

DATE: November 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27081

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Perregrine 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 August 27, 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 Darlene Lokey Anderson issued an unfavorable security clearance decision dated March 16, 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 Administrative Judge made findings of fact that were not reasonably supported by the record; (2) whether the Administrative Judge erred in not making formal findings with respect the SOR paragraph 1.g.; and (3) whether the Administrative Judge's conclusion that Applicant is vulnerable to foreign influence 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 the Administrative Judge made findings of fact that were not reasonably supported by the record. Applicant claims that the Administrative Judge erred in making three findings of fact, which, individually and in total, caused her to make an incorrect security clearance decision. The three findings were: (1) "[t]he Applicant's contact [with his sister in Taiwan] is limited to a telephone call once or twice a year;" (2) the finding that "[t]he other four occasions [of six in which Applicant traveled to the People's Republic of China] were related to work abroad that he generated through his foreign contacts, and were in no way associated with his employer in the United States;" and (3) the finding that a former manager who Applicant worked for while they were with a defense contractor and who invited Applicant to lecture in Korea "is now working at a research institute connected with the Korean government."

The Board finds two of Applicant's claims of error to be unpersuasive. The first challenged finding is supported by Applicant's statement of July 26, 2002, wherein Applicant stated that "[m]y sister . . . is a citizen of Taiwan and my contact with her is limited to one or two telephone calls per year" (Government Exhibit 2). The Judge's finding was consistent with the record evidence.

Applicant's second assignment of error is unpersuasive. Applicant does not specify why the statement is incorrect. The record indicates that Applicant traveled four times to the People's Republic of China (PRC) to lecture, that Applicant arranged three of the lectures through a named foreign professional acquaintance, and these lectures were not work requested by Applicant's employer. The challenged finding is supported by substantial record evidence.

However, we are persuaded that the Judge erred in making the third contested finding of fact. There is record evidence that the "Mr. B" that Applicant met some years earlier was the person who was originally scheduled to lecture in Korea, but who could not keep that commitment and asked Applicant to consider substituting for him. The Applicant testified

that he did so partially due to his friendship with Mr. B and partially to enhance his own international reputation. Apparently, there was another individual working at a research institute connected with the Korean government who formally extended the lecture invitation to Applicant. *See* Hearing Transcript at pp. 67-69. The Judge failed to distinguish between these two persons. The Board regards this error as harmless, however, in view of the Judge's other findings of fact which are supported by the record evidence and the fact that this particular error does not detract from the Judge's conclusions and ultimate decision in the case.

2. Whether the Administrative Judge erred in not making formal findings with respect to the SOR paragraph 1.g. Applicant points out that the Administrative Judge erred by making formal findings on only six, instead of all seven, paragraphs of the SOR. The Board agrees. Speculating that the Judge may have confused his case with that of another applicant, Applicant then argues, without citing relevant authority, that this constitutes such error that it requires the Board to reverse the Judge's security clearance decision. The Board disagrees with respect to the remedy requested by Applicant.

The Judge's error is not outcome determinative. Reading the Judge's decision in its entirety, the Board concludes that the Judge intended to make an adverse formal finding with respect to SOR paragraph 1.g. but erroneously failed to include it in her formal findings. Even if we assume for purposes of this appeal that the Judge may have made a favorable formal finding for Applicant, a favorable formal finding under SOR paragraph 1.g. does not mandate an overall favorable security clearance decision because, reviewing the record as a whole, there are several other bases for the Judge's ultimate adverse decision. *Cf.* ISCR Case No. 01-24356 (February 26, 2003) at p. 6.

3. Whether the Administrative Judge's conclusion that Applicant is vulnerable to foreign influence is arbitrary, capricious or contrary to law. The Board construes Applicant's position as: (a) the Judge erred as a matter of law because she ignored the Directive's requirements to consider mitigating conditions; and (b) sufficient record evidence exists which required the Judge to conclude that Applicant had successfully mitigated security concerns. Applicant contends that the Judge's conclusion that no conditions could mitigate the security concerns related to him was erroneous because there were at least two mitigating conditions that the Judge should have considered but failed to consider: (i) Foreign Influence Mitigating Condition 1, a determination that his family members or associates were not agents of a foreign power or were in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the persons involved and the United States (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1); and (ii) Foreign Influence Mitigating Condition 3, his contact and correspondence with foreign citizens are casual and infrequent (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).

Preliminarily, Applicant does not controvert the facts described in the SOR except for SOR paragraph 1.b., which was amended to reflect Applicant's position that his parents-in-law are citizens of the Republic of China (Taiwan) and not the PRC. The matters in dispute here involve mitigation. Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by him or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15.

There is no indication that the Judge ignored record evidence. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. Here, as explained in the following paragraphs, the Judge considered whether Applicant's family members or associates were "agents" of a foreign government, a term that is expressly contained in Foreign Influence Mitigating Condition 1. Furthermore, Administrative Judges have broad latitude and discretion in how they write their decisions, and there is no requirement that a Judge specifically cite and discuss each and every piece of record evidence. The ability of an appealing party to point to favorable evidence not cited or discussed by a Judge, standing alone, is not sufficient to overcome the rebuttable presumption that the Judge considered all the evidence. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3.

Applicant highlights several factors which he believes are in the record evidence and require an outcome in his favor. First, Applicant argues that his sister is a professor at a university in Taiwan and is not an agent of any foreign government. On appeal Applicant argues that his contact with her is limited to one call a year "at most."⁽²⁾

Second, he argues that his elderly parents-in-law currently reside in the United States and that the United States is assisting in Taiwan's defense. Citing a decision by an Administrative Judge in the DOHA Hearing Office (*See* ISCR

Case No. 01-23873 (May 15, 2003)), Applicant argues that the President recently stated that the United States will do 'whatever it takes' to help Taiwan's defense, but Applicant recognizes other language in the Judge's decision that Taiwan has been known to target the U.S. for economic and technical information.

Third, Applicant argues that his contact with Mr. A, a university professor in the PRC was on a professional basis. Applicant contends that the reimbursements that he received from his lectures in the PRC were nominal, and that he lectured prior to his engagement in DoD-related work. Applicant says that he severed his relationship with Mr. A since 2000. Applicant cites a decision by another Hearing Office Administrative Judge that suggests that lecturing, for which expenses were reimbursed, is not a "service" with or for a foreign country, national, or representative of any foreign interest, and is not the type of conduct that is a concern under the preamble to the Guideline. *See* ISCR Case No. 02-12617 (June 10, 2003). Applicant argues that he is internationally known because his employer encouraged him and other similar professional employees to build up their international reputations for the company, which would include giving lectures.

The Administrative Judge concluded that Applicant may be vulnerable to foreign influence because he "has significant foreign ties, including a sister and other associations with individuals who are either agents of or employed by a foreign government." Applicant cannot demonstrate that the Judge erred in not applying Foreign Influence Mitigating Condition 1 merely because Applicant testified that his sister is a university professor, his parents-in-law live in the United States, and neither they, nor his former acquaintance in the PRC, are agents of a foreign government. The burden is on Applicant to demonstrate mitigation. Directive, Additional Procedural Guidance, Item E3.1.15. In the case of Foreign Influence Mitigating Condition 1, Applicant has at best demonstrated that a portion of the mitigating condition applies to a portion of his foreign relatives. He has not demonstrated that the Administrative Judge should have applied Mitigation Condition 1 to his situation as a whole. Under the plain meaning Mitigating Condition 1, if a family member or associate is an agent of a foreign government, Mitigating Condition 1 is not satisfied. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at pp. 6-7. Moreover, even if Applicant meets the burden of proof establishing that his relatives are not agents of a foreign government, he still must meet the burden of establishing that his foreign contacts are not in a position to be exploited by a foreign power in a way that could force him to chose between his loyalty to the contacts and his loyalty to the United States. Applicant argues on appeal that the Administrative Judge failed to consider this aspect of Foreign Influence Mitigating Condition 1 in her decision and that the evidence supported its application. Applicant has failed to establish error on the part of the Judge. The Judge explicitly referred to this language in her decision. Applicant has failed to demonstrate how the Judge erred by concluding that this portion of Foreign Influence Mitigating Condition 1 did not apply to the case. Furthermore, with regard to Foreign Influence Mitigating Condition 3, despite Applicant's emphasis on the number of times per year he contacts his sister, whether he contacts her once or twice is not significant because, in either event, such contact would be occasional. The important issue is the non-casual nature of his relationship with his sister. There is a rebuttable presumption that an applicant's contacts with immediate family members are not casual. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 7. On appeal, Applicant has not demonstrated that the Administrative Judge committed harmful error in her analysis of Applicant's situation with regard to his foreign contacts.

During the proceedings below, Applicant did not: (a) offer evidence regarding the nature or status of relations between Taiwan and the United States; (b) ask the Judge to take administrative or official notice regarding the nature or status of this relationship; or (c) ask the Judge to take administrative or official notice of any document, publication or official Internet site describing or explaining the nature and status of the relationship. On the other hand, Department Counsel introduced documentary evidence showing that Taiwan is among the most active collectors in economic collection and industrial espionage. *See* Government Exhibit 3 at p. 15. A party that does not ask the Administrative Judge to take administrative or official notice of the nature or status of the relations between the United States and another country has a heavy burden on appeal of demonstrating that the Judge's failure to recognize that relationship as characterized by Applicant was arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at pp. 3-4. Moreover, to support his argument that the Judge erred because she did not consider the nature of U.S./Taiwan relations, Applicant now is: (a) attempting to supplement the factual record on appeal in violation of Directive, Additional Procedural Guidance, Item E3.1.29; (b) citing the decision of another Hearing Office Administrative Judge as authority even though that decision was not binding on the Judge in the proceedings below and is never binding precedent on the Board (see following discussion). At the hearing Applicant did not present any evidence on the nature of U.S./Taiwan relations to the Judge for her consideration, nor did he ask her to consider her colleague's decision in ISCR Case No. 01-

23873. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at pp. 3-4. For these reasons, we are not persuaded that the Judge erred in her consideration of U.S./Taiwan relations.

Finally, Applicant's reliance on another Hearing Office Administrative Judge's decision in ISCR Case No. 02-12617 to prove the Judge erred in this case, is misplaced. As noted with respect to Applicant's reliance on ISCR Case No. 01-23873, the decisions of Hearing Office Administrative Judges are not binding on the Board. Further, the Judge in the proceedings below was not required to distinguish her conclusions in this case from the conclusions that another Judge reached in ISCR Case No. 01-23873. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 7. Moreover, to the extent that any party seeks to have this Board (or another Judge) accept such a decision as persuasive authority, the party must articulate sound reasons for doing so and should show: (a) the issues in the cited decision are identical or similar to the ones in the current case; (b) the relevant facts are identical or similar; (c) the cited decision articulates a rational basis for its conclusions; and (d) the cited decision relies on reasoning or analysis that can be applied to the facts and circumstances in the current case. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5. A cursory review of the cited decision indicates that it involved Guideline L (Outside Activities) issues, not Guideline B issues. Therefore, it was essential that Applicant demonstrate the applicability of the cited decision to his case. Applicant did not do so here.

Apart from SOR paragraph 1.g, the Judge articulated a rational basis why the facts and circumstances of Applicant's case raised security concerns under Guideline B, as well as reasons why those security concerns were not satisfactorily resolved. If a Judge is faced with unresolved security concerns or doubts that have a rational basis in the record evidence, the Judge acts properly by resolving them in favor of the national security. Directive, Item E2.2.2 ("Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security."). *See, e.g.*, ISCR Case No. 01-00677 (May 21, 2002) at p. 7.

Conclusion

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief asserts some facts that go beyond the record evidence. The Board cannot consider new evidence that is first presented on appeal. Directive, Additional Procedural Guidance, Item E3.1.29.

2. To the extent that Applicant is now attempting to supplement the record evidence with a statement that he contacts his

sister once a year "at the most," such a statement cannot be considered as explained in Footnote 1.