

DATE: June 9, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-32581

## 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 August 23, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Robert J. Tuider issued an unfavorable security clearance decision, dated December 8, 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 Applicant was denied a timely decision in his case; and (2) whether the Administrative Judge's unfavorable security clearance decision lacks a rational basis. 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 Applicant was denied a timely decision in his case. On appeal, Applicant objects to the passage of time between his hearing in January 2004 and the issuance of the Administrative Judge's decision in December 2004. The Board construes this statement as raising the issue of whether Applicant was denied a timely decision in his case.

There is no indication in the case file as to how many other cases the Administrative Judge was handling in addition to Applicant's case, or why the Judge did not issue his decision sooner than he did. The Board will not speculate about the reason or reasons why the Judge did not issue his decision sooner than he did. Even if the Board were to assume -- solely for purposes of deciding this appeal -- that the Judge should have issued a decision in Applicant's case sooner than he did, such an assumption would not result in a conclusion that the Judge committed harmful error. Absent a showing that a delay in the processing of a case prejudiced an applicant's rights in any meaningful way, mere proof of a delay is not sufficient to warrant remand or reversal of the Judge's decision. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 4. Without a showing of identifiable prejudice to the appealing party caused by the timing of the issuance of a Judge's decision, delay in the issuance of a Judge's decision does not warrant remand or reversal. *See, e.g.*, DISCR Case No. 93-1186 (January 6, 1995) at p. 5.

2. Whether the Administrative Judge's unfavorable security clearance decision lacks a rational basis. Applicant asserts: (a) he has been honest with the federal government about his past and present situation, and about his family ties and contacts; (b) he has been a naturalized U.S. citizen for almost 20 years and has not engaged in any misconduct; (c) his immediate family members reside in the United States; and (d) the Administrative Judge's decision is "nonsense" and based on speculation, media propaganda, and prejudice against the country of his origin. The Board construes these assertions as raising the issue of whether the Judge's unfavorable security clearance decision lacks a rational basis.

Applicant's honesty and candor with the federal government did not preclude the Administrative Judge from evaluating the security significance of the facts and circumstances disclosed by Applicant. *See, e.g.*, ISCR Case No. 02-31537

(April 7, 2004) at p. 3 ("Even an honest applicant may pose a security risk based on conduct and circumstances unrelated to the applicant's truthfulness and veracity."). Applicant's honesty and candor about himself and his family does not demonstrate any factual or legal error by the Judge.

Although acts of misconduct can have security significance, a security clearance decision can be based on facts and circumstances not involving acts of misconduct. *See, e.g.*, ISCR Case No. 02-01395 (November 13, 2003) at p. 4 ("The legality of Applicant's actions and circumstances did not preclude the Judge from considering whether they raise security concerns under Guideline C."). Even though Department Counsel did not present evidence that Applicant committed acts of misconduct, Department Counsel presented evidence sufficient to allow the Administrative Judge to conclude that security concerns had been raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). Given the Judge's findings of fact about Applicant's possession and use of an Iranian passport to travel to Iran, Applicant's wife being an Iranian citizen, and Applicant's and his wife's contacts with her father (who is an Iranian citizen living in Iran), the Judge had a rational basis for concluding security concerns had been raised under Guideline B and Guideline C. Furthermore, considering the record as a whole, it was not arbitrary or capricious for the Judge to conclude that Applicant had not presented evidence sufficient to meet his burden of persuasion under the Directive. [\(2\)](#)

Applicant's claim that the Administrative Judge relied on speculation and prejudice against his country of origin is not persuasive. There is a rebuttable presumption that government officials carry out their duties in good faith, and that presumption can only be rebutted or overcome by clear evidence to the contrary. *See National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004). Applicant's claim that the Judge relied on speculation to reach his decision is unsupported by anything in the record below or the Judge's decision, and falls far short of rebutting the presumption that Judge carried out his duties in good faith when he issued his decision. Furthermore, there is a rebuttable presumption that quasi-judicial officers are impartial and unbiased. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). A person seeking to rebut or overcome that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. Applicant's belief that Judge acted on the basis of prejudice falls far short of raising any colorable claim of prejudice. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 3 ("Finally, any challenge to a Judge's fairness and impartiality is not measured or evaluated in terms of a party's personal beliefs about the Judge's conduct and rulings, but rather in terms of whether there is anything in the record below that indicates a basis to reasonably question the fairness or impartiality of the Judge.").

### **Conclusion**

Except for the showing of a long passage of time between the hearing and the issuance of the Administrative Judge's decision that did not prejudice Applicant's rights in any identifiable manner, Applicant has not demonstrated error below. Accordingly, the Board affirms the Administrative Judge's security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains factual assertions about changes in his job status, his father's life, and his wife's citizenship, as well as a copy of a document concerning his wife's legal status that was issued several months after the hearing. Those factual assertions, and the document attached to Applicant's appeal brief, constitute new evidence, which the Board cannot consider. *See Directive, Additional Procedural Guidance, Item E3.1.29.*

2. "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." *Directive, Additional Procedural Guidance, Item E3.1.15.*