

DATE: October 5, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-11420

## **APPEAL BOARD DECISION AND REMAND ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Philip D. Cave, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 15, 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 Michael J. Breslin issued an unfavorable security clearance decision, dated March 14, 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 finding Applicant stopped associating with a Sudanese political organization only about 5 or 6 years ago; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing consistent with the Board's rulings and instructions.

#### **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**

The Administrative Judge found that: (a) Applicant's seven brothers and sisters are citizens and residents of Sudan; and (b) Applicant lives with his wife in the United States, but his wife's children, with whom Applicant has ties of affection or obligation, and her parents, are citizens and residents of Sudan. The Judge concluded that Applicant's family ties raised security concerns under Guideline B (Foreign Influence), and that Applicant had failed to present evidence that was sufficient to extenuate or mitigate those security concerns. [\(1\)](#)

1. Whether the Administrative Judge erred by finding Applicant stopped associating with a Sudanese political organization only about 5 or 6 years ago. The Administrative Judge found that Applicant stopped associating with a Sudanese political organization, which has been opposed to the Sudanese government, about 5 or 6 years ago. The Judge cited Applicant's association with that political organization as a factor in his analysis under Guideline B. Applicant challenges the Administrative Judge's finding that he stopped associating with the Sudanese political organization only about 5 or 6 years ago, asserting that he testified that he stopped that association 26 years ago.

The hearing transcript in the case file before the Board contains several handwritten changes, each accompanied with the initials "MB." One of those handwritten changes occurs on page 27 of the hearing transcript, where Applicant's answer "I think about 26 years" appears with the number "26" crossed out and the numbers "5, 6" written above the crossed out number "26." Applicant's appeal brief cites the unchanged text of Applicant's testimony in support of this claim of error. The difference between "26 years" and "5 or 6 years" is not trivial.

Nothing in the case file or the decision being appealed indicates who made those handwritten changes, and nothing in the case file or the decision being appealed indicates that Applicant or Department Counsel were informed that any changes were made to the hearing transcript in the case file. Since the initials "MB" correspond to the initials of the Administrative Judge's first and last name, the Board will assume -- for purposes of deciding this appeal -- that the

Judge made the handwritten changes to the hearing transcript. Since the hearing transcript is part of the evidentiary record, the absence of any notice by the Administrative Judge to the parties of his changes to the hearing transcript left both parties unaware of what changes the Judge had made to the evidentiary record.<sup>(2)</sup> Accordingly, Applicant's claim of error raises a question about the hearing transcript that leaves the Board unable to resolve this issue at this time in a manner that is fair to the parties.<sup>(3)</sup>

The Administrative Judge's apparently unilateral decision to change the hearing transcript on page 27 has resulted in the Board being faced with a difficult dilemma. Applicant is challenging a factual finding by the Judge based on Applicant's reliance on a copy of the hearing transcript that does not reflect the Judge's changes to the transcription of Applicant's testimony. Absent any indication in the case file that the parties were informed that the Judge made changes to the hearing transcript, Applicant's reliance on the copy of the hearing transcript provided to him appears to be reasonable and understandable. Yet, without the Judge's change to the transcription of Applicant's testimony, the record evidence is ambiguous as to when Applicant stopped associating with the Sudanese political organization in question.

Since there is no indication in the case file that the Applicant and Department Counsel were given notice of what changes the Administrative Judge made to the hearing transcript, it appears that both parties were: (a) not given an opportunity to be heard on whether the Judge's changes to the hearing transcript were warranted; and (b) not given an opportunity to be make a reasoned decision as to whether any of the Judge's changes to the hearing transcript adversely affected their respective rights, at the hearing level or on appeal.<sup>(4)</sup> The Board will not presume to decide for either party as to whether: (i) either party agrees or disagrees with the changes to the hearing transcript that the Judge made; or (ii) either party believes that the changes to the hearing transcript that the Judge made are, individually or collectively, prejudicial to its rights under the Directive.

Moreover, because of the procedural posture of this case, the Board is faced with a difficult, novel legal question of what is the legal effect, if any, of the Administrative Judge's apparently unilateral changes to the hearing transcript on the appeal rights of the parties (in particular with respect to the consideration and resolution of Applicant's challenge to the Judge's factual finding).<sup>(5)</sup> Since there is no indication in the case file that the parties were made aware of the Judge's changes to the hearing transcript, it would not be fair to the parties for the Board to address this novel legal question (as a part of its consideration and resolution of Applicant's challenge to the Judge's fact finding) without the parties having an opportunity to be heard on the matter.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant also contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because: (a) the Judge failed to consider record evidence favorable to Applicant; (b) there is no evidence that Applicant's family and other relatives in Sudan have been targeted by the Sudanese government; (c) an analysis of decisions by Hearing Office Administrative Judges in two other cases shows that the Judge's analysis in this case is arbitrary and capricious; and (d) the Judge failed to adequately analyze Applicant's case under the whole person concept.

Because the Board is remanding this case for further processing and issuance of a new decision, it would be premature for the Board to address this appeal issue.

### **Conclusion**

Applicant's first appeal issue raises a question about the hearing transcript that leaves the Board unable to resolve this issue at this time in a manner that is fair to the parties. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with instructions. On remand, the Judge is directed to inform the parties of all changes he has made to the hearing transcript and allow them a reasonable opportunity to indicate whether they agree or disagree with those changes. After allowing the parties such an opportunity, the Judge should rule on any objection to the transcript changes that either party might make. The Judge has the discretion to decide how to best document these procedural actions for the case record. Finally, the Judge should issue a new decision consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

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

1. The Administrative Judge entered a formal finding in favor of Applicant with respect to the Guideline C (Foreign Preference) allegation set forth in SOR paragraph 2. That favorable formal finding is not at issue on appeal.

2. If the Administrative Judge (a) had informed the parties of the changes to the hearing transcript and they agreed, or did not object, to those changes, but (b) did not document such a course of action for the record, then the Board would have no meaningful basis to decide whether a claim of error affected by any of the transcript changes was waived or otherwise barred by the complaining party's agreement, or lack of objection, to the Judge's changes to the hearing transcript. Since there is no indication in the case file that the Judge informed the parties of the changes to the hearing transcript that he apparently made, there is no basis for the Board to conclude Applicant waived, or is otherwise barred from raising, a claim of error based on his copy of the hearing transcript.

3. *Cf.* ISCR Case No. 02-17720 (November 16, 2004)(case remanded because Board could not address appeal issues in a meaningful way that would be fair to the parties because the state of the case file was such that Board could not determine which documents in the case file were admitted into evidence and which documents were not admitted into evidence, and the Board could not locate in the case file copies of documents referred to in the Judge's decision); ISCR Case No. 02-20365 (November 2, 2004)(case remanded because the manner in which certain exhibits were handled during the hearing left the Board unable to address an appeal issue in a meaningful way that would be fair to the parties).

4. Although a party is expected to take reasonable steps to raise objections or other procedural issues on the record in a timely manner, there may be unusual situations where a party cannot be expected to do so. *See* ISCR Case No. 03-00543 (May 21, 2004) at p. 4 (acknowledging the possibility that a party may be precluded, by unusual circumstances, from raising an objection or procedural issue on the record at the hearing level). This case presents such an unusual circumstance.

5. If the Board were to decide the merits of Applicant's claim of factual error at this time, the Board would be faced with the dilemma of deciding the evidentiary status of the hearing transcript in the case file (with the changes apparently made by the Administrative Judge, without any indication in the case file of notice to the parties) versus the evidentiary status of the hearing transcript provided to Applicant. Such a decision would touch upon fundamental questions of due process and evidence that warrant the Board giving the parties an opportunity to be heard before such a decision is attempted.