

DATE: May 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29044

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 the Applicant a Statement of Reasons (SOR), dated November 14, 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), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated December 17, 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 erred by holding against the Applicant with respect to the Guideline B security concerns, and (2) whether the Administrative Judge erred in concluding that the Guideline E security concerns 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 Issues

1. Whether the Administrative Judge erred by holding against the Applicant with respect to the Guideline B security concerns. Applicant contends that he should not be denied a security clearance merely because he has relatives in a foreign country (including immediate family members and in-laws). This contention is not persuasive.

The Administrative Judge made the following findings that are not challenged on appeal: (1) Applicant's spouse is a citizen of the People's Republic of China (PRC), (2) Applicant has parents-in-law and a brother-in-law who are citizens of the PRC and residing in the PRC, (3) Applicant traveled to the PRC in 2002 to visit his in-laws, and (4) Applicant's parents-in-law came to the United States in December 2003 on a six-month visa and as of April 2004 were residing with Applicant and his spouse. Given those findings, the Administrative Judge concluded that Applicant's ties with those immediate family members raised security concerns under Guideline B and that Foreign Influence Disqualifying Condition 1 applied. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15. Given Applicant's admissions to the SOR allegations under Guideline B and the evidence presented by Department Counsel at the hearing, the burden of persuasion shifted to Applicant.

Applicant argues that the Administrative Judge gave insufficient weight to evidence that Applicant was not close to his relatives in the PRC, does not speak their language, that those relatives were not agents of the PRC government, and that Applicant would place his daughter's welfare over the well-being of his relatives in the PRC if pressure were placed on them in the future. Applicant's argument does not demonstrate that it was arbitrary, capricious, or contrary to law for the 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. Mere disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error. Rather, the appealing party must show that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law. Applicant has not met his burden of showing the Judge erred in weighing the record evidence.

Applicant also suggests that the Administrative Judge's adverse decision is based solely on the fact that Applicant's relatives are PRC citizens. This contention is similarly not persuasive.

The Administrative Judge's adverse conclusions under Guideline B were not based merely upon the fact that Applicant's wife and her family were citizens of the PRC. Rather, they were based on the record evidence that Applicant's ties with his foreign family members pose a security risk under the particular facts of this case. *See, e.g.*, ISCR Case No. 99-0457 (January 3, 2001) at p. 6. The Board notes that this program has adjudicated Guideline B (Foreign Influence) cases involving applicants with ties to a wide variety of countries, not just the PRC. Furthermore, whether an applicant with family ties to citizens of the PRC can mitigate the security concerns raised by such ties depends on the particular facts and circumstances of each applicant's case. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 10 (resolution of applicant's case does not decide, favorably or unfavorably, the outcome of all security clearance adjudications involving applicants with ties to family members in the PRC).

2. Whether the Administrative Judge erred in concluding that the Guideline E security concerns had not been mitigated.

Applicant contends the Administrative Judge erred because Personal Conduct Mitigating Condition 3 [\(U\)](#) should have been applied by the Judge. In support of that contention, Applicant argues that: (1) he had acknowledged his error and provided the correct information, (2) the Judge erred in finding that Applicant's disclosures of the omitted information at his interview were not made "up front," but were in response to specific questions, and (3) Applicant's disclosure of the omitted information was "prompt" because it occurred at his first interview. For the reasons set forth below, we conclude the Applicant has not demonstrated the Judge erred.

The Administrative Judge found Applicant deliberately failed to disclose all his drug use when he completed a security clearance application, and provided the omitted information only in response to specific questions posed by an interviewer. That finding is reasonably supported by record evidence. The Judge's reasoning in not applying Personal Conduct Mitigating Condition 3 is sustainable. The fact that Applicant voluntarily disclosed the omitted information to the investigator the first time he was interviewed did not preclude the Judge from considering the passage of time between the falsification and the subsequent disclosure, as well as the nature of the omission, and concluding Applicant's disclosure was not a "prompt good-faith effort" within the meaning of that mitigating condition. *See, e.g.*, ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (not arbitrary or capricious for Judge to conclude that disclosures made at an applicant's first interview, six months after the falsification, were not prompt). Considering the record as a whole, the Judge's reasoning reflects a plausible interpretation of the record evidence, and it is not arbitrary, capricious, or contrary to law. The ability of a party to argue for an alternate interpretation of the record evidence is insufficient, standing alone, to demonstrate error. *See, e.g.*, ISCR Case No. 97-0202 (January 20, 1998) at p. 4.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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 individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.3).