

DATE: November 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06054

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 May 4, 2004, 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 James A. Young issued an unfavorable security clearance decision, dated May 3, 2005.

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 the Administrative Judge erred by not taking into account an email message that was sent to him by Applicant's hearing counsel two days after the hearing; (2) whether the Administrative Judge erred by finding Applicant was a dual citizen of the United States and Slovakia; and (3) whether the Administrative Judge erred by finding Applicant was reluctant to surrender his Slovak passport because he wanted to keep open his options so he can choose whether to retire in the United States or in Slovakia. 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⁾

Applicant's appeal brief contains factual assertions that seek to supplement the record evidence, and a photocopy of a one-page document in a foreign language that he asserts proves he surrendered his Slovakia passport after the hearing. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

1. Whether the Administrative Judge erred by not taking into account an e-mail message that was sent to him by Applicant's hearing counsel two days after the hearing. On appeal, Applicant contends the Administrative Judge erred by not taking into account an email message that his hearing counsel sent to the Judge two days after the hearing.

A copy of the email message relied on by Applicant on appeal is in the case file. The email message was sent by Applicant's hearing counsel to the Administrative Judge, with cc copies to Applicant and Department Counsel. The email message sent to the Judge includes the text of an email message that Applicant sent to his hearing counsel. The text of Applicant's email message indicates he is forwarding to his hearing counsel an email message from the Slovak Consulate with Applicant's translation of the email message from the Slovak Consulate. The hearing counsel's email message to the Judge states he is following up to procure official documentation and translations about the matter, and he is seeking Department Counsel's consent to a motion to reopen the evidentiary record for the purpose of submitting the official documentation and translations.

The case file does not contain any indication that a motion to reopen the record was ever filed. Furthermore, Applicant's appeal brief relies solely on the email message sent to the Administrative Judge by Applicant's hearing counsel.

The Board does not have supervisory jurisdiction over Hearing Office Administrative Judges, who have discretionary

authority to make decisions of a procedural nature, ⁽²⁾ subject to review for action that is arbitrary, capricious, or contrary to law. ⁽³⁾ Whether the Board agrees with the discretionary choices a Judge makes concerning procedural matters is irrelevant. The standard of review is whether the Judge's challenged choices are arbitrary, capricious, or contrary to law.

On its face, the email message sent to the Administrative Judge indicated that Applicant's hearing counsel would seek to obtain and submit official documentation and translations, and further indicated that Applicant's hearing counsel was seeking Department Counsel's consent to a motion to reopen the record. The Board cannot say, as a matter of law, that the Judge had to treat the email message itself as a motion to reopen the record. Furthermore, the email message itself referred to official documentation and translations that would be procured for submission as new evidence. Accordingly, the Judge was not compelled to consider the email message itself as an evidentiary submission.

Considering all the circumstances, the Board does not have to agree with the how the Administrative Judge handled the email message or his choice to not discuss or mention it in his decision to conclude Applicant has not demonstrated legal error.

2. Whether the Administrative Judge erred by finding Applicant was a dual citizen of the United States and Slovakia. Applicant challenges the Administrative Judge's finding that he was a dual citizen of the United States and Slovakia. Applicant bases that challenge primarily on the email message Applicant's hearing counsel sent to the Judge after the hearing, as well as factual assertions in his appeal brief that constitute proffers of new evidence on appeal. As noted earlier in this decision, the Board cannot consider new evidence on appeal. Applicant's proffer of new evidence on appeal does not demonstrate the Judge erred.

3. Whether the Administrative Judge erred by finding Applicant was reluctant to surrender his Slovak passport because he wanted to keep open his options so that he could choose whether to retire in the United States or in Slovakia. The Administrative Judge found that Applicant was reluctant to surrender his Slovak passport because he wanted to keep open his option so that he could choose whether to retire in the United States or in Slovakia. On appeal, Applicant challenges that finding, asserting: (a) he has surrendered his Slovak passport since the hearing; and (b) it makes no sense for him to want to retire in Slovakia.

Applicant's claim about surrendering his Slovakia passport after the hearing is based on a proffer of new evidence, which the Board cannot consider.

There is conflicting record evidence on whether Applicant wants to retire in Slovakia. As the trier of fact, the Administrative Judge had to consider and weigh the conflicting record evidence on this matter. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at 5 (discussing Judge's responsibility to consider and weigh conflicting record evidence and make findings of fact). The Board does not have to agree with the Judge's finding to conclude Applicant has not demonstrated the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Dissenting Opinion of Administrative Judge Michael Y. Ra'anan

I disagree with the disposition of this case.

Applicant's appeal relies on a post-hearing submission. At the hearing the Administrative Judge closed the record. I cannot discern from the Judge's decision how he handled the post-hearing submission. I believe the case should have been remanded for the Judge to explain what role, if any, the post-hearing submission played in his decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline B (Foreign Influence). Those favorable formal findings are not at issue on appeal.
2. *See* Directive, Additional Procedural Guidance, Item E3.1.10.
3. *See* Directive, Additional Procedural Guidance, Item E3.1.32.2 and Item E3.1.32.3.