

DATE: January 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30929

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Catherine M. Engstrom, Esq., Department Counsel

FOR APPLICANT

Robert R. Sparks, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated February 14, 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 Kathryn Moen Braeman issued a favorable security clearance decision dated June 30, 2003.

Department Counsel appealed the Administrative Judge's favorable 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 erred by failing to discuss the significance of a particular document; and (2) whether the Administrative Judge improperly relieved Applicant of the burden of showing that his family does not pose a security risk, and erroneously concluded Applicant met his burden of presenting evidence supportive of a favorable security clearance decision. 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 [\(1\)](#)

1. Whether the Administrative Judge erred by failing to discuss the significance of a particular document. At the hearing, Department Counsel asked the Administrative Judge to take official notice of an annual report to Congress. Applicant did not object, and the Judge indicated that she would take official notice of the annual report. On appeal, Department Counsel asserts the Judge failed to address the significance of that document.

There is no general legal requirement for a Judge to discuss each and every piece of record evidence. *See, e.g.*, ISCR Case No. 97-0730 (October 21, 1998) at p. 3. While it probably would have been helpful for the Judge to discuss the report to Congress beyond giving a brief reference to it in her decision, the Board declines to hold that, as a matter of law, the Judge was required to do so under the particular facts and circumstances of this case. *Cf.* ISCR Case No. 98-0809 (August 19, 1999) at p. 2 (noting that Hearing Office Administrative Judges have broad latitude and discretion in writing their decisions).

2. Whether the Administrative Judge improperly relieved Applicant of the burden of showing that his family does not pose a security risk, and erroneously concluded Applicant met his burden of presenting evidence supportive of a favorable security clearance decision. Department Counsel contends the Administrative Judge's decision "attempts to relieve the Applicant of the burden to show that his family does not pose a security risk." Department Counsel also makes several arguments that the Board construes as raising the contention that the Administrative Judge erred by concluding Applicant met his burden of presenting evidence supportive of a favorable security clearance decision.

Department Counsel is correct that an applicant has the ultimate burden of persuasion in these cases. *See* Directive, Additional Procedural Guidance, Item, E3.1.15. However, the Board does not have to agree with the Administrative Judge's reasoning or analysis in this case to conclude that Department Counsel has failed to make a persuasive argument

that the Judge impermissibly shifted the burden of persuasion away from Applicant in this case.

Central to Department Counsel's arguments is the claim that the Administrative Judge failed to articulate a rational basis for her conclusion that Foreign Influence Mitigating Condition 1 ⁽²⁾

can be applied to Applicant's two brothers. The Board does not have to agree with the Administrative Judge's application of Foreign Influence Mitigating Condition 1 to conclude that Department Counsel has failed to make a persuasive argument that the Judge improperly applied Foreign Influence Mitigating Condition 1 in this case. ⁽³⁾

Because of the limits of the Board's authority under the Directive, ⁽⁴⁾

and because there is no presumption of error below: (a) an Administrative Judge's unchallenged findings and conclusions will be allowed to stand; and (b) a Judge's challenged findings and conclusions will be allowed to stand if the appealing party fails to demonstrate error below. *Cf.* ISCR Case No. 01-22606 (June 30, 2003) at p. 4 (in discussing the precedential value of decisions by Hearing Office Administrative Judges, the Board noted various circumstances under which it has affirmed decisions below despite the existence of fact or legal error by the Judges). In this case, Department Counsel has failed to demonstrate error below, and therefore the Judge's decision is allowed to stand.

Conclusion

Department Counsel has failed to demonstrate error below. Accordingly, the Administrative Judge's decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, 1.c, 1.f, and 1.g. Those formal findings have not been challenged on appeal. Accordingly, the Board need not discuss those formal findings.

2. "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."

3. Because Department Counsel has not challenged the Administrative Judge's formal findings in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, 1.c, 1.f, and 1.g, the Board need not address the Judge's application of Foreign Influence Mitigating Condition 1 in connection with relatives of Applicant other than the two brothers.

4. *See* Directive, Additional Procedural Guidance, Item E3.1.32.