

DATE: June 29, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-28436

## **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 January 8, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Elizabeth M. Matchinski issued an unfavorable decision, dated February 1, 2005.

Applicant appealed the Administrative Judge's adverse 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 it is permissible for the Administrative Judge to rely on Applicant's statements to Applicant's detriment, (2) whether the Administrative Judge's findings of fact are plausible in light of the record evidence, and (3) whether the Administrative Judge's conclusions follow rationally from her findings of fact. For the reasons set forth below, 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 <sup>(1)</sup>

(1) Whether it is permissible for the Administrative Judge to rely on Applicant's statements to Applicant's detriment. Applicant asks the Board to consider new evidence. The Board is not permitted to consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant contests the Administrative Judge's consideration of Applicant's own statements against him. He argues that his estimates were impromptu, his answers were convoluted but truthful, that he'd like to see an American lawyer, and that Turkish law is complex.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge states otherwise. Implicit in that presumption is that the Judge is normally obliged to consider all the record evidence. Therefore, it is not error for the Judge to consider the record evidence to which Applicant refers.

Applicant's concerns about seeing a lawyer are not timely. The Judge asked Applicant twice if he had elected to represent himself, and he said yes both times.

The remainder of Applicant's arguments under this issue do not demonstrate error on the part of the Administrative Judge for considering Applicant's statements. Furthermore, a fair reading of the Judge's decision as a whole is consistent with Applicant's arguments.

(2) Whether the Administrative Judge's findings of fact are plausible in light of the record evidence. Applicant challenges the Administrative Judge's findings of fact regarding Applicant's financial and property interests in Turkey, and his immediate family living in Turkey. As noted earlier in this decision, Applicant asks the Board to consider new evidence. The Board is not permitted to consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant's challenges fail to demonstrate that Judge's material findings of fact are erroneous given the record evidence before the Judge.

(3) Whether the Administrative Judge's conclusions follow rationally from her findings of fact. Applicant asks the Board to reverse the Administrative Judge's conclusions and Formal Findings against Applicant. The Board cannot grant Applicant's request. The Judge's conclusions and Formal Findings follow rationally from her material findings of fact. Applicant has failed to demonstrate error. Therefore, there is no basis for the Board not to affirm the Judge's conclusions and Formal Findings against Applicant

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's decision. Therefore, the Judge's February 1, 2005 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. The Administrative Judge issued favorable Formal Findings under SOR subparagraphs 1.b., 2.c., 2.d. and 2.e. Those findings are not at issue on appeal.