

DATE: December 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29403

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Mark S. Zaid, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated January 31, 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 Joan Caton Anthony issued an unfavorable security clearance decision, dated April 21, 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 Department Counsel failed to establish a *prima facie* case against Applicant that supported the Administrative Judge's unfavorable security clearance decision; (2) whether the Administrative Judge erred by concluding certain matters raised security concerns under Guideline B (Foreign Influence); (3) whether the Administrative Judge erred by concluding Applicant did not mitigate the security concerns raised under Guideline B (Foreign Influence); and (4) whether the Administrative Judge failed to evaluate Applicant's security eligibility under the whole person concept. 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

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his ties and contacts with immediate family members and in-laws who are citizens and residents of Pakistan. However, Applicant does raise various challenges to the conclusions that the Judge reached about his family ties and contacts.

1. Whether Department Counsel failed to establish a *prima facie* case against Applicant that supported the Administrative Judge's unfavorable security clearance decision. Applicant argues Department Counsel "failed to submit any evidence into the record that meets [its] burden" of establishing a *prima facie* case against Applicant. This claim of error is not persuasive.

Department Counsel has the burden of presenting evidence to prove controverted SOR allegations.⁽¹⁾ Department Counsel does not have the burden of presenting direct or objective evidence of a nexus between an applicant's conduct and circumstances and an unfavorable security clearance decision.⁽²⁾ In this case, the Administrative Judge had a rational basis for concluding Department Counsel had presented sufficient evidence concerning Applicant's family ties and foreign contacts to meet its burden of establishing a *prima facie* case under Guideline B (Foreign Influence), thereby shifting the burden of persuasion to Applicant to present evidence to rebut, explain, extenuate or mitigate the security concerns raised under that Guideline.⁽³⁾

2. Whether the Administrative Judge erred by concluding certain matters raised security concerns under Guideline B (Foreign Influence). Applicant makes five arguments that the Board construe as raising the issue of whether the

Administrative Judge erred by concluding that certain matters raise security concerns under Guideline B. Specifically, Applicant argues: (a) the Administrative Judge did not have a rational basis for concluding Applicant's family ties in Pakistan raise security concerns under Guideline B; (b) the Judge erred by concluding Applicant's giving of annual gifts of money (\$300-\$600) constituted financial support and contributed to Applicant being vulnerable to coercion, exploitation, or pressure by a foreign government; (c) the Judge erred by concluding that the livelihood of Applicant's brother raises a security concern under Guideline B; (d) it was arbitrary and capricious for the Judge to conclude the fragile health of Applicant's father and father-in-law increases the security concerns under Guideline B; and (e) there is no rational connection between terrorism and the adjudication of Applicant's security clearance case. With one exception that constitutes harmless error, Applicant's claims are not persuasive.

The main thrust of the first three arguments is that the Administrative Judge erred by not viewing Applicant's family ties and foreign contacts separately and reaching a conclusion as to the security significance of each one in isolation. Under the whole person concept, ⁽⁴⁾ the Judge had to evaluate the security significance of the totality of Applicant's family ties and foreign contacts, not just each one separately. ⁽⁵⁾ Applicant is not entitled to have the Judge engage in a piecemeal analysis of his family ties and foreign contacts. The Board need not decide whether the Judge could have concluded that each family tie or foreign contact involved in Applicant's case -- standing alone -- was sufficient to raise security concerns under Guideline B. All the Board must do is decide whether there is sufficient record evidence to allow the Judge to reasonably infer or conclude that the totality of Applicant's family ties and foreign contacts raise security concerns under Guideline B. Considering the record as a whole, the Judge had a rational basis for concluding that the totality of Applicant's ties with immediate family members and in-laws in Pakistan raised security concerns under Guideline B.

The Board finds persuasive Applicant's argument that the Administrative Judge erred by concluding the fragile health of Applicant's father and father-in-law increased the security concerns under Guideline B. The Judge articulated no rational basis for her conclusion on this point, and it is not obvious or self-evident from the record evidence concerning the health status of Applicant's father and father-in-law why the Judge reached her challenged conclusion on this point. However, considering the record as a whole, this error is harmless. ⁽⁶⁾

Applicant's argument that terrorism has no rational connection to a security clearance adjudication is not persuasive. As noted earlier in this decision, Department Counsel does not have to present direct or objective evidence of a nexus. Moreover, Applicant's argument goes too far by asserting that the existence of terrorism is irrelevant to the adjudication of security clearance cases. Contrary to Applicant's assertion, it is possible to envision several ways in which terrorists could pose a threat to classified information. Terrorists can be expected to try to harm the United States, directly or indirectly. There is no reason to expect such terrorists would ignore opportunities to attack United States interests, directly or indirectly. If terrorists had an opportunity to hurt the United States by obtaining classified information, there is no good reason to expect they would simply ignore such an opportunity. Terrorists could try to compromise classified U.S. information to gain information that could be of operational benefit to them (*e.g.*, gain insight into sensitive military technology that they could exploit directly against the U.S. military or civilian targets, or use such access to try to develop countermeasures to help themselves on a tactical level when conducting their terrorist operations and related activities). Similarly, terrorists could reveal to other adversaries of the United States classified information that they cannot exploit themselves, so that those other adversaries could exploit it to the detriment of the United States. Furthermore, terrorists need to obtain funding for their operations. Terrorists have engaged in theft, drug dealing, and other illegal activities to obtain funding. ⁽⁷⁾ Classified information could have value to foreign countries willing to pay for it. Terrorists could try to gain access to classified U.S. information in order to sell it to the highest bidder. There is no good reason to assume that terrorists would overlook an opportunity to obtain classified information for sale to the highest bidder as a means of obtaining funding for their terrorist activities. ⁽⁸⁾ For all these reasons, the Board concludes it was not arbitrary, capricious, or contrary to law for the Judge to take into account that there are individuals and groups in Pakistan who have acted and continue to act in a manner that is hostile to U.S. security interests.

3. Whether the Administrative Judge erred by concluding Applicant did not mitigate the security concerns raised under Guideline B (Foreign Influence). Applicant raises several arguments that the Board construes as raising the issue of whether the Administrative Judge erred by concluding Applicant did not mitigate the security concerns raised under Guideline B. Specifically, Applicant argues: (a) the Judge erred by not giving more weight to her favorable credibility

determination; (b) the Judge made a foreign policy assessment concerning Pakistan that is not supported by the record evidence and is contrary to official Executive Branch statements about U.S.-Pakistan cooperation; (c) the Judge erred by not applying Foreign Influence Mitigating Condition 1; (d) the Judge erred by concluding Applicant's relationship with his father and father-in-law is not casual and infrequent; (e) the Judge failed to give due weight to the "clear evidence of mitigation" he presented.

Applicant conflates a credibility determination with record evidence, and seeks to elevate Applicant's statements to status of binding or conclusive evidence. A credibility determination -- whether favorable or unfavorable -- is not a substitute for record evidence.⁽⁹⁾ Even if an Administrative Judge concludes that an applicant's testimony is credible, that does not mean that the Judge must accept that testimony uncritically without regard to considering and weighing that testimony in light of the record as a whole. A credibility determination does not relieve a Judge from the obligation to weigh the evidence as a whole and reach reasonable conclusions from the record as a whole.⁽¹⁰⁾ Even if the Judge concluded Applicant had testified honestly and sincerely, the Judge would still have to consider and weigh Applicant's testimony in light of the record evidence as a whole when assessing the security significance of the evidence concerning Applicant's family ties and foreign contacts.⁽¹¹⁾ Accordingly, Applicant's credibility argument does not demonstrate the Judge erred.

Applicant correctly notes that DOHA proceedings are not intended to adjudicate foreign policy issues committed to other parts of the federal government.⁽¹²⁾ Moreover, Applicant correctly notes that decisions by Hearing Office Administrative Judges are not legally binding precedent and can only be cited as persuasive authority.⁽¹³⁾ However, Applicant then proceeds to argue that the Board should follow the views of Hearing Office Administrative Judges who have reached conclusions about Pakistan that are favorable to Applicant,⁽¹⁴⁾ despite his candid acknowledgment that some Hearing Office Judges in other cases have reached conclusions about Pakistan that are not favorable to him.⁽¹⁵⁾ Applicant offers no cogent reason why the Board should follow one set of Hearing Office decisions over the other set of Hearing Office decisions. Applicant's argument does not demonstrate the Judge committed error in this case.⁽¹⁶⁾

Applicant's argument concerning Foreign Influence Mitigating Condition 1⁽¹⁷⁾ is not persuasive. As noted earlier in this decision, the Administrative Judge had a rational basis for concluding Department Counsel presented sufficient evidence concerning Applicant's family ties and foreign contacts to meet its burden of establishing a *prima facie* case under Guideline B (Foreign Influence), thereby shifting the burden of persuasion to Applicant to present evidence to rebut, explain, extenuate or mitigate the security concerns raised under that Guideline. Applicant's burden of persuasion included presenting sufficient evidence to warrant application of pertinent Adjudicative Guidelines mitigating conditions.⁽¹⁸⁾ The Judge concluded Applicant did not present sufficient record evidence to warrant application of Foreign Influence Mitigating Condition 1. There is no presumption of error below, and an appealing party has the burden of showing error below. Applicant's argument that the Judge erred by not applying Foreign Influence Mitigating Condition 1 reduces to a disagreement with the Administrative Judge's conclusion that the record evidence does not warrant application of Foreign Influence Mitigating Condition 1, without any cogent argument or reason for how or why the Judge's conclusion is arbitrary, capricious, or contrary to law. Applicant's argument falls short of meeting his burden of persuasion on appeal.

Applicant's argument concerning the nature of his relationship with his father and his father-in-law fails to demonstrate the Administrative Judge erred. To a large extent, Applicant bases his argument on decisions by Hearing Office Judges in other cases. As discussed earlier in this decision, such decisions are not legally binding precedent. Applicant has not presented a cogent argument for why the Board should follow the Hearing Office decisions he relies on in support of this claim of error. There is a rebuttable presumption that contacts with immediate family members are not casual in nature.⁽¹⁹⁾ Moreover, there is a rebuttable presumption that an applicant may have ties of affection for, or obligation to, the parents of the applicant's spouse.⁽²⁰⁾ Given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's contacts with his father and father-in-law in Pakistan were not casual or infrequent.

4. Whether the Administrative Judge failed to evaluate Applicant's security eligibility under the whole person concept. Applicant contends the Administrative Judge did not apply the whole person concept, arguing that: (a) the Judge did not

weigh the record evidence properly; (b) Applicant's testimony was truthful; (c) Applicant testified that there is "zero possibility" of any security compromise; and (d) Applicant's need for a security clearance is limited to access to secure areas only, not access to classified information itself. These arguments fail to demonstrate the Judge erred.

(a) Applicant disagrees with the Administrative Judge's weighing of the record evidence, but fails to articulate a cogent argument or reason why the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law. Standing alone, Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law when weighing the record evidence. [\(21\)](#)

(b) The argument is a variation of Applicant's conflating credibility with weight of the record evidence. Even if the Administrative Judge concluded Applicant's testimony was truthful, such a conclusion would not compel the Judge to find in Applicant's favor. Moreover, Applicant's testimony is relevant evidence, but it is not binding, conclusive or dispositive under the whole person concept.

(c) Applicant's opinion about the security significance of his conduct and circumstances is not binding or conclusive on the Administrative Judge. [\(22\)](#) The Judge was not required to accept Applicant's opinion or use it as the basis for her security clearance decision. Moreover, Applicant's statement that "the basis for Judge Anthony's decision is a mystery" is not an argument that demonstrates error below. Acceptance of Applicant's argument about the significance of his opinion would lead to the untenable result that the federal government would not be able to deny or revoke a security clearance unless an applicant affirmatively concedes that he or she poses a security risk.

(d) Applicant's limited need for access is irrelevant. The "clearly consistent with the national interest" standard applies whether an applicant needs a security clearance for access to classified information or for access to a secure area. [\(23\)](#) The security concerns raised under Guideline B in this case do not turn on whether Applicant needs access to secure areas only or access to classified information itself.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate harmful error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Concurring Opinion of Administrative Judge Michael Y. Ra'anan

I agree with the majority opinion in all aspects save one.

Applicant claims on appeal that there was no evidence presented to show a terrorist threat to U.S. classified information and that such a threat runs contrary to common sense or human experience. I think Applicant's claims are frivolous. Furthermore, the terms of the Directive clearly raise the government's concerns about an applicant's foreign ties even where there are no questions of terrorism. The government is not obligated to present evidence to prove that the

Directive is justified.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. *See* Directive, Additional Procedural Guidance, Item E3.1.14.
2. *See Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973).
3. *See* Directive, Additional Procedural Guidance, Item E3.1.15.
4. *See* Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.
5. *See, e.g.*, ISCR Case No. 03-05645 (September 15, 2004) at p. 4; ISCR Case No. 02-09892 (July 15, 2004) at p. 5.
6. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).
7. *See* U.S. Department of Treasury and U.S. Department of Justice, *2003 National Money Laundering Strategy* (report to Congress signed by the Secretary of Treasury and the Attorney General, available at <http://www.ustreas.gov/offices/enforcement/publications/ml2003.pdf>). The report is required by 31 U.S.C. §5341(a).
8. Theft or misappropriation of classified U.S. information to obtain financial gain is not merely a theoretical possibility. *See, e.g., United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991).
9. *See, e.g.*, ISCR Case No. 02-20110 (June 3, 2004) at p. 6 n.12; ISCR Case No. 02-08032 (May 14, 2004) at p. 6.
10. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 6-7; ISCR Case No. 02-02892 (June 28, 2004) at p. 4.
11. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7.
12. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 3.
13. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges, and the burden of persuasion that a party has when citing such decisions on appeal).
14. The Board rejects Applicant's assertion that the Board is "obligated to ensure some level of consistency with respect to the conclusions of Administrative Judges." Under the Directive, the Board does not have general, supervisory jurisdiction over Hearing Office Judges. *See, e.g.*, ISCR Case No. 02-04344 (September 15, 2003) at p. 3. Moreover, the Board does not have jurisdiction or authority to review Hearing Office decisions that have not been appealed. And, even when Hearing Office decisions are appealed, the Directive limits the Board to consideration of the material issues raised by the parties. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Accordingly, findings and conclusions in a Judge's decision that are not challenged on appeal are not proper subjects for review by the Board. In view of the foregoing, it is neither legally required under the Directive nor practical for the Board to undertake the task Applicant asks it to assume.
15. Applicant's acknowledgment of Hearing Office decisions that run contrary to his position reflects a proper recognition of his professional obligations to this tribunal, which the Board appreciates.
16. Implicit in Applicant's arguments is the premise that countries that are not openly hostile to the United States, or which do not have interests inimical to the United States, cannot pose a risk to the security of classified information under Guideline B (Foreign Influence). That premise is not warranted. The United States is entitled to protect classified

information from any person, entity, or country not authorized to have access to such information, not just those that are hostile to the United States or have interests inimical to the United States. *See, e.g.*, ISCR Case No. 02-26976 (October 22, 2004) at pp. 5-6; ISCR Case No. 02-11570 (May 19, 2004) at pp. 5-6.

17. "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" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1).

18. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6.

19. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5.

20. *See, e.g.*, ISCR Case No. 02-16657 (September 23, 2004) at p. 5.

21. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5 ("If an appealing party challenges the Judge's weighing of the record evidence, that party must not simply disagree with the Judge's weighing of the record evidence, but rather must articulate a cogent reason or argument for how the Judge erred in weighing the record evidence."). *See also* ISCR Case No. 03-02486 (August 31, 2004) at pp. 7-8 (discussing why the appealing party must do more than just set forth an alternate interpretation of the record evidence when challenging a Judge's findings of fact).

22. *See, e.g.*, ISCR Case No. 02-23336 (May 10, 2004) at p. 5; ISCR Case No. 02-09907 (March 17, 2004) at pp. 5-6.

23. *See, e.g.*, ISCR Case No. 02-28502 (March 26, 2004) at p. 4.