

DATE: February 16, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23506

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

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 January 10, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based on Guideline C (Foreign Preference), Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Administrative Judge Wilford H. Ross issued an unfavorable security clearance decision, dated October 1, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by ruling that Applicant has a foreign preference based on possession of a foreign passport, (2) whether the Administrative Judge's conclusion that Applicant could be subject to foreign influence is rational in light of the record evidence, and (3) whether the Administrative Judge's conclusion that Applicant deliberately falsified his security clearance questionnaire is sustainable. For the reasons set forth below, 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 ruling that Applicant has a foreign preference based on possession of a foreign passport. Applicant argues that his only mistake was his failure to surrender his Philippines passport, but that was due to his lack of knowledge of the ramifications of such a failure. Applicant requests the Board grant him one month to surrender the passport.

Applicant's argument regarding his lack of knowledge is not persuasive. On June 24, 2004, Applicant received the ASDC3I memorandum (Money memo), dated August 16, 2000, which spells out the Department's policy on this matter. Applicant provided a submission to the Administrative Judge, dated July 18, 2004. Applicant had an opportunity to review the Money memo before he provided his last submission, yet he did not surrender the passport or request additional time to do so. Now that the record is closed and the Judge has issued an adverse decision, Applicant requests that the Board grant him one month to surrender the passport. The Board is not permitted to consider new evidence on appeal. *See*, Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, the Board does not have supervisory jurisdiction over applicants. *See*, ISCR Case No. 02-24719, dated January 12, 2005, footnote 5, at p. 4. Therefore, the Board lacks the authority to grant Applicant's request.

(2) Whether the Administrative Judge's conclusion that Applicant could be subject to foreign influence is rational in light of the record evidence. The Administrative Judge found that Applicant's ties to the Philippines (including his wife's citizenship, his five siblings' residency and citizenship, his ownership of a house in that country, his travel there, and his bank account there) presented a security concern to the government that Applicant is subject to foreign influence. On

appeal, Applicant challenges the Judge's conclusion. Applicant cites new evidence which the Board cannot consider. *See*, Directive, Additional Procedural Guidance, Item E3.1.29. The remainder of Applicant's challenge amounts to no more than a disagreement about how the Judge weighed the record evidence. An applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See*, ISCR Case No. 03-11655, dated January 31, 2005, p. 3. Applicant has failed to demonstrate that the Judge's conclusion is erroneous.

(3) Whether the Administrative Judge's conclusion that Applicant deliberately falsified his security clearance questionnaire is sustainable. Applicant contends that the Administrative Judge erred in finding against him with respect to the Guideline E (Personal Conduct) allegations because: (1) his omissions of information from his security clearance application were not deliberate falsifications, (2) his answers were contributed to by improper or inadequate advice of authorized personnel, (3) he subsequently disclosed the omitted information, and (4) he has an outstanding work history with the United States government. Applicant's arguments do not persuade the Board that the Judge erred.

Based upon the record before him, the Judge's findings and conclusions with respect to the Guideline E allegations are sustainable. First, an applicant's statements about his intent and state of mind when he completed his security clearance application are relevant evidence, but they are not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp.6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts Applicant's denial. *Id.* Second, there is no record evidence to support Applicant's claim--made for the first time on appeal--that his answers were contributed to by improper or inadequate advice of authorized personnel. Third, the security concerns raised by an applicant's falsifications are not necessarily mitigated by the fact that they have subsequently been disclosed. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (government's security concerns not mitigated by the fact that Applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (government's security concerns not mitigated by the fact Applicant had "come clean" and "had nothing left to hide"). Fourth, Applicant's arguments that he is loyal, of good character, and has held a security clearance for many years without any problems do not demonstrate the Judge erred. *See* ISCR Case No. 03-01059 (September 24, 2004) at p. 4. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

This case involved the omission of information which was of obvious security significance in response to four different questions. It was not unreasonable for the Judge to conclude that the Applicant's failure to disclose the relevant information had been intentional, despite Applicant's denials. Applicant has failed to demonstrate that the Judge's conclusion was error.

Conclusion

Applicant has failed to demonstrate that the Administrative Judge erred in his October 1, 2004 decision. Therefore, that decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board