

DATE: May 10, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23336

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 3, 2003 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 Philip S. Howe issued an unfavorable security clearance decision dated January 8, 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 some factual errors were made in the adjudication of Applicant's case; and (2) whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. 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** [\(1\)](#)

1. Whether some factual errors were made in the adjudication of Applicant's case. Applicant claims the following factual errors occurred in his case: (a) the synopsis of the decision incorrectly states that Applicant's relatives have financial interests in the United States; (b) SOR paragraph 1.c incorrectly alleges that Applicant's sister-in-law in Lebanon has mail contact with Applicant's wife; (c) the Administrative Judge erred by finding that Applicant's wife has eight sisters and seven of them live in the United States; and (d) the Judge erred by finding Applicant's mother lives in Syria. For the reasons that follow, the Board concludes Applicant has demonstrated some errors, but that those errors are harmless and do not warrant remand or reversal.

(a) Applicant's claim of error concerning the second sentence of the synopsis of the Administrative Judge's decision has some merit. The wording of that sentence is ambiguous and somewhat confusing because it fails to clearly indicate the location of the financial interests of Applicant's relatives. To the extent that sentence in the synopsis could be construed as indicating the financial interests of Applicant's relatives are in the United States, it is inconsistent with the Judge's findings in the decision about the financial interests that Applicant's relatives have in Syria, not in the United States.

However, the Board has held that it "is not inclined to view the synopsis of an Administrative Judge's decision as critical, or more important than the body of the Judge's decision itself. Absent unusual circumstances, any flaw or failing with a synopsis is not likely to demonstrate harmful error." ISCR Case No. 01-20314 (September 29, 2003) at p. 3. *Accord* ISCR Case No. 00-0633 (October 24, 2003) at p. 5 n.7. The flaw in the Judge's synopsis identified by Applicant does not rise to the level of harmful error in this case.

(b) Applicant's challenge to the second sentence of SOR paragraph 1.c does not demonstrate error by the Administrative Judge. When responding to the SOR, Applicant's answer to SOR paragraph 1.c was "I admit" without any explanation or qualification. Furthermore, at the hearing, Applicant did not object to the second sentence of SOR paragraph 1.c, or offer evidence to refute or rebut that sentence. If Applicant wanted to challenge the second sentence of SOR paragraph

1.c or offer evidence to refute or rebut it, he had the opportunity to do so during the proceedings below. Applicant cannot fairly challenge that sentence in the SOR for the first time on appeal. And, in any event, the Judge's decision does not contain any specific finding of fact concerning the means by which Applicant's wife and Applicant's sister-in-law in Lebanon communicate with each other. Considering the record evidence as a whole, the particular means by which Applicant's wife and Applicant's sister-in-law communicate with each other do not seem to be important to the Guideline B issues in this case, or the Judge's analysis of Applicant's security eligibility.

(c) According to the hearing transcript (at p. 26), Applicant testified that his wife has eight sisters, seven of who live in the United States. Accordingly, the Administrative Judge's challenged finding is sustainable. And, in any event, the Judge's findings and conclusions about the security concerns raised under Guideline B do not turn on whether Applicant's wife has seven or eight sisters. Therefore, even if the Board were to assume, solely for purposes of deciding this appeal, that this claim of error had merit, it would only demonstrate harmless error.

(d) The Administrative Judge's finding about Applicant's mother (Decision at p. 3) is confusing and inconsistent. Applicant's mother cannot be living in Syria and be ill in the United States at the same time. Although there is documentary evidence that Applicant's mother lives in the United States (Government Exhibit 1) and testimony that appears to indicate she is ill in Syria (Hearing Transcript at p. 38), the Judge had to weigh the record evidence and make a reasonable finding of fact. The Judge's finding about Applicant's mother is inherently inconsistent and, therefore, cannot be sustained.

However, this error is harmless under the particular facts and circumstances of this case. The SOR did not allege that Applicant's mother lives in Syria. Furthermore, reading the Administrative Judge's decision in its entirety, the Board concludes the Judge's analysis under Guideline B is based on the Judge's findings and conclusions about Applicant's ties with a sister (and her husband) living in Syria, and a sister-in-law (and her husband) in living in Lebanon. Accordingly, the Judge's unsustainable finding about where Applicant's mother lives is not pertinent to the Judge's analysis under Guideline B.

2. Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) he has had a security clearance before, has always complied with security policies and procedures, and has always acted properly with respect to security matters; (b) his relatives overseas are Armenian Christians who are not employed by a foreign government, have no connections with a foreign government, and are not likely to be influenced, coerced, or exploited by a foreign government; (c) the desire of his brother-in-law to come to the United States and live here is not likely to be realized for various reasons, and Applicant is not sponsoring anyone else to come to the United States; (d) his relatives abroad do not know where he works or what he does for a job; (e) his contacts with his relatives abroad are indirect and through his mother or his mother-in-law; and (f) in 1980, he renounced his Syrian citizenship and surrendered his Syrian passport and had never traveled back to Syria since then. The Board construes these arguments as raising the issue of whether the Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law.

The absence of any security violations by Applicant is favorable information. However, the absence of any evidence that Applicant has engaged in security violations does not preclude an adverse security clearance decision. The federal government is not required to wait until an applicant has failed to properly handle or safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Moreover, Department Counsel is not required to prove that an applicant presents a clear and present danger to the security of classified information. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 6. Here, the facts and circumstances of Applicant's family ties with relatives in Syria and Lebanon provide a rational basis for the Administrative Judge to conclude there are security concerns under Guideline B that the Applicant had to refute, rebut, explain, extenuate, or mitigate. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant's arguments that support a conclusion that he does not have a foreign preference fail to demonstrate the Administrative Judge erred. The SOR did not allege that Applicant has a foreign preference within the meaning of Guideline C. The Judge did not find Applicant has a foreign preference within the meaning of Guideline C. And, the absence of a foreign preference does not negate security concerns raised under Guideline B. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5; ISCR Case No. 99-0601 (January 30, 2001) at p. 6. Accordingly, the Judge's

adverse conclusions under Guideline B are not rendered arbitrary, capricious, or contrary to law merely because there has been no showing that Applicant has a foreign preference.

Applicant's remaining appeal arguments set forth an alternate interpretation of the record evidence. However, Applicant's disagreement with the Judge's interpretation of the record evidence is not sufficient to demonstrate the Administrative Judge erred. Given the record evidence in this case, the Judge had a rational basis for his conclusion that the facts and circumstances of Applicant's ties with family members in Lebanon and Syria raise security concerns under Guideline B. Furthermore, the Judge was not required to conclude that Applicant had met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15 because Applicant denied that his family ties posed any security risk. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 12 ("Moreover, an applicant's opinion as to the security significance of the applicant's conduct or circumstances is not dispositive and does not relieve a Judge of his or her responsibility to evaluate the applicant's security eligibility."). Rather, the Judge had to weigh the evidence as a whole and decide whether Applicant presented sufficient probative evidence to warrant a conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant despite his family ties with relatives in Lebanon and Syria. Applicant's disagreement with the Judge's adverse conclusions under Guideline B is not sufficient to demonstrate the Judge weighed the record evidence and analyzed Applicant's case in a manner that is arbitrary, capricious, or contrary to law.

### **Conclusion**

Applicant has failed to demonstrate error below that warrants remand or reversal. Therefore, the Board affirms the Administrative Judge's unfavorable 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. On appeal, Applicant offers to provide the Board with additional documents to prove or clarify his statements. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, Applicant had the opportunity to present documentary evidence for the Administrative Judge to consider in his case. Accordingly, the Board will not take up Applicant on his offer to submit additional documentation for consideration in his case.