

DATE: October 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26976

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 30, 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) and Guideline F (Financial Considerations). Administrative Judge James A. Young issued an unfavorable security clearance decision dated May 6, 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 the synopsis of the Administrative Judge's decision contains a factual or legal error; (2) whether the Administrative Judge erred by finding that Applicant divorced his first wife; (3) whether the Administrative Judge erred by stating that Applicant's loyalty is not at issue; (4) whether the Administrative Judge erred by not taking into account the level of security clearance requested by Applicant; (5) whether the Administrative Judge erred by concluding Applicant's ties to citizens of Russia pose a security risk; and (6) whether the Administrative Judge gave undue or disproportionate weight to Applicant's unsatisfied debts. 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. Whether the synopsis of the Administrative Judge's decision contains a factual or legal error. Applicant contends the synopsis of the Administrative Judge's decision contains a factual or legal error, or both. In support of this contention, Applicant points to passages in the Judge's decision that he asserts are inconsistent with the synopsis.

Absent unusual circumstances, any flaws or errors in the synopsis of an Administrative Judge's decision are not likely to be harmful. *See, e.g.*, ISCR Case No. 02-23336 (May 10, 2004) at pp. 3-4. Even if the Board were to assume, solely for purposes of deciding this appeal issue, that Applicant's brief identifies some flaws with the synopsis in this case, Applicant has not shown how he was harmed in any meaningful way by such flaws in the synopsis.

2. Whether the Administrative Judge erred by finding that Applicant divorced his first wife. Applicant argues that the Administrative Judge erred by finding that he divorced his first wife. Whether Applicant divorced his wife, or she divorced him, is not relevant to any of the issues before the Administrative Judge. Even if this finding of fact by the Judge were erroneous, it would be harmless error that does not prejudice Applicant in any meaningful way.

3. Whether the Administrative Judge erred by stating that Applicant's loyalty is not at issue.

Applicant contends his loyalty to the United States is crucial in this case and that Department Counsel did not allege or prove that he is not loyal to the United States or that he would not remain loyal to the United States. This claim does not demonstrate the Administrative Judge erred.

In the decision below (at p. 4), the Administrative Judge specifically stated the following: "Applicant asserts he is a loyal American citizen who would not betray the U.S. The Government has not alleged, and the evidence does not show, Applicant is anything but a loyal U.S. citizen. However, the issue is not his loyalty, but whether he is *vulnerable* to foreign influence that could result in the compromise of classified information." (italics in original)(citation to hearing transcript omitted). Because the Judge did not state or imply that Applicant's loyalty was the basis for his unfavorable decision, Applicant's claim of error is moot.

4. Whether the Administrative Judge erred by not taking into account the level of security clearance requested by Applicant. Applicant argues the Administrative Judge erred by not taking into account the type of security clearance being requested for him. This claim of error lacks merit.

The level of security clearance requested for a particular person is based on the need-to-know principle, not levels of trustworthiness. A trustworthy, reliable person may be granted only a Confidential clearance because that is all the person needs to perform his or her duties. And, when there is a basis for questioning a person's security eligibility, that person loses access to classified information at all levels, not just some levels. *See* Directive, Section 3.2. The level of security clearance being sought for Applicant is not relevant or material to the issues in this case and, therefore, the Administrative Judge had no obligation to discuss it or take it into account when making his security clearance decision.

5. Whether the Administrative Judge erred by concluding Applicant's ties to citizens of Russia pose a security risk. Applicant does not dispute the Administrative Judge's findings that Applicant's current wife and his stepson are citizens of Russia, that Applicant's parents-in-law are citizens of Russia living in that country, that Applicant has traveled to Russia at least eight times since 1995, and that Applicant has had contact with his Russian parents-in-law about once every three months. However, Applicant contends the Judge erred by reaching adverse conclusions under Guideline B (Foreign Influence) about the facts and circumstances of his ties with Russian citizens. Applicant's arguments in support of this contention do not demonstrate the Judge committed harmful error.

The Administrative Judge erred by relying on administrative or official notice of DOHA practice or experience to make a finding about the human rights record of Russia (Decision at p. 5 and n. 3). Neither Hearing Office Judges nor the Board have authority or expertise to make pronouncements about the human rights records of foreign countries. *Cf.* ISCR Case No. 02-09907 (March 17, 2004) at p. 3 (pronouncements about foreign relations are the responsibility of President and other Executive Branch officials, not DOHA Judges); ISCR Case No. 02-00318 (February 25, 2004) at pp. 6-7 (same). To the extent it is pertinent to a DOHA adjudication, authoritative U.S. government information about the records of foreign countries is publicly available from the State Department and is easily accessible. ⁽¹⁾ DOHA practice or experience is not a substitute for information from authoritative sources. However, the Judge's erroneous reliance on administrative or official notice of DOHA practice or experience did not prejudice Applicant in a meaningful way under the particular facts and circumstances of this case.

Applicant's personal opinion about the security significance of his family ties with Russian citizens does not demonstrate the Administrative Judge erred. A Judge is not bound by an applicant's opinion about the security significance of the applicant's conduct and circumstances. *See, e.g.,* ISCR Case No. 02-23336 (May 10, 2004) at p. 5. Accordingly, error is not demonstrated by Applicant's disagreement with the Judge about the security significance of his family ties with Russian citizens.

Applicant's argument about the nature of current U.S.-Russian relations does not demonstrate the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. Guideline B (Foreign Influence) does not differentiate between friendly and hostile countries, and the federal government is entitled to protect classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests that are inimical to those of the United States. ⁽²⁾ The federal government is entitled to ensure that persons entrusted with classified information are not at risk of failing to properly handle and safeguard such information because of potential conflicts of interest due to foreign family ties. *See, e.g.,* ISCR Case No. 02-02892 (June 28, 2004) at p. 9. Applicant's argument is based on an untenable premise that only countries that are clearly hostile to the United States pose a threat to the security of U.S. classified information. Not all countries seek unauthorized access to classified information in order to harm the United States. Some countries seek such unauthorized access in order to reap the benefits of sensitive U.S. technology for themselves. ⁽³⁾ The security of

U.S. classified information is threatened whether a foreign country seeks unauthorized access to classified information in order to harm the United States, or seeks such access simply in order to reap for itself the benefits of U.S. classified information.

Finally, Applicant's argument about a statement Department Counsel made during the hearing does not demonstrate error by the Administrative Judge. Argument by Department Counsel is not evidence, and there is no indication in the decision being appealed that the Judge relied on Department Counsel's argument to evaluate Applicant's security eligibility.

6. Whether the Administrative Judge gave undue or disproportionate weight to Applicant's unsatisfied debts. Applicant's also: (a) challenges the Administrative Judge's weighing of the record evidence concerning his history of financial difficulties; (b) seeks to minimize the significance of his unpaid debts by noting that he did not have repossessions, court judgments, or other civil proceedings against him due to his debts; and (c) makes an argument that could be construed as asserting the Judge should have applied Financial Considerations Mitigating Condition 1. For the reasons that follow, the Board concludes Applicant's argument fail to demonstrate the Judge erred.

(a) Applicant does not challenge the Administrative Judge's findings of fact about his history of financial difficulties. However, Applicant does argue the Administrative Judge gave "disproportionate weight to the financial items contained in the SOR with respect to the totality of the Applicant's credit activity history." This argument does not demonstrate the Judge erred.

Absent a showing that the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 02-23118 (June 18, 2004) at p. 4. Applicant's appeal arguments show that he clearly disagrees with the Judge's weighing of the record evidence concerning his history of financial difficulties. However, Applicant's disagreement with the Judge does not demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

(b) Applicant also argues the Administrative Judge committed legal error "by not giving weight" to the fact that his credit report does not list any repossessions, court judgments against him, or legal proceedings pending against him. This argument does not demonstrate the Judge erred.

As discuss in the preceding paragraph, the Board will not disturb an Administrative Judge's weighing of the record evidence in the absence of a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law. Merely because Applicant's financial difficulties are not more serious than they could be, it does not follow that the Judge could not conclude Applicant's history of financial difficulties raised security concerns under Guideline F. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p. 10.

(c) Applicant also argues the Administrative Judge erred by not giving due consideration to the evidence that he was laid off and unemployed for eight months. The Board construes this argument as raising the issue of whether the Judge should have applied Financial Considerations Mitigating Condition 3 ⁽⁴⁾ and concluded Applicant's financial difficulties were extenuated or mitigated by application of that mitigating condition.

The Administrative Judge explained why he concluded that application of Financial Considerations Mitigating Condition 3 was not warranted in this case (Decision at pp. 5-6). Considering the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to decide that Applicant had not presented evidence sufficient to warrant application of Financial Considerations Mitigating Condition 3.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate harmful error below.

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. *See, e.g.*, <http://www.state.gov/g/drl/hr/c1470.htm> (Web page providing hypertext link to State Department reports on human rights); <http://www.state.gov/s/ct/rls/pgtrpt> (Web page providing hypertext link to State Department reports on terrorism, including state-sponsored terrorism); <http://www.state.gov/r/pa/ei/bgn> (Web page providing hypertext link to State Department "Background Notes" on foreign countries).

2. The deliberate or inadvertent disclosure of classified information to persons or entities not authorized to have access to such information is a security violation regardless of whether the persons or entities gaining unauthorized access to classified information have interests or objectives that are inimical to the national security of the United States. The federal government can make an unfavorable security clearance decision based on an applicant's deliberate or inadvertent disclosure of classified information to unauthorized persons or entities without regard to whether there is any evidence that the person or entity gaining unauthorized access intends to use that information for purposes hostile to the national security of the United States. The federal government is not limited to protecting classified information from only those persons, entities, or countries that have a demonstrated hostility toward the United States.

3. *See, e.g.*, Office of the National Counterintelligence Executive, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage -- 2003* (available at http://www.ncix.gov/publications/reports_speeches/reports/fecie_all/fecie_2003/fecie_2003.pdf) at p. v (noting individuals and entities "from more than 90 countries" targeted sensitive U.S. technologies and trade secrets in 2002 and 2003), p. 7 (noting that in 2003 more than 60 countries sought to obtain sensitive U.S. militarily critical technologies); Defense Security Service, Counterintelligence Office, *Suspicious Indicators and Security Countermeasures for Foreign Collection Activities Directed Against the U.S. Defense Industry* (available at <http://www.dss.mil/seclib/scm.pdf>) at p. 4 (noting that foreign companies from countries that are political and military allies have sought to acquire sensitive U.S. technology).

4. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.3).