

DATE: August 30, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16848

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated May 10, 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). Administrative Judge Carol G. Ricciardello issued a favorable security clearance decision, dated January 24, 2005.

Department Counsel appealed the Administrative Judge's favorable 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 imposing an improper burden of proof on Department Counsel; and (2) whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are not supported by the record evidence. For the reasons that follow, the Board reverses 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 Administrative Judge erred by imposing an improper burden of proof on Department Counsel. Department Counsel contends the Administrative Judge imposed an improper burden of proof on Department Counsel by reaching favorable conclusions under Guideline B (Foreign Influence) based on the absence of evidence that Applicant had committed any security violations. This contention has merit.

The Administrative Judge concluded that the record evidence of Applicant's ties and contacts with immediate family members in Taiwan raised security concerns under Guideline B (Foreign Influence). After concluding the record evidence did not support the application of Foreign Influence Mitigating Condition 1⁽¹⁾ or Foreign Influence Mitigating Condition 3,⁽²⁾ the Administrative Judge properly considered Applicant's security eligibility under the whole person concept. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4. However, when doing so, the Judge erred by placing great significance on the absence of any evidence that Applicant had committed any security violations. The Judge's references and analysis regarding Applicant's security-related conduct appear to be based entirely on his answer to question 31 of the SF-86 that contains no information -- favorable or unfavorable -- about Applicant's security record. Department Counsel is not required to prove that an applicant has committed a security violation before the applicant's access to classified information can be denied or revoked. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Moreover, Department Counsel persuasively argues that the Judge's reasoning in this case has the further defect of giving Applicant the benefit of the doubt despite Applicant's failure to present any evidence concerning his security record. Absent any such record evidence, there is no rational basis for the Judge to reach her favorable conclusion about Applicant's security record.

Department Counsel also contends the Administrative Judge acted in an arbitrary and capricious manner by placing significance on the absence of evidence that Taiwan is targeting its citizens to gain unauthorized access to classified

U.S. information. This claim of error is persuasive. Department Counsel does not have to prove -- under Guideline B or any other Guideline -- that a particular foreign country is targeting a specific group or category of people for possible exploitation. The security significance of facts and circumstances indicating an applicant is in a position of vulnerability to foreign influence is not diminished merely because Department Counsel does not present evidence showing that a particular foreign country is seeking to take advantage of that particular vulnerability. *See, e.g.*, ISCR Case No. 03-16516 (November 26, 2004) at p. 7. Applicant's burden of presenting evidence to rebut, explain, extenuate, or mitigate the security concerns raised under Guideline B by his ties and contacts with family members in Taiwan⁽³⁾ was not satisfied by the fact that Department Counsel did not present evidence that Applicant's situation posed a clear and present danger or imminent threat of espionage.

2. Whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are not supported by the record evidence. Department Counsel also argues the Administrative Judge acted in an arbitrary and capricious manner by reaching favorable conclusions under Guideline B despite the absence of record evidence to support those conclusions. This claim of error has merit. Department Counsel correctly notes that there is no record evidence to support the Administrative Judge's conclusion that Applicant has demonstrated "consistent conduct." Moreover, Department Counsel correctly notes that the Judge failed to articulate how Applicant's unspecified "consistent conduct" refuted, extenuated, or mitigated the security concerns raised under Guideline B.

There is no presumption in favor of granting a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Furthermore, a favorable security clearance decision should not be made unless there is record evidence that would support an affirmative determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant. *See* Executive Order 10865, Section 2; Directive, Section 4.2; Directive, Additional Procedural Guidance, Item E3.1.25. An Administrative Judge's responsibility to weigh the record evidence does not mean the Judge is free to draw whatever inferences or conclusions the Judge wants to draw; rather the Judge must draw reasonable inferences and reach reasonable conclusions that fairly take into account the totality of the record evidence, and must evaluate the security significance of the facts and circumstances of an applicant's case in a manner that is consistent with the "clearly consistent with the national interest" standard. *See, e.g.*, ISCR Case No. 03-02382 (February 15, 2005) at p. 5.

Once Department Counsel presented record evidence that raised security concerns under Guideline B, the Administrative Judge could not make a favorable security clearance decision unless the Judge articulated a rational basis, supported by record evidence, for concluding that Applicant had rebutted, extenuated or mitigated the security concerns raised under Guideline B. Given the sparse record evidence in this case, the Judge failed to articulate a rational basis for her favorable conclusions under Guideline B.

Conclusion

Department Counsel has demonstrated harmful error below. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. "A determination that the immediate family members(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" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1).
2. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).
3. *See* Directive, Additional Procedural Guidance, Item E3.1.15.