asked the Administrative Judge to take administrative notice of three documents. Applicant objected. After conducting a discussion with both counsel about the documents, the Judge ruled that he would not take administrative notice of any of the three documents (Hearing Transcript at pp. 16-24). Department Counsel contends the Judge erred by not taking administrative notice of the three documents.

Department Counsel's appeal brief asserts that documents for which administrative or official notice was requested were "[offered] for the purposes of Judicial Notice, not as evidence in the case at hand." Department Counsel cites no legal authority in support of its position. Even under the relaxed evidentiary standards applicable in these proceedings (Directive, Additional Procedural Guidance, Item E3.1.19), administrative or official notice is not something *sui generis* that is totally unconnected to or independent from basic, minimum principles of evidence law.⁽¹⁾ However, the Board rejects Applicant's argument that administrative or official notice in DOHA proceedings must strictly comply with the Federal Rules of Evidence. With one exception not applicable to this appeal,⁽²⁾ Item E3.1.19 of the Additional Procedural Guidance indicates that the Federal Rules of Evidence serve as a guide, not a strict requirement. Furthermore, administrative or official notice in administrative proceedings is broader than judicial notice under the Federal Rules of Evidence.⁽³⁾

Copies of the three documents in question are not in the case file. The Board cannot consider in a vacuum, without reference to a properly developed record, whether a document was properly excluded by an Administrative Judge.⁽⁴⁾ There is no indication from the hearing transcript that Department Counsel asked the Judge to mark the documents for identification and place them in the case file to preserve Department Counsel's appeal rights with respect to the Judge's ruling on the three documents. If a party wishes to preserve its appeal rights on an evidentiary issue, then that party must

take basic, minimum steps to preserve the record so that the Board can address that evidentiary issue on appeal. In this case, Department Counsel did not take sufficient steps to preserve the issue for appeal so that the Board could make a reasoned decision as to whether the Judge erred by excluding the three documents in question.

2. Whether the Administrative Judge erred by concluding that Applicant's ties with immediate family members in Taiwan were mitigated sufficiently to warrant a favorable security clearance decision. The Administrative Judge concluded that Applicant's ties with immediate family members in Taiwan were mitigated sufficiently to warrant a favorable security clearance decision. Department Counsel contends the Judge's conclusion should not be sustained because: (a) the record evidence does not support the Judge's application of Foreign Influence Mitigating Condition 1 [\(5\)](#); and (b) the specific reasons the Judge gave for his favorable conclusion do not support it. Applicant contends that the record evidence does support the Judge's favorable conclusion, and that the Board decisions relied on by Department Counsel are distinguishable on their facts from Applicant's case.

Department Counsel correctly notes that Applicant "is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15. Applicant has a heavy burden to satisfy in these proceedings because:

- (a) there is no presumption in favor of granting or continuing a security clearance; [\(6\)](#)
- (b) a favorable security clearance decision cannot be made unless there is an affirmative finding that it is "clearly consistent with the national interest" to grant or continue a security clearance for an applicant [\(7\)](#); and
- (c) even a close case must be resolved in favor of the national security. [\(8\)](#)

The heavy burden of persuasion that Applicant has to meet is not diminished, lessened or reduced by the fact that Taiwan is not a country that is hostile to the United States. Nothing in Guideline B (Foreign Influence) indicates or suggests that it is limited to countries that are hostile to the United States. [\(9\)](#) Furthermore, the United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, [\(10\)](#) regardless of whether that person, organization, or country has interests inimical to those of the United States. [\(11\)](#) Finally, history shows that individuals have disclosed classified information to foreign entities or countries that are not considered to be hostile to the United States. [\(12\)](#)

Department Counsel correctly notes that Foreign Influence Mitigating Condition 1 is bifurcated in nature and precludes an Administrative Judge from applying it merely based on the conclusion that an applicant's immediate family members in a foreign country are not agents of a foreign power. [\(13\)](#) Accordingly, the Judge's conclusion that there is no evidence that Applicant's immediate family members are connected with the Taiwanese government, the Taiwanese military, or Taiwanese intelligence services (Decision at p. 4) is not sufficient to support his application of Foreign Influence Mitigating Condition 1.

Department Counsel persuasively argues the Administrative Judge made an unwarranted assumption about what the Taiwanese government believes is an acceptable risk to take in connection with its relationship with the United States. There is no record evidence that would allow the Judge to make any finding of fact or reach a reasoned conclusion as to what the Taiwanese government believes is or is not an acceptable risk to take in connection with its relationship with the United States. Furthermore, the Judge's assumption is not tenable as a general proposition because it ignores the historical reality (noted by Department Counsel on appeal) that there have been cases where individuals have committed espionage against the United States by passing classified information to countries that are not considered hostile to the United States. Such espionage cases indicate that countries not hostile to the United States are capable of deciding that receiving classified information from a person engaged in espionage against the United States is worth the risk that such espionage might damage their relationship with the United States.

Department Counsel correctly notes that foreign influence or pressure under Guideline B is not limited to coercive [\(14\)](#)

means of influence or pressure. However, the Board does not find persuasive Department Counsel's argument that the Administrative Judge analyzed Applicant's case

only in terms of the potential for coercive means of influence or pressure being used. Applicant's argument to the contrary is more persuasive.

Department Counsel persuasively argues that (a) the federal government is not required to prove that an applicant *would* compromise classified information if a foreign government approaches the applicant directly or through immediate family members living abroad⁽¹⁵⁾; and (b) the Administrative Judge had insufficient record evidence to conclude that Applicant would act properly if the Taiwanese government were to try to gain unauthorized access to classified information through coercive or noncoercive means brought to bear on him or his immediate family members in Taiwan. Although security clearance decisions are not an exact science and involve predictive judgments,⁽¹⁶⁾ an Administrative Judge must make predictive judgments that have a rational basis in the record evidence and are not based on unwarranted assumptions.

An Administrative Judge cannot make a favorable security clearance decision unless the Judge articulates a rational basis for concluding it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. Here, the Judge failed to articulate a sustainable basis for his favorable security clearance decision.

Conclusion

Department Counsel has demonstrated error below that warrants reversal of the decision below. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's 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. *Cf.* ISCR Case No. 02-06478 (December 15, 2003) at p. 4 (Administrative Judge's discretion under Item E3.1.19 is not unfettered). *Cf. also Blagoev v. Ashcroft*, 354 F.3d 652, --, 2004 WL 32920 (7th Cir. 2004)(noting that although administrative agencies are not bound by conventional rules of evidence, their evidentiary rulings must still comport with due process of law).

2. *See* ISCR Case No. 01-23356 (November 24, 2003) at pp. 7-8 (addressing the exception to Directive, Additional Procedural Guidance, Item E3.1.19 that is established by Item E3.1.20).

3. *See, e.g., McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986).
4. *See* ISCR Case No. 98-0476 (July 22, 1999) at pp. 2 and 4 (in case where the Administrative Judge informed the parties he proposed to take official notice of several documents, but excluded five of those documents based on objections raised by Department Counsel, the Judge's failure to include copies of the five documents objected to in the case file "resulted in an incomplete case record, which has the potential of impairing the appeal rights of the parties and interfering with the ability of the Board to carry out its appellate functions").
5. "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."
6. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).
7. Executive Order 10865, Section 2; Directive, Section 4.2 and Additional Procedural Guidance, Item E3.1.25.
8. *See, e.g.,* ISCR Case No. 02-26826 (November 12, 2003) at p. 4; ISCR Case No. 98-0419 (April 30, 1999) at p. 8.
9. *See, e.g.,* ISCR Case No. 00-0317 (March 29, 2002) at p. 6; ISCR Case No. 00-0489 (January 10, 2002) at p. 12.
10. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).
11. *See, e.g.,* ISCR Case No. 97-0699 (November 24, 1998) at p. 3. *Cf. also* NATIONAL INDUSTRIAL SECURITY PROGRAM OPERATING MANUAL, DoD 5220.22-M, Chapter 10 (identifying and discussing restrictions on disclosure of classified information to foreign governments, foreign entities, and foreign nationals).
12. Indeed, the federal government has prosecuted persons under the espionage statute for passing classified information to individuals or entities from friendly countries. *See, e.g., United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 915 (1992); *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988).
13. *See, e.g.,* ISCR Case No. 02-26826 (November 12, 2003) at pp. 4-5; ISCR Case No. 99-0511 (December 19, 2000) at p. 10.
14. *See, e.g.,* ISCR Case No. 99-0295 (October 20, 2000) at pp. 7-8.
15. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)(government does not have to prove an applicant would mishandle classified information before it can deny or revoke security clearance), *cert. denied*, 397 U.S. 1039 (1970).
16. *See, e.g.,* ISCR Case No. 01-09691 (March 27, 2003) at p. 3.