

DATE: April 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09445

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Matthew S. Freedus, Esq.

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated March 23, 2004, which stated the reasons why DOHA proposed to deny or revoke a security clearance for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated October 19, 2004.

Applicant appealed the Administrative Judge's unfavorable security clearance decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal raises the following issue: whether the Administrative Judge's decision was arbitrary, capricious and 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 Issue

Whether the Administrative Judge's decision was arbitrary, capricious and contrary to law. Applicant challenges the Administrative Judge's decision with the followings arguments: (1) the Administrative Judge failed to analyze all the evidence and consider Applicant as a whole person because of his ties to citizens and residents of the Peoples Republic of China (PRC); (2) the Administrative Judge failed to apply pertinent mitigating conditions; (3) the Administrative Judge's approach effectively bans first generation Chinese with family ties to the PRC from having security clearances; (4) the Administrative Judge failed to reconcile his decision with cases which produced a favorable outcome.

Applicant's first argument relies in part on isolated passages from the Administrative Judge's decision recited out of context. To the extent that is the case, the Board finds Applicant's argument unpersuasive, because a reading of the Judge's decision as a whole shows that the Judge considered both favorable and unfavorable portions of the evidence (including many of the portions cited by Applicant on appeal) before concluding that Applicant had not demonstrated mitigation of the security concerns raised by his ties to the PRC. However, as a general proposition, Applicant is correct that an Administrative Judge's analysis must be of the whole person. It is well settled that the mere application of a specific Adjudicative Guideline Condition (whether disqualifying or mitigating) is not necessarily dispositive. [\(1\)](#)

Although Applicant's general point is well taken, the totality of the facts and circumstances in the case before Board do not persuade us that Applicant was deprived of a whole person analysis. Applicant cites several pieces of mitigating evidence which the Judge did not discuss in his opinion. The Board is not persuaded that the Judge failed to consider that evidence. There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge states otherwise. A Judge is not required to discuss every piece of evidence. *See, e.g.*, ISCR Case No. 03-00526 (April 7, 2005), at p. 4. Applicant's first argument fails to demonstrate that the Judge erred.

Applicant's second argument is also not persuasive. Applicant focuses the most attention on Guideline B (Foreign Influence) Mitigating Condition (MC) 4 ("The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required"). There is no record evidence that Applicant has ever been faced with circumstances which make MC4 applicable. Applicant's testimony on how he would act when faced with a hypothetical situation did not require the Judge to apply MC4. Applicant also argues Guideline B Mitigating Condition 1 ("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"), Mitigating Condition 3 ("Contact and correspondence with foreign citizens are casual and infrequent") and Mitigating Condition 5 ("Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities") should have been applied. Applicant's arguments are not persuasive. There is no evidence which would have required the Judge to apply the second prong of MC1. Given the nature of the relationships involved, the Judge could reasonably conclude that MC1 was more pertinent than MC3 to mitigate the government's concerns. Application of MC5, although technically permissible would not have added much to the Judge's analysis, which focused on familial relationships, not finances.

Applicant's third argument is likewise not persuasive. Nothing in the Administrative Judge's decision suggests that he employed an approach that mandates denial just because Applicant's relatives are in the PRC. 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. It is well established that 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 security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p.6.

Finally, Applicant's fourth argument is also not persuasive. Applicant cited several favorable Hearing Office decisions to the Administrative Judge. Applicant believes the Judge had a duty to follow those decisions or reconcile his own decision with them. The Board disagrees. Administrative Judges do not have to reconcile, follow, or distinguish their decisions from other Hearing Office decisions. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p.7. Moreover, the Board is not bound by such Hearing Office decisions. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5. Applicant argues that DOHA has an obligation to treat similar cases in a like fashion and explain divergent outcomes. Applicant's argument is flawed because: (1) each DOHA decision should be predicated on a whole person analysis of the record evidence of the specific facts and circumstances of the individual applicant, (2) each Administrative Judge only has authority to review the cases assigned to him or her, and (3) the Board only has authority to review cases appealed to it. Cases with seemingly similar fact-patterns may have different outcomes for a variety of legitimate reasons, the most obvious of which is specific differences in the record evidence of each Applicant's histories and circumstances.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's October 19, 2004 decision. Therefore, the Judge's decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4: "Although an Administrative Judge must apply pertinent Adjudicative Guidelines disqualifying and mitigating conditions, the Judge is not required to apply them in a rigid, mechanical manner. Furthermore, because the Adjudicative Guidelines disqualifying and mitigating conditions do not exhaust the realm of human experience or the kinds of conduct or circumstances that are pertinent to evaluating an applicant's security eligibility, the mere presence or absence of any particular Adjudicative Guidelines disqualifying or mitigating condition is not dispositive of a case. Finally, a Judge acts properly by evaluating an applicant's case under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to evaluate Applicant's security eligibility under the general factors of the Directive, despite the Judge's conclusion that none of the Personal Conduct mitigating conditions applied"(footnotes omitted).