

DATE: March 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23979

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Roger L. Meyer, Esq.; Eli D. Stutsman, Esq.

The Defense Office of Hearings and Appeal (DOHA) issued to Applicant a Statement of Reasons (SOR) dated May 7, 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 Martin H. Mogul issued an unfavorable security clearance decision dated December 31, 2003. Applicant appealed the Judge's decision. The Board issued a decision and remand order dated August 25, 2004. The Judge issued a decision on remand dated August 31, 2004 in which he concluded that Applicant had failed to demonstrate that is clearly consistent with the national interest to grant or continue a clearance for Applicant.

Applicant appealed the Judge's unfavorable 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 was bound by apparent concessions offered by Department Counsel at the hearing; (2) whether the Administrative Judge's conclusions were sustainable in light of all the contrary record evidence and the Judge's favorable findings of fact; and (3) whether the Administrative Judge applied Foreign Influence Mitigating Condition 1 properly. For the reasons that follow the Board affirms 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

(1) Whether the Administrative Judge was bound by apparent concessions offered by Department Counsel at the hearing. Applicant argues that the Administrative Judge erred by not relying on two apparent concessions offered by Department Counsel during closing arguments at the hearing. ⁽¹⁾

Applicant's argument is not persuasive.

The Board has previously observed that Department Counsel's arguments are not evidence. *See*, ISCR Case No. 02-07191 (March 25, 2004) at p. 3 n.1. The Board has also held that a concession or stipulation is not binding on the Board. *See*, DISCR Case No. 92-0166 (February 10, 1993) at p. 2, and DISCR Case No. 89-0962 (May 21, 1991) at p. 3. Similarly, such a concession or stipulation is not binding on the Hearing Office Judge. The Judge was obliged to do his own analysis of the record evidence, and his decision to reach a conclusion which was inconsistent with the analysis of one or even both of the parties is not indicative of error.

(2) Whether the Administrative Judge's conclusions were sustainable in light of all the contrary record evidence and the Judge's favorable findings of fact. On appeal Applicant cites several favorable pieces of record evidence involving his conduct, his family life, his character and the financial status of his overseas family. Applicant further notes several favorable findings of fact in the Judge's decision. Applicant argues that the favorable record evidence and favorable findings of fact detract from the Judge's adverse conclusions. The Board does not find Applicant's argument persuasive.

Applicant's case is entirely about issues under Guideline B (Foreign Influence). The Administrative Judge analyzed the case using disqualifying and mitigating conditions set forth in the Directive under Guideline B. Although Applicant's case includes some favorable evidence, that evidence did not preclude the Judge's unfavorable conclusions as to Applicant's security eligibility in light of Applicant's circumstances including the fact that many of his family members (including several persons in his immediate family) live in Sudan. Specifically, the Judge discussed Foreign Influence Mitigating Condition 1 [\(2\)](#)

and why he could not apply it to Applicant given Applicant's circumstances in this case. As the Board will discuss under issue 3, the Judge's conclusion (that Foreign Influence Mitigating Condition 1 is not applicable in Applicant's case) is sustainable. Much of the favorable evidence cited by Applicant is not pertinent to the Judge's stated concern. Specifically, the Judge said he could not conclude that Applicant's family in Sudan is not in a position to be exploited under the second prong of Foreign Influence Mitigating Condition 1. Given Applicant's family's circumstances the favorable evidence Applicant cites does not demonstrate that the Judge erred.

(3) Whether the Administrative Judge applied Foreign Influence Mitigating Condition 1 properly. Applicant argues that the Administrative Judge, in analyzing the security significance of Applicant's family in Sudan, misapplied Foreign Influence Mitigating Condition 1 in Applicant's case. Specifically, Applicant argues that the Judge failed to apply the last twenty words of the mitigating condition. The Judge cited the language in question on page 4 of his decision. His conclusions on page 5 of the decision do not specifically repeat the words in question. A full reading of the Judge's decision suggests that he did consider the entire mitigating condition including language cited by Applicant. However, even if the Judge had failed to apply that language, Applicant has not shown that he was harmed by such a failure.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error in Administrative Judge's August 31, 2004 decision. Therefore that decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic:

With respect to the first appeal issue, I concur with my colleagues' reliance on prior Board decisions to conclude Applicant's claim of error lacks merit. Within the bounds of permissible advocacy, either party may argue in support of its views about: (a) the meaning or significance of the record evidence; (b) what provisions of the Directive or other federal law are pertinent to a case; and (c) how the record evidence supports, or does not support, the application of any given provision of the Directive or other pertinent federal law. However, an Administrative Judge -- not the parties -- is the decision-maker. In making findings of fact or ruling on questions of law, a Judge is not bound to accept the statements either party made during closing argument. Accordingly, I concur with my colleagues' conclusion that the statements made by Department Counsel during closing argument which Applicant cites on appeal do not demonstrate the Judge erred.

I concur with my colleagues' discussion and resolution of the second appeal issue.

I concur with my colleagues' conclusion that Applicant's argument concerning the Administrative Judge's failure to quote the entire language of Foreign Influence Mitigating Condition 1 on page 5 of his decision is unpersuasive. The Board will not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 02-29608 (December 17, 2003) at p. 3. Moreover, the Board reviews a Judge's decision in its entirety, not just isolated sentences in the Judge's decision, to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 6 n.4. The Judge cited the relevant language of Foreign Influence Mitigating Condition 1 on page 4 of his decision. Applicant offers no cogent argument in support of his claim how he was harmed or prejudiced by the Judge's failure to quote on page 5 of his decision language that appears on page 4 of his decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The two statements at issue are: (1) "Your Honor, the government would acknowledge that his contacts are casual and infrequent with his brothers and sisters." and (2) "As far as mitigating condition four. . . the government acknowledged that given [Applicant's] experience in the Sudan on one occasion that he's quite familiar with what he should do, and there's no doubt he would fulfill that requirement if it happened."
2. "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" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1).