

DATE: May 27, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01578

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 October 1, 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) and Guideline C (Foreign Preference). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision dated March 15, 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 issue has been raised on appeal: whether Applicant can be granted a security clearance based on actions he took after the hearing to address the security concerns raised under Guideline B and Guideline C. 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 Issue

The Administrative Judge concluded that the security concerns raised under Guideline C (Foreign Preference) has been mitigated by Applicant's surrender of his Lebanese passport to Lebanese authorities. However, the Judge concluded that Applicant had not mitigated the security concerns raised under Guideline B (Foreign Influence) by his family ties with close relatives in Lebanon, and his possession of a financial interest in Lebanon (consisting of his right to receive \$45,000 over the next three years).

On appeal, Applicant asks the Board to grant him a favorable security clearance decision because after the hearing: (a) he has surrendered his Lebanese passport; (b) he has withdrawn all money from Lebanon; (c) he has closed his bank account in Lebanon; and (d) "[c]ommunicating with my siblings in Lebanon has been cut to [a] minimum."

Applicant's surrender of his Lebanese passport is not relevant on appeal. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline C based on Applicant's post-hearing submission of evidence that he had surrendered his Lebanese passport (Decision at pp. 6 and 7). Accordingly, the Judge's unfavorable security clearance decision did not rely on Applicant's past possession of a Lebanese passport.

Applicant's statements about the current status of his financial interests in Lebanon constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Apart from offering new evidence on appeal, Applicant does not challenge the Administrative Judge's findings of fact about Applicant's financial interests in Lebanon.

Applicant's statement about the level of communication he currently has with relatives in Lebanon also constitutes new evidence, which the Board cannot consider. Apart from offering new evidence on appeal, Applicant does not challenge the Administrative Judge's findings of fact about his family ties to relatives in Lebanon.

As noted earlier in this decision, the Board does not review cases *de novo*. There is no presumption of error below, and the appealing party has the burden of raising claims of factual or legal error and demonstrating that such errors occurred. Because Applicant does not challenge the Administrative Judge's findings of fact, those factual findings stand without the Board needing to review the record evidence to determine whether there is sufficient evidence to support the Judge's findings. Furthermore, given the Judge's unchallenged factual findings, the Judge articulated a rational basis for her adverse conclusions under Guideline B.

The Board notes that Applicant expresses a willingness to "do what ever it takes" so that he can qualify for a security clearance. The Board must conduct itself in a fair and impartial manner. *See* Directive, Sections 4.1 and 6.3. Giving advice to Applicant on what to do to qualify for a security clearance would be inconsistent with the Board's obligation to conduct itself in a fair and impartial manner. Accordingly, the Board cannot and will not advise Applicant about what action or actions he can or should take. Finally, Applicant's statement could be construed as a request that he be granted a security clearance on condition that he carry out certain actions or comply with certain conditions specified by the Board. Under the Directive, there is no authority to grant a conditional security clearance. *See, e.g.*, ISCR Case No. 01-22311 (April 4, 2003) at p. 6.

Conclusion

The Board affirms the Administrative Judge's unfavorable security clearance decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board