

DATE: November 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08813

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 April 21, 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). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision, dated May 2, 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 overlooked or discounted favorable evidence presented by Applicant during the proceedings below; (2) whether the Administrative Judge erred in considering information which was not available in 2002; (3) whether the Administrative Judge should have considered certain documents submitted by Department Counsel; (4) whether the Administrative Judge improperly prohibited Applicant from introducing evidence at the hearing; (5) whether the Administrative Judge properly conducted a whole person analysis of Applicant's history and circumstances; and (6) whether the Administrative Judge's decision in Applicant's case needs to conform to decisions by other hearing office Judges. 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 the Administrative Judge overlooked or discounted favorable evidence presented by Applicant during the proceedings below. Applicant argues that the Administrative Judge overlooked or discounted favorable evidence presented by Applicant. A review of the Judge's decision shows that he explicitly referred to favorable evidence in the record. Thus, it is clear that he did not overlook Applicant's favorable evidence. In as much as Applicant challenges the weight given to his favorable evidence, the Administrative Judge is responsible for weighing the record evidence in light of the record evidence as a whole. Applicant's disagreement with the Judge's assessment of the evidence is not sufficient to persuade the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-19601 (April 5, 2004) at p. 3.

(2) Whether the Administrative Judge erred in considering information which was not available in 2002. Applicant argues that the Judge erred by considering his brother-in-law's status as an agent of Russian government, information which he says was not available in 2002, when Applicant discussed his plans to marry with his security officer. Applicant's argument is without merit. The Administrative Judge is obliged to consider available, reliable information, favorable and unfavorable. *See* Directive, Adjudicative Guidelines, Item E2.2.1. Furthermore, the brother-in-law's status with the Russian military is expressly cited in the SOR. Applicant offers no explanation as to why the Judge erred in considering evidence in support of an allegation contained in the SOR.

3. Whether the Administrative Judge should have considered certain documents submitted by Department Counsel. During the Hearing, Department Counsel asked the Administrative Judge to take official or administrative notice of four

documents (Government Exhibits 8, 9, 10 and 11). Government Exhibits 9, 10, and 11 are all official United States government pronouncements on the subjects of Russia and/or national security threats to the United States. Government Exhibit 8, an operations security intelligence threat handbook, is a document prepared by a private contractor at the behest of the United States government and is styled as an "unofficial publication of the U.S. government." Applicant objected to the introduction into the record of a portion of Government Exhibit 10 dealing with Russia and terrorism and the entirety of Government Exhibit 11, essentially on the grounds of relevance. Applicant did not object to Government Exhibit 8, but suggested the possibility that it contained factual inaccuracies. Applicant also did not object to Government Exhibit 9, but he indicated that it did not contain information about a new era of cooperation between Russia and the United States in the area of terrorism. The Judge agreed to take official or administrative notice of these documents despite Applicant's objections and comments.

Applicant clearly objected to a portion of Government Exhibit 10 dealing with terrorism and all of Government Exhibit 11 and stated cogent reasons for his objections. He also stated on the record that he did not object to the Judge's consideration of Government Exhibits 8 and 9 when the Judge asked him specifically whether or not he objected. Because of this, the Board will not treat Applicant's comments concerning Government Exhibits 8 and 9 as objections. The Board has held that an appealing party must take timely, reasonable steps to raise objections or other procedural matters to preserve them for appeal. *See, e.g.*, ISCR Case No. 02-20031 (August 31, 2004) at pp. 3-4. Applicant's *pro se* status did not relieve him of the obligation to take timely, reasonable steps to protect his rights under Executive Order 10865 and the Directive. *See, e.g.*, ISCR Case No. 01-21070 (December 7, 2004) at pp. 3-4. On appeal, Applicant cannot claim that the Judge's consideration of Government Exhibits 8, 9 and a portion of Government Exhibit 10 was error, having not raised an objection below.

Regarding Government Exhibits 10 (the portion objected to) and 11, they are clearly appropriate documents for the taking of official or administrative notice. Concerning Applicant's argument that the contents of the two exhibits are not relevant to his case, the Board notes that relevance is a broad evidentiary concept, not a narrow one. *See* Federal Rules of Evidence, Rule 401 ("Definition of 'Relevant Evidence'")(including Advisory Committee's Note to Rule 401). Given the SOR allegations in this case, the contents of the two exhibits are relevant.

4. Whether the Administrative Judge improperly prohibited Applicant from introducing evidence at the hearing.

Applicant's marriage to a citizen of Russia is an issue in the case. Applicant called a person who was both a former co-worker and a personal friend to testify on his behalf at the hearing. At one point, Applicant asked the witness if he had ever known anyone who had both a security clearance and a foreign spouse. The witness indicated that he had. Applicant then asked another question designed to get the witness' comments on whether security clearance holder's marriages to foreign spouses presented any problems, presumably from a security standpoint. Before Applicant had a chance to finish the question, the Administrative Judge interceded and stated that the information Applicant was attempting to elicit was irrelevant to the proceedings. On appeal, Applicant asserts that it was error for the Judge to prohibit him from introducing testimony of the prevalence of marriages of United States citizens who hold security clearances to citizens of foreign countries and the absence of any foreign influence in those marriages.

Given the broad parameters of Rule 401 of the Federal Rules of Evidence, the evidence Applicant sought to elicit from his witness was relevant. ⁽¹⁾ However, the Administrative Judge has the authority to rule on evidentiary matters during the hearing. Directive, Additional Procedural Guidance, Item E3.1.10. Those rulings are subject to review to determine whether they are consistent with pertinent provisions of Executive Order 10865 and the Directive (Additional Procedural Guidance, Item E3.1.32.2.) and whether they are arbitrary, capricious, or contrary to law (Additional Procedural Guidance, Item E3.1.32.3.). In reviewing a Judge's evidentiary rulings, the Board recognizes the practical need to give some latitude to the Judge, who often must make evidentiary rulings under the pressure of an ongoing hearing and without the luxury of being able to take those rulings under advisement. *See, e.g.*, ISCR Case No. 96-0785 (September 3, 1998) at p. 3. In the instant case, Applicant's witness was not offered as an expert on the matter of holders of security clearances who have foreign citizen spouses and there is no indication that his testimony was based on controlled studies or other precise evidence. Accordingly, the testimony would have been informal, based upon the witness' personal experiences, and thus, largely anecdotal. Such evidence, though relevant, is not particularly probative. Given this setting, the Board concludes that the Judge was not required, as a matter of law, to receive and consider the testimony. ⁽²⁾

(5) Whether the Administrative Judge properly conducted a whole person analysis of Applicant's history and circumstances. Applicant makes various arguments, which, taken together, the Board construes as raising the issue of whether the Administrative Judge conducted a whole person analysis of Applicant. The Board concludes that Administrative Judge considered Applicant's favorable evidence including, his meritorious service in the United States military, and the enthusiastic recommendations for Applicant by high-ranking officials of the Army and private industry. The Board also concludes that the Judge was not required to conclude that this favorable evidence overcame the government's security concerns under a whole person analysis.

(6) Whether the Administrative Judge's decision in Applicant's case needs to conform to decisions by other hearing office Judges. The Board has previously noted that decisions of individual Hearing Office Judges are not binding on other Hearing Office Judges, nor are they binding on the Appeal Board. Accordingly, even if the Board were to conclude that the Judge's decision in this case was not consistent with the decisions by his colleagues in other DOHA cases that are cited by Applicant, such a conclusion would not require the Board to hold that the Judge's decision in this case was arbitrary, capricious, or contrary to law. Because the decisions of Hearing Office Judges are not legally binding precedent in other cases, neither a Hearing Office Judge nor the Board is required to distinguish them or justify why they are not persuasive authority. Rather, a party citing such decisions has the burden of demonstrating that the cited decision addressed similar or identical issues and facts, articulated a rational basis for its conclusions, relied on reasoning or analysis that can be applied to the facts and conclusions of the current case, relied on reasoning or analysis that is consistent with governing legal authorities, or that there are sound reasons the Board should follow the reasoning of the cited case. *See*, ISCR Case 01-22606 (June 30, 2003) at pp. 3-5.

Conclusion

Applicant has failed to demonstrate that the Administrative Judge committed harmful error which warrant remand or reversal. Therefore the Judge's May 2, 2005 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Federal Rules of Evidence are used in DOHA hearings as a guide. Directive, Additional Procedural Guidance, Item E3.1.19. Rule 401 defines relevant evidence as "...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

2. Just as Federal Rule of Evidence 401 informs DOHA hearings, Federal Rule of Evidence 403 informs as well. Rule

403 provides for the proper exclusion of evidence, otherwise relevant, on grounds of prejudice, confusion, or waste of time.