

DATE: September 29, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-28447

## **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 October 20, 2003, which stated why DOHA proposed to deny or revoke a security clearance for Applicant. The SOR was based on Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Administrative Judge artin H. Mogul issued an unfavorable security clearance decision, dated May 26, 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge gave adequate weight to evidence that tended to support Applicant; and (2) whether the Administrative Judge erred by finding Applicant falsified a security clearance application. For the reasons set forth below<sup>3</sup>, 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 Issue**

Much of Applicant's brief is founded on factual assertions that constitute a proffer of evidence that was not in the record before the Administrative Judge. The Board is not permitted to consider new evidence on appeal. *See*, Directive Additional Procedural Guidance, E3.1.29. The Board will only address those arguments made by Applicant that do not rely on new evidence.

1. Whether the Administrative Judge gave adequate weight to evidence that tended to support Applicant. Applicant cites various pieces of evidence from the record which he believes demonstrate that he is not vulnerable to foreign influence. Some of the evidence cited by Applicant was not mentioned in the Judge's decision. However, it is well settled that a DOHA Administrative Judge is not obligated to discuss every piece of evidence. There is a presumption that the Judge took all the evidence before him into consideration, and Applicant has not rebutted that presumption. Some of the evidence cited by Applicant was discussed by the Judge. However, the Judge was ultimately not persuaded that Applicant's evidence demonstrated that Applicant had extenuated or mitigated the security concerns raised under Guideline B.

The Board need not agree with each and every one of the Judge's findings and conclusions to conclude that they are supported by adequate record evidence to sustain them in light of the contrary record evidence, and that they are not arbitrary, capricious, or contrary to law. Applicant's alternate interpretation of the record evidence is not sufficient to demonstrate that the Judge erred.

2. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. Applicant also challenges the Administrative Judge's findings that he falsified a security clearance application by not disclosing: (a) his past military service with the Taiwanese Navy, and (b) his past employment with a company, and a science and technology institute in Taiwan. Applicant had the opportunity to explain why he did not disclose those matters on the security clearance application. The record evidence of Applicant's explanation was relevant and material evidence that

the Judge had to consider, but it was not binding or conclusive on the Judge. The Judge had to consider Applicant's explanation in light of the record evidence as a whole and his assessment of the credibility of Applicant's testimony, and make findings as to whether Applicant's omission of information from the security clearance application was deliberate or not. The Board need not agree with the Judge's finding of falsification to conclude it reflects a legally permissible interpretation of the record evidence as a whole. Applicant's appeal arguments set forth a plausible, alternate interpretation of the record evidence, but they do not demonstrate the Judge erred.

### **Conclusion**

Because Applicant has not demonstrated error below, the Board affirms the Administrative Judge's decision.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board