

DATE: June 9, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28256

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 25, 2004, 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 Carol G. Ricciardello issued an unfavorable security clearance decision, dated December 8, 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 considered all the record evidence; (2) whether favorable Hearing Office decisions are binding on the Board; and (3) whether the Administrative Judge's conclusion that Applicant had not met his burden of persuasion under Guideline B Mitigating Conditions 1 and 3 was 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 Issues

(1) Whether the Administrative Judge considered all the record evidence. Applicant cites both testimonial and documentary parts of the record which are favorable to Applicant and raises the issue of whether the Administrative Judge fairly considered those portions of the record. There is a rebuttable presumption that the Judge considered all the record evidence unless she stated otherwise. In this case, the Judge specifically stated that she considered all the evidence. Furthermore, a reading of her decision in its entirety shows that she was aware of favorable record evidence. The fact that the Judge did not give as much weight to the favorable evidence as Applicant would have liked is not sufficient to demonstrate that the judge erred. *See, e.g.*, ISCR Case No 03-04172 (June 7, 2005), at pp. 6-7.

(2) Whether favorable Hearing Office decisions are binding on the Board. On appeal, Applicant cites three favorable decisions from the Hearing Office as authorities for the board to consider in evaluating Applicant's appeal. It is well settled that decisions by Hearing Office Judges are not legally binding on their colleagues in other cases, and are not binding precedent on the Board. Since the decisions cited by Applicant are not binding on the Board, the Board is not required to follow those decisions, distinguish them, reconcile any of its own decisions with them, or justify why it chooses not to follow them. Rather, the burden rests on the party citing Hearing Office decisions to make cogent arguments and present sound reasons for why the Board ought to accept such decisions as persuasive authority. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at pp. 3-4. Applicant's citation to favorable Hearing Office decisions has failed to demonstrate error in the decision below.

(3) Whether the Administrative Judge's conclusion that Applicant had not met his burden under Guideline B Mitigating Conditions 1 and 3 was arbitrary, capricious, or contrary to law. The Administrative Judge concluded that Applicant had failed to demonstrate that his Laotian relatives were not in a position to be exploited by a foreign power in a way that could force Applicant to choose between his loyalty or obligations to them and the United States. Applicant's appeal raises the issue of whether the Judge's adverse conclusion was arbitrary, capricious or contrary to law.

There is evidence in the record which is generally favorable to Applicant and which the Judge's decision suggests she considered. However, there is little of favorable evidence in the record which would have been pertinent to the Judge's analysis under the second prong of Guideline B Mitigating Condition 1 (MC 1), ⁽¹⁾ regarding whether Applicant might be forced to choose between his loyalty to foreign persons and the United States. The burden is on an applicant to show why a mitigating condition is applicable to his situation. *See*, Directive, Additional Procedural Guidance, Item E3.1.15. In this case, Applicant did not meet that burden with regard to the second prong of MC1. Therefore, the Judge was not obliged to reach favorable conclusions under MC 1 and her analysis under MC1 was not arbitrary, capricious, or contrary to law.

Mitigating Condition 3 ⁽²⁾ does not apply to Applicant's situation given the record evidence in this case. Applicant testified that he and his wife would like to bring family members from Laos to the U.S. and are prepared to sponsor their immigration. The record evidence does not support a conclusion that Applicant's ties are casual.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's decision. Therefore, the Administrative Judge's December 8, 2004 decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

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."

2. "Contact and correspondence with foreign citizens are casual and infrequent."