

DATE: September 27, 2004

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 03-12349

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 the Applicant a Statement of Reasons (SOR), dated November 24, 2003, 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) and Guideline C (Foreign Preference). Administrative Judge Wilford H. Ross issued an unfavorable security clearance decision, dated June 14, 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 issues: (1) whether the Board can consider new evidence in mitigation of Applicant's Guideline B and C disqualifying circumstances, and (2) whether the Administrative Judge erred by concluding Applicant demonstrated a foreign preference under Guideline C. 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 Board can consider new evidence in mitigation of Applicant's Guideline B and C disqualifying circumstances. In this case, Applicant admitted to all of the allegations in the SOR and requested an administrative determination of her case, rather than a hearing. She was provided a copy of Department Counsel's File of Relevant Material (FORM) and placed on reasonable notice of: (a) her right to offer written evidence in response to that FORM, and (b) the fact that the Judge would be making his decision based upon the written materials provided to him. Applicant offered no evidence in response to the FORM. In his decision, the Judge found that the Government had met its initial burden of proving by substantial evidence the security concerns raised under Guidelines B and C of the SOR, and that the Applicant had not introduced persuasive evidence in rebuttal, explanation or mitigation sufficient to overcome the Government's case against her. [\(1\)](#)

On appeal, Applicant offers for the first time evidence in support of her claims about: (1) the nature and extent of her contacts with her husband's foreign family members, (2) her husband's foreign family members not being agents of a foreign power or in a position to be exploited by a foreign power, and (3) her explanation about the circumstances surrounding her acquisition and use of a foreign passport.

As noted above, the Board only reviews a Judge's decision with respect to factual or legal errors which have been specifically identified by the appealing parties. The Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant's submission of new evidence does not demonstrate error on the part of the Judge, or render his decision arbitrary, capricious or contrary to law. *See* ISCR Case No. 02-18434 (August 13, 2004) at p. 3.

2. Whether the Administrative Judge erred by concluding Applicant demonstrated a foreign preference under Guideline C. On appeal, Applicant takes strong exception with the Administrative Judge's conclusion that she has demonstrated a

foreign preference under Guideline C. In support of this claim of error, Applicant relies -- in part -- on a proffer of new evidence. As discussed earlier in this decision, the Board cannot consider new evidence. Accordingly, Applicant's proffer of new evidence does not demonstrate the Judge erred with respect to his conclusions under Guideline C.

Apart from the proffer of new evidence, Applicant argues that her acquisition and use of an Iranian passport does not demonstrate a foreign preference. Given the record evidence in this case, the Administrative Judge had a rational basis for concluding that Applicant's possession and use of an Iranian passport demonstrated a foreign preference within the meaning of Guideline C. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at pp. 11-12 (possession and use of a foreign passport involves the exercise of rights and privileges of foreign citizenship that falls under Guideline C).

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Decision at p. 5.