

DATE: May 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20365

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

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

FOR APPLICANT

James L. Banks, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 18, 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 March 22, 2004.

Department Counsel appealed the Administrative Judge's favorable decision. The Board remanded the case to the Judge on November 2, 2004. The Judge issued a new favorable decision, dated November 29, 2004 ("Remand Decision").

Department Counsel appealed the Administrative Judge's favorable Remand 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 concluding Applicant mitigated the security concerns raised under Guideline C (Foreign Preference); and (2) whether the Administrative Judge erred by concluding Applicant mitigated the security concerns under Guideline B (Foreign Influence). For the reasons that follow, the Board reverses the Administrative Judge's Remand 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

Before addressing the main appeal issues, the Board will discuss a threshold issue raised by a portion of the Department Counsel's brief, which sets forth proposed "additions" to the Administrative Judge's Findings of Fact. Although the parties are free -- within the bounds of zealous advocacy -- to argue about what the record evidence shows, it is the Judge, not the parties, that makes the findings of fact in a case. Moreover, the Directive authorizes the Board to review a Judge's findings of fact, not engage in *de novo* fact-finding on appeal. Accordingly, the Board will consider Department Counsel's proffered "additions" only to the extent they constitute argument about the record evidence in support of any specific appeal issues raised by Department Counsel. ⁽¹⁾

1. Whether the Administrative Judge erred by concluding Applicant mitigated the security concerns raised under Guideline C (Foreign Preference). The Administrative Judge found that Applicant is a dual citizen of the United States and Lebanon, and that Applicant exercised his Lebanese citizenship by applying for, using, and renewing his Lebanese passport after he became a naturalized U.S. citizen in 1973. The Judge concluded Applicant mitigated the security concerns raised under Guideline C by applying Foreign Preference Mitigating Condition 4, ⁽²⁾

based on his finding that Applicant is willing to renounce his Lebanese citizenship. On appeal, Department Counsel contends: (a) there is no record evidence supporting the Judge's finding that Applicant is willing to renounce his Lebanese citizenship, and therefore, the Judge erred by applying Foreign Preference Mitigating Condition 4; and (b) in the alternative, even if the Board were to conclude the Judge did not err by applying Foreign Preference Mitigating

Condition 4, the record evidence does not support the Judge's conclusion that Applicant mitigated the security concerns raised under Guideline C.

As Department Counsel points out, the Administrative Judge concluded that Department Counsel had presented evidence sufficient to establish a *prima facie* case under Guideline B (Foreign Influence) and Guideline C (Foreign Preference), and therefore, the burden shifted to Applicant to present evidence of refutation, extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. (3)

There is no right to a security clearance, (4)

there is no presumption in favor of granting a security clearance, (5)

a security clearance should not be granted unless there is an affirmative determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant, (6)

and doubts must be resolved in favor of the national security. (7)

Accordingly, once facts raising security concerns under Guideline B and Guideline C were admitted by Applicant or proven by Department Counsel, Applicant had a heavy burden of persuasion. Having concluded that Applicant admitted, or Department Counsel proved, facts that raised security concerns under Guideline B and Guideline C, the Judge could not reach a favorable security clearance without articulating cogent reasons, supported by the record evidence as a whole and consistent with pertinent provisions of the Directive, for why the Judge concluded it was clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The record evidence in this case does not support the Administrative Judge's finding that Applicant expressed a willingness to renounce his Lebanese citizenship. Since the Judge's finding is not sustainable, his application of Foreign Preference Mitigating Condition 4 in this case cannot be upheld on appeal. Applicant correctly notes that his taking the statutory oath to become a naturalized U.S. citizen in 1973 is a relevant consideration. However, the Judge did not rely on Applicant taking that statutory oath in 1973 to support his predicate finding for applying Foreign Preference Mitigating Condition 4. Moreover, Applicant's taking of the statutory oath in 1973 does not extenuate or mitigate the security concerns raised under Guideline C (Foreign Preference) by his exercise of the rights and privileges of Lebanese citizenship (*i.e.*, possession, use, and renewal of a Lebanese passport) on multiple occasions between 1973 and 1999. Because the Judge failed to articulate a sustainable basis for his favorable conclusions under Guideline C, those conclusions do not provide a sufficient basis for the Judge's favorable security clearance.

Because the Administrative Judge did not apply Foreign Preference Mitigating Condition 1, Foreign Preference Mitigating Condition 2, or Foreign Preference Mitigating Condition 3, Department Counsel's arguments about those mitigating conditions need not be discussed to decide this appeal. Applicant's responses to Department Counsel's arguments concerning those three Foreign Preference mitigating conditions could be construed as arguments for affirming the Judge's favorable conclusions under Guideline C (Foreign Preference) on alternate grounds. Considering the record as a whole, the Board does not find Applicant's responses to Department Counsel's arguments as persuasive, alternate grounds for affirming the Judge's favorable conclusions under Guideline C.

2. Whether the Administrative Judge erred by concluding Applicant mitigated the security concerns under Guideline B (Foreign Influence). As noted earlier in this decision, the Administrative Judge concluded Department Counsel had established a *prima facie* case under Guideline B (Foreign Influence) and, therefore, the burden shifted to Applicant to present evidence of refutation, extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. Because there is no dispute that Applicant possesses an interest in property in Lebanon, the burden shifted to Applicant to present evidence about his property interest sufficient to overcome the security concerns raised under Guideline B. (8)

Department Counsel contends the Administrative Judge erred by concluding Applicant had mitigated the security concerns raised under Guideline B because: (a) the record evidence shows Applicant's property in Lebanon is worth

approximately \$150,000; and (b) the record evidence does not support the Judge's conclusion that the security concerns raised by Applicant's property in Lebanon are mitigated by Foreign Influence Mitigating Condition 5.

Under the Directive, Department Counsel did not have the burden of proving Applicant's interest in property in Lebanon was affirmatively disqualifying. Rather, Applicant had the burden of presenting evidence to explain, extenuate or mitigate his interest in property in Lebanon sufficiently to warrant a favorable security clearance decision. Given the sparse record evidence in this case, Department Counsel does not persuasively argue that the Administrative Judge should have found Applicant's interest in property in Lebanon is worth \$150,000. However, given the sparseness of record evidence about the particular facts and circumstances of Applicant's interest in property in Lebanon, it is difficult to discern the basis for how the Judge concluded that Applicant's property interest was both "substantial" for purposes of applying Foreign Influence Disqualifying Condition 8 and "minimal" for purposes of applying Foreign Influence Mitigating Condition 5. [\(9\)](#)

Furthermore, given the scant record evidence about the particular facts and circumstances of Applicant's interest in property in Lebanon, the Judge failed to articulate a discernable rationale for the Judge's conclusion that Applicant had satisfied his burden of persuasion *vis-a-vis* his Lebanese property. Accordingly, Department Counsel is correct in asserting that the Judge failed to articulate a sustainable basis for concluding that Applicant had mitigated the security concerns raised under Guideline B. Given the limited record evidence about the particular facts and circumstances of Applicant's property interest in Lebanon, Applicant's argument about the value of his interest in that property does not set forth a persuasive rationale for affirming the Judge's analysis, or concluding that the Judge's analysis constitutes harmless error.

Finally, Applicant correctly notes that the mere presence or absence of Adjudicative Guidelines disqualifying and mitigating conditions is not dispositive of a case. [\(10\)](#)

However, although it would be legally permissible for the Administrative Judge to reach a favorable security clearance decision in Applicant's case even if none of the Foreign Preference mitigating conditions or Foreign Influence mitigating conditions were applicable, the Judge still would have to articulate a rational basis -- supported by the record evidence as a whole and consistent with pertinent provisions of the Directive -- for concluding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Since the Judge failed to articulate a rational basis for his favorable conclusions under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) independent of his application of Foreign Preference Mitigating Condition 4 and Foreign Influence Mitigating Condition 5, Applicant's argument does not set forth a persuasive reason for affirming the Judge's decision.

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 Remand 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. If a party believes the Administrative Judge's decision does not set forth pertinent findings of fact, then the party can consider whether to raise a claim that the Judge failed to comply with the requirements of Directive, Additional Procedural Guidance, Item E3.1.25. If a party believes the Judge reached conclusions that do not rationally follow from, or are not adequately supported by, the Judge's findings of fact, then the party can consider whether to raise a claim that the Judge's conclusions are arbitrary or capricious.

2. "Individual has expressed a willingness to renounce dual citizenship" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.4).

3. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

4. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988).

5. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

6. Executive Order 10865, Section 2; Directive, Sections 3.2 and 4.2, Adjudicative Guidelines, Item E2.2.1, and Additional Procedural Guidance, Item E3.1.25.

7. Directive, Adjudicative Guidelines, Item E2.2.2. *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

8. Possession of a financial interest in a foreign country falls within the language of the Concern portion of Guideline B (Foreign Influence).

9. For purposes of deciding this appeal, the Board need not decide whether it is possible for an Administrative Judge to conclude that an applicant has a financial interest in a foreign country that is both "substantial" for purposes of Foreign Influence Disqualifying Condition 8 and "minimal" for purposes of Foreign Influence Mitigating Condition 5.

10. *See, e.g.*, ISCR Case No. 02-11454 (June 7, 2004) at p. 4; ISCR Case No. 01-24358 (April 13, 2004) at p. 7 n.13; ISCR Case No. 02-05110 (March 22, 2004) at p. 5 n.7.