

DATE: November 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29665

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 January 24, 2004, 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). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated June 18, 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 issue: whether the Administrative Judge erred in concluding that Applicant had not successfully rebutted, mitigated or extenuated the security concerns raised under Guideline B (Foreign Influence). 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 Applicant had not successfully rebutted, mitigated or extenuated the security concerns under Guideline B (Foreign Influence). On appeal, 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 under Guideline B (Foreign Influence). Specifically, Applicant contends that the Judge's adverse decision should be reversed because: (1) the evidence establishes Applicant is a loyal American, (2) Applicant's wife has applied for United States citizenship and has a security clearance, so she poses no threat of coercion to Applicant, and Applicant's foreign in-laws are retired and not agents of a foreign government, and (3) the facts of Applicant's case are similar to multiple Hearing Office decisions in which applicants were granted a clearance. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

(1) Applicant takes issue with the Judge's conclusion that "the issue is not [Applicant's] loyalty, but whether [Applicant] is vulnerable to foreign influence that could result in the compromise of classified information."⁽²⁾ It is Applicant's contention "that his loyalty is, in fact, the central issue."⁽³⁾ In the decision below, the Administrative Judge specifically stated the following: "Applicant asserts he is a loyal American citizen who would not betray the U.S. The Government has not alleged, and the evidence does not show, Applicant is anything but a loyal U.S. citizen. However, the issue is not his loyalty, but whether he is *vulnerable* to foreign influence that could result in the compromise of classified information" (italics in original)(citation to hearing transcript omitted). Because the Judge did not state or imply that Applicant's loyalty was a basis for his unfavorable decision, Applicant's claim of error is moot.

(2) Applicant essentially argues that the Judge should have found the government's security concerns mitigated under Foreign Influence Mitigating Condition 1⁽⁴⁾ because (a) Applicant's wife has applied for United States citizenship and has a security clearance, so she poses no threat of coercion to Applicant, and (b) Applicant's foreign in-laws are retired and not agents of a foreign government.

Given the totality of the record evidence in this case, the Administrative Judge had a rational basis for concluding the facts and circumstances of Applicant's family ties with Russia raised security concerns under Guideline B (Foreign Influence). The Judge also correctly held that Applicant had the burden of presenting evidence to extenuate, mitigate, or otherwise overcome the security concerns raised by the facts and circumstances of his family ties with Russia. *See* Directive, Additional Procedural Guidance, Item E3.1.15. *See also* ISCR Case No. 01-17496 (October 28, 2002) at p. 5 (applicant has the burden of showing applicability of Adjudicative Guidelines mitigating conditions).

Foreign connections not based on birth can raise security concerns under Guideline B. Accordingly, the Administrative Judge's decision is not rendered arbitrary, capricious, or contrary to law because Applicant's relationships with Russian citizens are based on his marriage. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 4 (Administrative Judge can consider security significance of evidence that an applicant's wife is a foreign citizen with family members living in foreign country). Whether Applicant's wife is eligible or not eligible to apply for U.S. citizenship now or in the future does not change the fact that she now is a Russian citizen and not a U.S. citizen, and does not change the security significance of those facts for purposes of adjudicating Applicant's current security eligibility. Similarly, although there was independent documentary evidence in the record that shows (a) the Office of Personnel Management (OPM) performed a background investigation on Applicant's wife so that she could be certified as a contract language instructor at a United States military installation, and (b) the results of the investigation were favorable and she got the job, ⁽⁵⁾ that evidence does not establish Applicant's wife had obtained a security clearance. Therefore, the Judge's unwillingness to draw such a conclusion from the testimony of Applicant's wife was not unreasonable. When asked what type of clearance she possessed, she did not respond with detailed information as to the type or level of clearance, but merely stated that she had "access to work at the base." ⁽⁶⁾ Finally, the Judge did not conclude that Applicant's wife posed a risk of coercing Applicant. Even if the Judge were to conclude that Applicant's spouse or in-laws living in another country were not likely to coerce the Applicant, the Judge still could consider whether other persons or entities could try to bring coercive or noncoercive influence or pressure to bear against Applicant's spouse or in-laws in Russia in an effort to influence or pressure him. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 5-6.

The absence of evidence that Applicant's family members in Russia are employees or agents of the Russian government is not dispositive. Having relatives, cohabitants or associates who are connected with a foreign government is a disqualifying condition under Guideline B. ⁽⁷⁾ However, the absence of such a connection with a foreign government does not mean that there is no security concern under Guideline B. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5; ISCR Case No. 01-03120 (February 20, 2002) at pp. 3-4. A reading of Guideline B in its entirety shows that security concerns can be raised by a variety of foreign connections, not just having family members with foreign government connections. Furthermore, the absence of a particular disqualifying condition does not compel a favorable security clearance decision. *See, e.g.*, ISCR Case No. 02-08052 (June 23, 2003) at p. 3 (the mere presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case). Moreover, the Board has previously rejected the premise that security concerns under Guideline B are mitigated merely because an applicant's foreign family members are elderly or retired. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at pp. 5-6 (Administrative Judge failed to articulate a rational basis for his conclusion that the age of the applicant's father reduces security concerns under Guideline B; also noting that foreign government could bring pressure to bear on the applicant's father through threats concerning father's pension).

Considering the record evidence as a whole, the Judge had a rational basis for concluding that Applicant had failed to provide sufficient evidence of extenuation or mitigation to overcome the security concerns raised by the totality of the facts and circumstances of his family ties with Russia. Applicant's disagreement with the Judge's adverse conclusions is not sufficient to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. Applicant's appeal arguments, viewed individually or collectively, do not demonstrate the Judge's adverse conclusions under Guideline B are arbitrary, capricious, or contrary to law.

(3) Applicant cites to numerous decisions by DOHA Administrative Judges for the proposition that many cases exist where security clearances have been granted to applicants who have foreign family connections similar to Applicant's. The decision in another DOHA case cited by Applicant on appeal does 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. The cited cases are not legally binding precedent on the Board in this or any other appeal. *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).

Conclusion

Applicant failed to meet his burden of demonstrating error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made a favorable finding with respect to SOR paragraph 1.h. That favorable finding is not at issue in this appeal.
2. Decision at p.4.
3. Applicant's Brief at p. 1.
4. "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 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).
5. Exhibit C; Transcript at pp. 32 and 47.
6. Transcript at p. 47.
7. "Relatives, cohabitants, or associates who are connected with any foreign government" (Directive, Adjudicative Guidelines, Item E2.A2.1.2.3).