

DATE: August 4, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28792

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Josiah M. Black, Esq.

Jacqueline L. Piscitello, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), dated October 20, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline B (Foreign Influence) and Guideline C (Foreign Preference). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated February 22, 2005.

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 issue: whether the Administrative Judge erred in concluding that the security concerns raised by the Guideline B (Foreign Influence) allegations in the SOR had not been mitigated. 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 Issue ⁽¹⁾

Whether the Administrative Judge erred in concluding that the security concerns raised by the Guideline B (Foreign Influence) allegations in the SOR had not been mitigated. Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude that he had rebutted, mitigated or extenuated the security concerns raised by the Guideline B (Foreign Influence) allegations. Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge: (1) misapplied Foreign Influence Mitigating Conditions 1 ⁽²⁾ and 3, ⁽³⁾ (2) failed to consider mitigating evidence, and (3) made an unfavorable decision that is unsupported by the record as a whole. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

The Administrative Judge made sustainable findings that: (1) Applicant's mother, brother, and aunt were citizens of Lebanon residing in that country, (2) Applicant had traveled to Lebanon in 1994 and 1999, paying a bribe to a border official to gain entry to the country on the latter trip, (3) Applicant's parents traveled to the United States to visit him in 1995, 1996, 1998, and 1999, (4) Applicant maintained contact with his brother and mother, by way of telephone calls once every couple of months, and communicated with his mother via electronic mail three or four times a year, and (5) Applicant's father had his business assets stolen, destroyed, or confiscated by the Lebanese government in approximately 1975. Given those findings, the Judge concluded that Applicant's ties with his immediate family members raised security concerns under Guideline B and that Foreign Influence Disqualifying Condition 1 ⁽⁴⁾ applied. *See* ISCR Case No. 01-22606 (June 30, 2003) at p. 6. That conclusion shifted the burden of persuasion to Applicant to mitigate the security concerns raised by the SOR. Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant contends that the Administrative Judge either ignored or gave insufficient weight to evidence that: (1)

Applicant's relatives in Lebanon were not agents of the Lebanese government, (2) Applicant's contacts were exclusively familial, and devoid of political or financial context, (3) Applicant is a loyal American citizen, with strong family and financial ties to the United States, and (4) Applicant's ties to Lebanese citizens are casual and infrequent, and would not subject him to coercion, exploitation, or pressure. In support of his contentions, Applicant argues for a different weighing of the evidence and cites to several Hearing Office decisions in which applicants in ostensibly similar circumstances were granted clearances.

Regarding Foreign Influence Mitigating Condition 1, the Administrative Judge concluded that, even assuming none of Applicant's family members were agents of the Lebanese government, Applicant still had the burden of demonstrating that his family members in Lebanon were not in positions where they are likely to be exploited by a foreign power. Applicant's arguments do not demonstrate that it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had not met his burden of establishing that his relatives were not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to those relatives and the United States. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Also, mere disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error without a showing that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law. Moreover, decisions in other DOHA Hearing Office cases do not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases and the cited cases are not legally binding precedent on the Board. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decisions by Hearing Office Judges). A review of the record evidence reveals that the Judge's decision not to apply Mitigating Condition 1 is sustainable.

Applicant's argument with regard to Foreign Influence Mitigating Condition 3 does not demonstrate error on the part of the Administrative Judge. There is a rebuttable presumption that contacts with immediate family members are not casual. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5. After a review of the record evidence in this case, the Board concludes that the Judge's decision not to apply Mitigating Condition 3 is sustainable.

Regarding the Administrative Judge's overall unfavorable security clearance decision, Applicant's ability to cite to record evidence that he contends the Judge should have given greater weight--such as the length of Applicant's United States citizenship and the extent of his financial and family ties to the United States--is not sufficient to demonstrate error on the part of the Judge. Merely because a Judge does not give greater weight to record evidence cited by the appealing party, it does not follow that the Judge simply ignored that evidence. The Government has not alleged, and the evidence does not show, Applicant is anything but a loyal United States citizen. However, the issue is not Applicant's loyalty, but whether he is vulnerable to foreign influence that could result in the compromise of classified information. Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had failed to provide sufficient evidence in mitigation to support a favorable security clearance determination.

Conclusion

Applicant has failed to demonstrate 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to the Guideline C allegations and SOR paragraph 2.e. Those favorable findings are not at issue on appeal.
2. Directive, Enclosure 2, Item E2.A2.1.3.1 ("A determination that the immediate family member(s), (*spouse, father, mother, sons, daughters, brother, 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*").
3. Directive, Enclosure 2, Item E2.A2.1.2.3 ("Contact and correspondence with foreign citizens are casual and infrequent").
4. Directive, Enclosure 2, Item E2.A2.1.2.1 ("An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country").