

DATE: May 16, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27076

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeal (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 21, 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 C (Foreign Preference). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated November 18, 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 issue has been raised on appeal: whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons set forth below the Board affirms the 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 Issue**

On appeal Applicant raises the following claims: 1. Applicant has no foreign allegiances now that he is a U.S. citizen; 2. Security concerns arising from Applicant's Palestinian immediate family members in Israel should have been found mitigated under Guideline B (Foreign Influence) Mitigating Condition 1 [\(1\)](#)

; 3. Adverse DOHA Decisions cited by the Administrative Judge are distinguishable from Applicant's situation; 4. Applicant's case should be adjudicated consistently with favorable DOHA adjudications that Applicant cites; and 5. A whole person analysis of Applicant's situation would lead to a favorable adjudication. Taken together these claims raise the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Applicant's first claim need not be addressed. The Administrative Judge found in Applicant's favor under Guideline C (Foreign Preference). Therefore, there is no surviving allegation that Applicant has a foreign allegiance.

Applicant's second claim fails to demonstrate that the record evidence in this case obliged the Administrative Judge to apply Mitigating Condition 1 in Applicant's favor. There is a rebuttable presumption that an applicant who has immediate family members in a foreign country has ties of affection or obligation to them and that such ties are not casual in nature. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5. The record evidence does not rebut that presumption. Nor does it demonstrate that Applicant's eleven immediate family members in Israel are not a position where they might be exploited in a way that would force applicant to choose between his loyalty to them and his loyalty to the US.

Applicant's third claim does not demonstrate that the Administrative Judge made errors which would justify remand or reversal. The Judge's citation to Appeal Board decisions in ISCR Case No. 01-20700, dated December 19, 2002; ISCR Case No. 01-02452, dated November 21, 2002; and ISCR Case No. 01-26893, dated October 16, 2002 are all appropriate for the general principles explained in the Judge's decision. The Judge's citation to ISCR Case No. 99-0501

is erroneous. However, it appears to be no more than a typographical error in a citation to ISCR Case No. 99-0511 (December 19, 2000).

Applicant's fourth claim is unpersuasive. The Board has previously held that a decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases even if Applicant establishes close factual similarities between the cited cases and the instant case (which Applicant has not done here). *See, e.g.*, ISCR Case No. 01-26347 (January 8, 2004) at pp. 4-5. The cited cases are not legally binding precedent on the Board in any case. *See*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decisions by Hearing Office Administrative Judges).

Applicant's fifth claim, although it has some merit, is ultimately unpersuasive given the record in this case. The Board has previously held that an Administrative Judge's analysis must be of the whole person. It is well settled that the mere application of a specific Adjudicative Guideline Condition (whether disqualifying or mitigating) is not necessarily dispositive. [\(2\)](#)

*See, e.g.*, ISCR Case No. 03-09445 (April 25, 2005), p. 3. The record evidence in this case does not suggest that Applicant was deprived of a whole person analysis.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error which would justify remand or reversal.

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "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).

2. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4: "Although an Administrative Judge must apply pertinent Adjudicative Guidelines disqualifying and mitigating conditions, the Judge is not required to apply them in a rigid, mechanical manner. Furthermore, because the Adjudicative Guidelines disqualifying and mitigating conditions do not exhaust the realm of human experience or the kinds of conduct or circumstances that are pertinent to evaluating an

applicant's security eligibility, the mere presence or absence of any particular Adjudicative Guidelines disqualifying or mitigating condition is not dispositive of a case. Finally, a Judge acts properly by evaluating an applicant's case under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to evaluate Applicant's security eligibility under the general factors of the Directive, despite the Judge's conclusion that none of the Personal Conduct mitigating conditions applied" (footnotes omitted).