

DATE: September 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14052

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 19, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline L (Outside Activities) and Guideline B (Foreign Influence). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated July 19, 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 demonstrated bias or gave the appearance of bias at Applicant's hearing; (2) whether the Administrative Judge's analysis under Guideline L (Outside Activities) was arbitrary, capricious, or contrary to law; (3) whether the Administrative Judge's analysis under Guideline B (Foreign Influence) was arbitrary, capricious, or contrary to law; (4) whether the Administrative Judge failed to apply the whole person concept when evaluating Applicant's security eligibility; and (5) whether the Administrative Judge erred by imposing an impossible burden of proof on Applicant. For the reasons that follow, the Board remands this case with the recommendation that the case be assigned to another Administrative Judge to conduct a new hearing and issue a new decision in Applicant's case.

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 demonstrated bias or gave the appearance of bias at Applicant's hearing. On appeal, Applicant contends the Administrative Judge demonstrated bias or gave the appearance of bias. In support of this claim of error, Applicant argues: (a) there are public accusations that DOHA is engaged in "xenophobia and witch hunts reminiscent of the McCarthy era" when it comes to Guideline B (Foreign Influence) cases; and (b) during the hearing, the Judge made comments that demonstrated bias or gave the appearance of bias. Department Counsel counters Applicant's claim of error by arguing: (i) Applicant's claim does not meet the legal standard for establishing bias; (ii) the Judge's comments cited by Applicant are "wholly insufficient to overcome the presumption of [quasi-judicial] impartiality"; and (iii) Applicant's claim is a "specious attempt by Applicant to paint, the Administrative Judge, who has given countless years of public service to this nation, with the broad brush of prejudice based upon the flimsiest evidence."

The right to a fair and impartial adjudication⁽¹⁾ is an important one.⁽²⁾ There is a rebuttable presumption that an Administrative Judge is fair and impartial,⁽³⁾ and a person seeking to rebut that presumption has a heavy burden of persuasion.⁽⁴⁾ An appealing party's personal belief that a Judge is biased is not sufficient to rebut the presumption of impartiality. Rather, the standard is whether the record of the proceedings below contains anything that would provide a basis for a disinterested person to reasonably question the fairness and impartiality of the Judge.⁽⁵⁾ General claims of

bias or unfairness are not sufficient to rebut the presumption that a Judge is fair and impartial.⁽⁶⁾

Applicant's general claim of bias lacks merit. Applicant's reliance on a magazine article published in 2004 to support his assertions that there is a perception that DOHA is "biased against anyone from a foreign country" and "DOHA is already being accused in the public press of xenophobia and witch hunts reminiscent of the McCarthy era" goes beyond the pale of permissible zealous advocacy. Claims of error should be based on arguments having a reasonable basis in the record evidence and procedural history of a case, not innuendo or insinuation based on an article having nothing to do with the particular case at hand. Just as Applicant is entitled to have his case adjudicated fairly within the bounds of the law, Applicant must act within the bounds of permissible advocacy when raising claims of error. Generalized claims of "xenophobia" and "witch hunts" are indiscriminate accusations of organizational bad faith and institutional misconduct that have no legitimate place in these proceedings,⁽⁷⁾ and fail to raise any colorable claim of bias or the appearance of bias.

Applicant's specific claim of bias or the appearance of bias is not so readily disposed of. Applicant contends the Administrative Judge demonstrated bias or gave the appearance of bias at the hearing when he made the following remarks:

"Well, I would just say before we close this that I congratulate you on being a very successful businessman and having started this company and your career here, and what you're doing, and trying to keep jobs in the U.S."

"I for one get a little tired of calling United Airlines for my reservations and talking to a gentleman with a very strong Indian accent. And I ask him where he lives, and he says he's in Calcutta. And you're at least trying to keep jobs here, and I congratulate you for that."

(Hearing Transcript at p. 117)

Applicant, who is a naturalized U.S. citizen born in India, argues that the Judge's comments were injudicious and raise questions whether he received a fair and impartial adjudication of his case. Department Counsel asserts that the Judge's "*arguably* poor choice-of-words in attempting to compliment Applicant's business accomplishments and constructive efforts, after an almost 4 ½ hour hearing in which Applicant claimed he was being singled out, 'does not translate into a showing of bias'" (italics in original).⁽⁸⁾

Applicant is correct that an Administrative Judge's use of intemperate or injudicious language may give rise to questions of bias.⁽⁹⁾ But, a party's ability to take exception with a Judge's remarks is not sufficient to demonstrate bias or the appearance of bias.⁽¹⁰⁾ More than a party's strong disagreement with a Judge's remarks is needed to support a claim of bias or the appearance of bias. Department Counsel is correct that the Administrative Judge's remarks should be viewed in the context of the entire hearing.⁽¹¹⁾ However, the content and nature of a Judge's remarks are more important than their quantity or length in assessing a claim of bias or the appearance of bias.⁽¹²⁾ In this case, even viewing the Judge's remarks in the context of the entire hearing, the Board concludes that those remarks are injudicious enough that a disinterested person reasonably could question whether the Judge's evaluation of Applicant's case was being based on a fair and impartial consideration of the record evidence in light of the applicable law, or whether the Judge evaluated Applicant's case, in part, based on his personal opinion about matters that have no bearing whatsoever on Applicant's security eligibility.

2. Applicant's remaining appeal issues. Because of the Board's disposition of the first appeal issue, it would be premature for the Board to address any of the remaining appeal issues.

Conclusion

Applicant has met his burden of demonstrating harmful error that warrants a remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case for correction of the error identified by Applicant. Because of the nature of the error identified by Applicant, no useful purpose would be served by remanding the case to the same Administrative Judge. Accordingly, the Board remands the case with the recommendation that the case be

assigned to another Administrative Judge for a new hearing and issuance of a new 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. *See* Directive, Sections 4.1, 6.3, and Additional Procedural Guidance, Item E3.1.10.

2. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 3; ISCR Case No. 99-0519 (February 23, 2001) at p. 7.

3. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

4. *See, e.g.*, ISCR Case No. 02-06478 (October 25, 2004) at p. 4; ISCR Case No. 02-33169 (September 23, 2004) at p. 5.

5. *See, e.g.*, ISCR Case No. 02-29279 (February 9, 2005) at p. 4; ISCR Case No. 03-01240 (December 28, 2004) at p. 4.

6. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 3; ISCR Case No. 99-0007 (November 28, 2000) at p. 3; ISCR Case No. 99-0068 (November 30, 1999) at p. 3.

7. *Compare* ISCR Case No. 01-26893 (October 16, 2002) at p. 9 (an argument that the federal government was acting no better than terrorists by seeking to deny or revoke an applicant's access to classified information goes beyond the pale of legitimate advocacy).

8. Department Counsel's assertion about the Administrative Judge's "countless years of public service to this nation" is based on matters that go outside the record in this case. Even if the Board accepts, solely for purposes of deciding this appeal, that the Judge has performed many years of honorable public service, such public service does not preclude Applicant's claim of bias or the appearance of bias.

9. *See, e.g.* DISCR Case No. 94-0282 (February 21, 1995) at p. 5 (citing earlier Board decisions).

10. *See, e.g.*, DOHA Case No. 94-0972 (July 20, 1995) at p. 3 (bias not demonstrated by appealing party's strong disagreement with an Administrative Judge's comment during the hearing about his opinion concerning some of the evidence presenting by the appealing party).

11. *See* ISCR Case No. 96-0897 (December 9, 1997) at p. 2. *Cf.* ISCR Case No. 94-1055 (May 8, 1996) at p. 2 (when

evaluating a claim that an Administrative Judge demonstrated bias or a lack of impartiality by asking questions of witnesses, the Board will consider the Judge's questioning of witnesses as a whole, rather than focus on individual questions in isolation).

12. *See* DISCR Case No. 94-0282 (February 21, 1995) at p. 5 n. 9 ("Demonstration of bias does not turn on the number of words an appealing party identifies. For example, a single racial epithet might be sufficient to show bias."). *Cf.* ISCR Case No. 98-0809 (August 19, 1999) at p. 2 (legal sufficiency of an Administrative Judge's decision does not turn on its length, but rather whether it contains findings, conclusions, and pertinent discussion that satisfies the requirements of the Directive).