

DATE: April 7, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-00526

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

Rex B. Wingerter, Esq.

The Defense Office of Hearings and Appeal (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 19, 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), Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision, dated October 4, 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 raises the following issues: (1) whether the Administrative Judge's decision under Guideline B (Foreign Influence) was arbitrary, capricious or contrary to law, and (2) whether the Administrative Judge's findings and conclusions under Guideline E (Personal Conduct) were supported by the record evidence. For the reasons set forth below, 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's decision under Guideline B (Foreign Preference) was arbitrary, capricious or contrary to law. Applicant argues that the Administrative Judge's adverse conclusions under Guideline B (that Applicant had failed to mitigate the government's security concerns regarding Applicant's three siblings who are citizens and residents of Iran and his travels to Iran) were unreasonable given the totality of the record evidence. Applicant's argument is not persuasive.

As a preliminary matter, the arguments in Applicant's appeal brief relating to the Foreign Influence Guideline rely to a considerable degree on a misreading of the Administrative Judge's decision. On three occasions in his appeal brief, Applicant states that the Judge found that Applicant's siblings in Iran were not in a position to be exploited by a foreign power. This reading of the Judge's decision is inaccurate. Regarding Applicant's siblings in Iran, the Judge concluded that ". . . the record does not demonstrate that they are not in a position to be exploited by a foreign power." [\(2\)](#)

Applicant asserts that the Administrative Judge's adverse security clearance decision was based solely on his conclusion that Iran's government is inimical to the United States. Applicant reads the Judge's decision too narrowly. A review of the Judge's decision shows that he was concerned that Iran's conduct towards the United States and its willingness to repress its citizens increased the likelihood that Applicant may be put in the position of having to choose between loyalty to his siblings and the United States. The Judge's conclusion is reasonable given the record evidence.

Applicant also argues that the Administrative Judge should have applied Foreign Influence Mitigating Condition 3. [\(3\)](#) After a review of the entire record, the Board concludes the Judge's decision not to discuss or apply Mitigating Condition 3 in connection with Applicant's Iranian siblings is sustainable given the record evidence. Applicant's ability

to argue for a different characterization of his relationship with his siblings from the one adopted by the Judge is not sufficient to demonstrate error.

Applicant argues that the fact that Iran represses its citizens is irrelevant without evidence connecting Applicant to the repression. Applicant's point is not persuasive given the facts and circumstances in this case. To the extent Applicant's argument is based on Applicant's erroneous reading of the Judge's decision as finding Applicant's Iranian relatives are not in a position to be exploited, the force of that argument is seriously undercut. It is rational to weigh the repressive nature of the regime in Iran when analyzing the likelihood that Applicant may be forced to choose between his devotion to the members of his immediate family living under that regime and his loyalty to the United States. It is logical that a repressive government would be more likely than a non-repressive government to exploit persons under its control in order to extort cooperation out of a close relative. Applicant has not met his burden of establishing that the Judge erred.

Applicant argues that the Administrative Judge's reading of the Directive means any person with relatives in Iran or a similarly situated country would effectively be barred from obtaining a security clearance, and that such a reading is unconstitutional. Applicant has failed to demonstrate the Judge erred. Again, to the extent this argument is based on Applicant's erroneous reading of the Judge's decision regarding the potential exploitation of Applicant's Iranian relatives, the argument is flawed. Each security clearance adjudication is a separate decision based on the specific facts in the record of that case and the Board is not in a position to assume facts about an entire class of hypothetical cases. In this case, the Board is not convinced that the Administrative Judge employed an analysis, used language, or made findings and conclusions that amounted to an automatic denial of a security clearance for Applicant merely because he has relatives in Iran. 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. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 6. The Judge's conclusion that Applicant had not met his burden of overcoming the case established by Department Counsel is sustainable given the record in this case.

Applicant argues that the Judge ignored favorable letters of recommendation that offered substantial evidence that Applicant would not be swayed by threats to family members in Iran. There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge states otherwise. There is also no requirement that the Judge discuss every piece of evidence. The Judge is required to weigh all the evidence, both favorable and unfavorable, when making his ultimate security clearance determination. Here, Applicant has failed to establish that the Judge ignored favorable evidence or that he weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

(2) Whether the Administrative Judge's findings and conclusions under Guideline E (Personal Conduct) were supported by the record evidence. Applicant challenges the Administrative Judge's findings that Applicant had failed to resolve doubts about why he had omitted pertinent information from his security clearance application. Applicant has not demonstrated that the Judge erred.

Applicant reads the Judge's decision as saying that Applicant failed to explain his omission which Applicant argues ignores an explanation he gave that he misunderstood the requirements of a question on the application form. The Board reads the decision differently. The Judge specifically acknowledges Applicant's explanation, but notes that the explanation is at variance with the plain language requirements of the security clearance application. Only then did the Judge say that Applicant failed to explain the omission. That explanation, combined with other language the Judge used ("Given the submission's importance to his company, he exercised questionable judgment by not carefully reviewing the form before submitting it."<sup>(4)</sup> And ". . . the circumstances produce doubts as to the cause of the omission."<sup>(5)</sup>), leads the Board to determine that the Judge reached a sustainable unfavorable conclusion under Guideline E.

Applicant argues in the alternative that the Administrative Judge failed to take into account mitigating factors surrounding his omission of information on his security clearance application. He contends that the omission was not recent, that his security clearance application was not complete because he relied on assurances of his facility security officer that the information he supplied was correct, and that he voluntarily and promptly informed the government of corrections.<sup>(6)</sup> When a party challenges an Administrative Judge's application of the Adjudicative Guidelines, the Board has to decide whether 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 the Personal Conduct Mitigating Conditions cited by Applicant (see footnote 6). Again, Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred by deciding that application of those mitigating conditions was not warranted in light of the record evidence in this case.

### Conclusion

Applicant has failed to demonstrate error in the Administrative Judge's October 4, 2004 decision. The Judge's decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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 Administrative Judge made formal findings in favor of Applicant under Guideline C. Those findings are not issue on appeal. The Judge issued favorable findings under SOR paragraphs 2.c., 2.d., and 3.a. which are also not at issue on appeal. The Judge issued a formal favorable finding under SOR paragraph 2.a. and an unfavorable finding under 2.b. A complete reading of the Judge's decision clearly shows that those two formal findings were inverted, that is the Judge intended 2.a. to be unfavorable and 2.b. to be favorable. The Judge's favorable finding under 2.b. is not at issue on appeal.

2. Decision at pp. 6-7.

3. "Contact and correspondence with foreign citizens are casual and infrequent." *See*, Directive, Adjudicative Guidelines, Item E2.A2.1.3.3.

4. Decision at p. 7.

5. Decision at p. 7.

6. Thereby invoking Personal Conduct Mitigating Conditions 3 ("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.) and 4 ("Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided," Directive, Adjudicative Guidelines, Item E2.A5. 1.3.4.). Applicant cites Personal Conduct mitigating Condition 2 in his brief ("The falsification

was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily," Directive, Adjudicative Guidelines, Item E2.A5.1.3.2.). Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2 is applicable when a case involves the issue of whether an applicant has made disclosures that are corrections of an earlier falsification. *See, e.g.*, ISCR case No. 98-0582 (November 12, 1999) at p. 7.