

DATE: May 21, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-00543

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

#### **FOR APPLICANT**

Philip D. Cave, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 11, 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 James A. Young issued an unfavorable security clearance decision dated December 17, 2003.

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 the right to be represented during the proceedings below; and (2) whether the Administrative Judge's conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. 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 Applicant was denied the right to be represented during the proceedings below. On appeal, Applicant contends he was denied the right to be represented during the proceedings below, arguing that the Administrative Judge erred by denying his request for a continuance so that he could retain a particular lawyer. In support of that contention, Applicant submitted an affidavit with his appeal brief. In response, Department Counsel argues the record evidence does not support Applicant's claim and asks the Board to strike Applicant's affidavit from the record. The Board construes Department Counsel's brief as asserting the Board should physically remove the affidavit from the case file, not merely disregard it.

Department Counsel correctly notes that Directive, Additional Procedural Guidance, Item E3.1.19 precludes the consideration of new evidence on appeal. When an appealing party seeks to offer new evidence on appeal, the new evidence usually pertains to the merits of the case. In such cases, the Board routinely notes that it cannot consider new evidence on appeal and limits its consideration of appeal issues to those that have support in the record evidence. However, the Board does not physically strike new evidence from the case file. It does not do so for several reasons. First, the Directive is silent on whether there is any right to strike something from the record. Second, striking new evidence from the case file would be impractical or unduly burdensome in many cases. It is not unusual for parties offering new evidence to do so in the form of factual assertions that are contained in their appeal briefs, intermingled with arguments that do not rely on the new evidence. Third, it could cause confusion among appealing parties and generate legal challenges to the Board's actions if the Board were to strike new evidence from some appeal case files but not others without explanation or reasoned differentiation.<sup>(1)</sup> Fourth, there may be some unusual situations where a party would be able to raise an appeal issue only by referring to a matter that is not contained in the record of the proceedings below.<sup>(2)</sup> Fifth, striking new evidence from the appellate record is unnecessary because the Board members are legally presumed to be capable of ignoring or disregarding new evidence.<sup>(3)</sup> Sixth, striking material from the

appellate record could unfairly complicate and prejudice the ability of the aggrieved party to preserve a matter for a motion to reconsideration by the Board, or for litigation in federal court.<sup>(4)</sup> Seventh, even if the Board were to conclude a motion to strike was appropriate, granting such a motion would not result in physical removal of material from the case file.<sup>(5)</sup> For all these reasons, physically striking material from a case file would not be appropriate. Accordingly, Department Counsel's motion to strike is denied.

Applicant's claim of error squarely relies on an affidavit that clearly makes factual assertions that go beyond the record below. Applicant's argument that there may be some situations where a claim of procedural error could only be raised by going outside the record is not implausible.<sup>(6)</sup> However, Applicant's conceptual argument does not advance Applicant's procedural argument in this appeal. If a party has a meaningful opportunity to raise an objection or procedural issue with an Administrative Judge, but fails to do so, then that party is not in a strong position to claim error on appeal. If a party has a meaningful opportunity to preserve on the record -- either orally or in writing -- an objection or procedural issue, but fails to do so, then that party is not in a strong position to claim error based on a proffer of new evidence on appeal. Raising objections and other procedural matters on the record serves multiple purposes:

- (a) ensure that a matter is brought to the attention of the Administrative Judge so that the Judge has an opportunity to consider it and rule on it;
- (b) enable both parties to have notice of the matter and a meaningful opportunity to be heard on it before the Judge acts or rules on it;
- (c) avoid impermissible *ex parte* communications;
- (d) preserve the matter for the record in the event of an appeal;
- (e) avoid waiver or forfeiture of important rights due to a failure to raise objections or other procedural matters in a timely manner; and
- (f) protect the substance and appearance of a fair and impartial proceeding, at the hearing level and on appeal.

Even making allowances for Applicant's *pro se* status, the Board notes that Applicant had sufficient opportunity to raise the matter of a continuance and legal representation during the proceedings below. At the hearing, the Administrative Judge asked Applicant if he had decided to represent himself, and whether he was prepared to present his case. Applicant responded "Yes" to both questions. *See* Hearing Transcript at p. 4. Furthermore, Applicant responded "No" when Judge asked him whether he had any procedural issues before they went on with the case. *See* Hearing Transcript at pp. 6-7. Moreover, at no time during the hearing did Applicant tell the Judge or otherwise indicate that he was not prepared to proceed with the hearing or needed a lawyer to adequately present his case. Because Applicant had sufficient opportunity to raise the matter of a continuance and legal representation at the hearing, this case does not present the kind of situation that might warrant the Board considering an appellate affidavit.

2. Whether the Administrative Judge's conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant's ties with his mother, two brothers, four sisters, parents-in-law, and other relatives in Sudan raised security concerns under Guideline B that were not extenuated or mitigated. Applicant essentially concedes the Judge properly concluded that Applicant's family ties in Sudan raise security concerns under Guideline B. However, Applicant contends the Judge erred because: (a) Applicant's situation is less serious than that of applicants who received favorable security clearance decisions from DOHA Judges in two other cases; (b) the Judge should have applied Foreign Influence Mitigating Condition 1; (c) the Judge failed to apply Foreign Influence Mitigating Condition 5; and (d) application of the whole person concept would result in a favorable security clearance decision in this case. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

- (a) A decision by one Hearing Office Administrative Judge is not legally binding on a fellow Hearing Office Judge in another case. And, no decision by a Hearing Office Judge is legal binding precedent that the Board must follow or apply.<sup>(7)</sup> Of course, it is legally permissible for Applicant to urge the Board to follow or accept, as persuasive authority,

a decision by a Hearing Office Judge.

The Board has read the two Hearing Office decisions cited by Applicant. Applicant's reliance on those two decisions is understandable. However, The Board does not find either decision to be persuasive, and declines to follow or apply their reasoning.

(b) The Administrative Judge's conclusion that Applicant's family ties in Sudan raise security concerns under Guideline B is not challenged on appeal. Given the record evidence in this case, <sup>(8)</sup> the burden shifted to Applicant to present sufficient evidence to warrant a favorable security clearance. <sup>(9)</sup> Applicant's burden of persuasion includes presenting sufficient evidence to warrant application of Adjudicative Guidelines mitigating conditions, to warrant favorable conclusions under the general factors of Directive, Section 6.3 and Enclosure 2, Item E2.2.1, or both.

Applicant's argument for why the Administrative Judge should have applied Foreign Influence Mitigating Condition 1 <sup>(10)</sup> is based on an alternate interpretation of the record evidence. However, Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. Given the record evidence in this case, Applicant's appeal argument does not persuade the Board that it was arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had not submitted sufficient evidence to warrant application of Foreign Influence Mitigating Condition 1.

(c) Applicant's argument concerning Foreign Influence Mitigating Condition 5 <sup>(11)</sup> fails to demonstrate the Administrative Judge erred. The SOR did not allege that Applicant had financial interests in Sudan. The Judge did not find that Applicant had financial interests in Sudan. The Judge did not have to consider whether Applicant extenuated or mitigated nonexistent foreign financial interests. <sup>(12)</sup> Moreover, the absence of any financial interests in Sudan did not preclude the Judge from considering the security significance of Applicant's family ties in Sudan and concluding that Applicant had not successfully mitigated the security concerns raised by the totality of his family ties in Sudan.

(d) Applicant's argument concerning the whole person concept does not demonstrate error below. Applicant's argument is based on an alternate interpretation of the record evidence, but it fails to show the Administrative Judge's conclusions under Guideline B are arbitrary, capricious, or contrary to law.

### **Conclusion**

Applicant has failed to persuade the Board that there was a procedural error that warrants remand for a new hearing. Applicant also has failed to demonstrate harmful error in the Administrative Judge's decision. Accordingly, the Board affirms the Judge's security clearance decision.

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: Jeffrey B. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. *Quare* if motions to strike were recognized as the proper method to challenge a proffer of new evidence on appeal, would the failure of a party to move to strike constitute a waiver of any objection to the proffered new evidence?
2. If an Administrative Judge were to preclude a party from having a meaningful opportunity to make an objection or raise a procedural matter on the record (either in writing or orally), then -- as a practical matter -- the only way that the aggrieved party could seek appellate review of the objection or procedural matter would be to go outside the record.
3. *Cf.* DISCR Case No. 89-1122 (October 30, 1990) at p. 7 (Administrative Judge is presumed to be capable of disregarding incompetent or inadmissible evidence)(quoting federal case).
4. *Cf.* ISCR Case No. 02-18668 (February 10, 2004) at p. 4 ("The Board cannot consider in a vacuum, without reference to a properly developed record, whether a document was properly excluded by an Administrative Judge."). Just as a Hearing Office Judge who sustains an objection to the admissibility of a document should keep a copy of the excluded document in the record to allow the offering party a meaningful opportunity to challenge the Judge's ruling on appeal, the Board should preserve the integrity of the appellate record to allow a party a meaningful opportunity to challenge the Board's ruling on whether something is new evidence, either through a motion for reconsideration or a lawsuit in federal district court.
5. Even in those proceedings where a motion to strike is recognized, the granting of a motion to strike does *not* result in the stricken material being physically removed from the record. *See, e.g.,* Paul C. Giannelli, *Understanding Evidence* (LexisNexis, 2003) at p. 71.
6. *See* footnote 2 of this decision.
7. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges).
8. The Board finds persuasive Applicant's argument concerning the limited probative value of Government Exhibit 4 with respect to the Guideline B issues in this case. However, reading the decision below in its entirety, it does not appear that the Administrative Judge relied on that document to reach his adverse conclusions under Guideline B. And, in any event, this case does not involve the question whether travel to Sudan could give rise to security concerns, but rather whether Applicant's family ties in Sudan give rise to security concerns.
9. *See* Directive, Additional Procedural Guidance, Item E3.1.15.
10. "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" (Directive, Enclosure 2, Item E2.A2.1.3.1).
11. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities" (Directive, Enclosure 2, E2.A2.1.3.5).
12. *See* ISCR Case No. 02-13568 (February 13, 2004) at p. 3 n.1 ("Implicit in the concepts of extenuation and mitigation is the predicate that some conduct occurred for which a claim of extenuation or mitigation may be raised.")