

DATE: March 24, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11293

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Tim J. Moore, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), dated May 6, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline B (Foreign Influence). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated November 16, 2004.

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

Applicant's appeal presents the following issue: whether the Administrative Judge erred in concluding that the security concerns raised under Guideline B (Foreign Influence) had not been mitigated. 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 erred in concluding that the security concerns raised under Guideline B (Foreign Influence) had not been mitigated. Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude that he had rebutted, mitigated or extenuated the security concerns raised under Guideline B (Foreign Influence). Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge: (1) misapplied paragraph E2.A2.1.1 of the Directive, ⁽¹⁾

(2) failed to consider mitigating evidence, and (3) made an unfavorable decision that is unsupported by the record as a whole. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

The Administrative Judge made findings that: (1) Applicant had a mother, brother, sister-in-law, brother-in-law, mother-in-law, and father-in-law residing in Lebanon, (2) Applicant had traveled to Lebanon in 1996, 1997, 1998, 2000, 2002, and 2003, (3) Applicant maintained contact with his brother and mother, by way of weekly telephone calls, and (4) Applicant's wife maintained contact with her parents in Lebanon, by way of twice weekly telephone calls. Given those unchallenged findings, the Administrative Judge reasonably could conclude that Applicant's ties with those immediate family members raised security concerns under Guideline B and that Foreign Influence Disqualifying Condition 1 ⁽²⁾

applied. *See* ISCR Case No. 01-22606 (June 30, 2003) at p. 6. That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he 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 clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant argues that the Administrative Judge gave insufficient weight to evidence that: (1) Applicant's relatives in Lebanon were not agents of the Lebanese government, (2) Applicant's contacts were exclusively familial, and devoid of

political or financial context, (3) Applicant is an American citizen who has lived in the United States for 24 years and has extensive ties with the United States and only memories of Lebanon, and (4) the political situation in Lebanon has stabilized. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's ability to cite to record evidence that he contends the Judge should have given greater weight--such as the length of Applicant's United States citizenship and the extent of his financial ties to the United States--is not sufficient to overcome that rebuttable presumption. Merely because a Judge does not give greater weight to record evidence cited by the appealing party, it does not follow that the Judge simply ignored that evidence. Furthermore, mere disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error without a showing that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law.

The absence of evidence that Applicant's family members in Lebanon are employees or agents of the Lebanese government is not dispositive. Having relatives, cohabitants or associates who are connected with a foreign government is a disqualifying condition under Guideline B. [\(3\)](#)

However, the absence of such a connection with a foreign government does not mean that there is no security concern under Guideline B. *See, e.g.*, ISCR Case No. 02-29665 (November 10, 2004) at p. 5. A reading of Guideline B in its entirety shows that security concerns can be raised by a variety of foreign connections, not just having family members with foreign government connections. Moreover, the absence of a particular disqualifying condition does not compel a favorable security clearance decision. *See, e.g.*, ISCR Case No. 02-08052 (June 23, 2003) at p. 3.

Applicant also asserts the Administrative Judge failed to consider that an unfavorable security clearance decision will have a significant financial effect on Applicant and directly affect his ability to give care and support for his immediate family. An applicant's need for a security clearance to keep his job is not material to the evaluation of his security suitability. The possibility that an unfavorable clearance decision could have adverse consequences for an applicant's job situation is not relevant or material to an evaluation of the security significance of that applicant's situation. *See, e.g.*, ISCR Case No. 01-21070 (December 7, 2004) at p. 4. The security significance of Applicant's relatives living in Lebanon is not diminished or reduced by the fact that an unfavorable security clearance decision could result in the loss of his job.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. This is the general concern provision for Guideline B (Foreign Influence).
2. Directive, Adjudicative Guidelines, Item E2.A2.1.2.1 ("An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country").
3. Directive, Adjudicative Guidelines, Item E2.A2.1.2.3.