

DATE: June 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

)

ISCR Case No. 02-30587

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 23, 2004, 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) and Guideline C (Foreign Preference). Administrative Judge Michael J. Breslin issued an unfavorable security clearance decision, dated November 24, 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 the Administrative Judge committed harmful error by referring to Applicant's Russian girlfriend as his "former fiancée" in the conclusions section of his decision; and (2) whether the Administrative Judge erred by concluding that the presence of Applicant's brother in Iran and Applicant's former girlfriend in Russia raised unmitigated security concerns 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 Issues

1. Whether the Administrative Judge committed harmful error by referring to Applicant's Russian girlfriend as his "former fiancée" in the conclusions section of his decision. The Administrative Judge made the following findings of fact with reference to a Russian woman Applicant met on a business trip to Russia in 1998: (a) Applicant developed a romantic relationship with the woman which lasted from 1999 to 2002; (b) the woman stayed with Applicant in his home in the United States for about nine months in 1999 and then returned to Russia; (c) after her return to Russia, Applicant kept in frequent contact with her through e-mail and met her in Europe or Russia during business trips; (d) at the time Applicant submitted his security clearance application, he was considering marrying the woman; (e) the relationship was terminated amicably during Applicant's visit to Moscow during Christmas, 2002; and (f) Applicant still maintains contact with the woman by telephone and e-mail. At one point in the conclusions section of his decision, the Judge refers to the woman as Applicant's "former fiancée." On appeal, Applicant argues that the Judge's conclusion that the woman was Applicant's fiancée (and by inference that the couple was engaged) was incorrect, pointing out that the relationship never matured to the status of engagement. Although he does not precisely articulate the point, Applicant is, in essence, arguing that, for the purposes of evaluating the significance of the relationship under Guideline B, the Judge's characterization of his girlfriend as his fiancée implies a closer relationship than the one actually established by the record evidence.

Applicant is correct that the Administrative Judge's characterization of his girlfriend as his fiancée was error, given the facts of this case. The Board concludes, however, that the error was harmless. The Judge's decision contains only one reference to the Applicant's girlfriend as his "former fiancée." When reviewing an Administrative Judge's decision, the Board does not consider individual sentences (or phrases) in isolation from the rest of the decision; rather, the Board

considers the decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR case No. 01-22311 (April 4, 2003) at p. 4. Viewed in the context of the Judge's decision as a whole, the one instance where the Judge refers to Applicant's girlfriend as his "former fiancée" is an aberration that is inconsistent with the remainder of the Judge's decision. The Board notes that there are multiple references to the Russian woman as Applicant's "girlfriend" or "female friend" in both the findings and conclusions portions of the Judge's decision. A reading of the Judge's decision in its entirety indicates that the Judge neither explicitly nor impliedly concluded that Applicant was engaged to his Russian friend. The Board is also convinced, after a reading of the Judge's decision, that his overall characterization of the relationship between Applicant and his Russian girlfriend is supported by the record evidence.

2. Whether the Administrative Judge erred by concluding that the presence of Applicant's brother in Iran and Applicant's former girlfriend in Russia raised unmitigated security concerns under Guideline B (Foreign Influence). Regarding Guideline B, the Administrative Judge concluded that the status of Applicant's brother as a citizen and resident of Iran and the status of his former girlfriend (with whom he still maintained contact) as a citizen and resident of Russia gave rise to security concerns that had not been mitigated. On appeal, Applicant makes several contentions in support of his main argument that the evidence he presented established the applicability of Guideline B Mitigating Condition 1⁽¹⁾ and Guideline B Mitigating Condition 3.⁽²⁾ He states: (a) his brother is not in a position that could present the possibility of the Iranian government coercing him to obtain information about an individual as insignificant as Applicant, who left Iran in 1987 without records; (b) although a member of an ethnic minority which has historically faced oppression in Iran, Applicant's brother, because of his current position as a successful businessman, is past the point where he could be influenced by oppression from the Iranian government; (c) his current contacts with his former girlfriend are not of a romantic nature and are very casual with declining frequency; and (d) he has lived half his life in the U.S. and through his conduct during that time, he has proven his loyalty to this country. Applicant's argument fails to establish error on the part of the Judge.

Once the Administrative Judge concluded that Department Counsel had presented evidence sufficient to establish a *prima facie* case under Guideline B, the burden shifted to Applicant to present evidence of refutation, extenuation, mitigation or changed circumstances sufficient to warrant a favorable security clearance decision.⁽³⁾ There is no right to a security clearance,⁽⁴⁾ there is no presumption in favor of granting a security clearance,⁽⁵⁾ a security clearance should not be granted unless there is an affirmative determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant⁽⁶⁾ and doubts must be resolved in favor of the national security.⁽⁷⁾ Accordingly, once facts raising security concerns under Guideline B were admitted by Applicant or proven by Department Counsel, Applicant had a heavy burden of persuasion.

When a party challenges an Administrative Judge's application of the Adjudicative Guidelines, the Board has to decide whether the party has shown the Judge: (i) reached conclusions not supported by substantial record evidence; (ii) acted in a manner that is arbitrary or capricious; or (iii) acted contrary to law. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4.

Considering the record as a whole, it was not arbitrary or capricious for the Administrative Judge to conclude the record evidence did not warrant application of Guideline B Mitigating Conditions 1 and 3.

Applicant's disagreement with the Administrative Judge's weighing of the record evidence does not demonstrate the Judge erred. There is no simple formula or rule of law on how a Judge must weigh record evidence. Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge has discretion to weigh the record evidence. A Judge is not always faced with a case where the record evidence points all in one direction. To the contrary, it is not unusual for a Judge to be faced with conflicting record evidence, or with a record that contains some evidence that favors one side and different evidence that favors the other side. In such situations, the Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a conclusion as to whether the applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15.⁽⁸⁾ 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. They must articulate a cogent reason or argument for how the Judge erred in weighing the record evidence. Similarly, if an appealing party challenges a Judge's conclusions, that party must not simply disagree with the Judge's conclusions, but must articulate a cogent reason or

argument for how the Judge's conclusions are arbitrary, capricious, or contrary to law.

Applicant has failed to meet his burden of establishing that the Administrative Judge's conclusions that Guideline B Mitigating Conditions 1 and 3 did not apply to the case were arbitrary, capricious, or contrary to law.

Conclusion

Applicant on appeal has failed to establish harmful error below. Accordingly, the Board affirms the Administrative Judge's unfavorable security clearance determination.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, 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. "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."

2. "Contact and correspondence with foreign citizens are casual and infrequent."

3. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

4. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988).

5. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

6. Executive Order 10865, Section 2; Directive, Sections 3.2 and 4.2, Adjudicative Guidelines, Item E2.2.1, and Additional Procedural Guidance, Item E3.1.25.

7. Directive, Adjudicative Guidelines, Item E2.2.2. *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

8. "The 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."