

DATE: November 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16516

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 December 4, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Robert Robinson Gales issued a favorable security clearance decision, dated June 10, 2004.

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 acted in a manner that is arbitrary, capricious, or contrary to law by not applying an August 16, 2000 Department of Defense memorandum concerning foreign passports to Applicant's case; and (2) whether the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law when he applied certain provisions of the Adjudicative Guidelines. 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⁾

1. Whether the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law by not applying an August 16, 2000 Department of Defense memorandum concerning foreign passports to Applicant's case. The Administrative Judge found that Applicant possessed and used an Iranian passport after he became a naturalized U.S. citizen in January 1991 and that Applicant did not surrender that Iranian passport. However, taking issue with a Board decision interpreting the August 16, 2000 memorandum concerning foreign passports, ⁽²⁾

and invoking the "overall common sense determination" language from Directive, Adjudicative Guidelines, Item E.2.2.3, the Judge concluded that the facts and circumstances of Applicant's case did not fall under the scope of the August 16, 2000 memorandum. Department Counsel challenges the Judge's analysis and ruling on this aspect of the case as being arbitrary, capricious, or contrary to law because it runs contrary to a Board decision on point and is inconsistent with the language and meaning of the August 16, 2000 memorandum concerning foreign passports.

The Board reviews decisions by Hearing Office Administrative Judges. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Neither the Directive nor well-established principles of federal administrative law provide for a Hearing Office Judge to review Board decisions. While a Hearing Office Judge may disagree with a Board decision, a Hearing Office Judge has no more authority or discretion to "sidestep" or "overrule" a Board decision that runs contrary to the Judge's preferences than an applicant or Department Counsel has to "sidestep" or "overrule" a ruling of the Judge during the course of the proceedings before the Judge. The Judge's attempt to "sidestep" or "overrule" a Board decision is arbitrary, capricious, and contrary to law.

Furthermore, the Administrative Judge's expressed disagreement with a Board decision is, for all practical purposes, a

disagreement with the language and scope of the August 16, 2000 memorandum concerning foreign passports that was discussed in that Board decision. The August 16, 2000 memorandum is legally binding on the Judge, regardless of what the Judge might think about its wisdom, desirability, or efficacy. [\(3\)](#)

A Judge's authority under the Directive does not extend to reviewing or passing judgment on the wisdom, desirability, or efficacy of DoD policy.

The Administrative Judge's invocation of the "overall common sense determination" language from the Directive is misplaced. The language of Directive, Adjudicative Guidelines, Item E2.2.3 concerning an adjudicator's obligation to make a "common sense determination" does not trump or nullify the authority of DoD to make and set policy for security clearance adjudications. [\(4\)](#)

Both Hearing Office Judges and the Board must render fair and impartial decisions that are consistent with applicable law and DoD policy. [\(5\)](#)

The "overall common sense determination" language cited by the Judge does not authorize the Judge to decide whether to apply the provisions of the August 16, 2000 memorandum in cases involving foreign passports. [\(6\)](#)

Furthermore, acceptance of the Judge's reasoning in this case would result in the untenable situation that a Hearing Office Judge could cite the "overall common sense determination" language of the Directive to avoid or circumvent any specific provision of the Directive, or applicable DoD policy, that the Judge felt did not comport with the Judge's concept of what was wise, desirable, or efficacious.

Accordingly, the Board concludes Department Counsel persuasively argues that the Administrative Judge's analysis and ruling concerning Applicant's Iranian passport are arbitrary, capricious, and contrary to law.

2. Whether the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law when he applied certain provisions of the Adjudicative Guidelines. The Administrative Judge concluded that: (a) Applicant's possession and use of an Iranian passport and voting in an Iranian election -- both after he became a naturalized U.S. citizen -- were mitigated under Foreign Preference Mitigating Condition 1 [\(7\)](#)

; (b) Applicant's family ties with two siblings in Iran were mitigated under Foreign Influence Mitigating Condition 1 [\(8\)](#)

; and (c) Applicant was entitled to the application of Foreign Influence Mitigating Condition 5. [\(9\)](#)

Department Counsel challenges the Judge's application of those three Adjudicative Guidelines mitigating conditions as being arbitrary, capricious, or contrary to law. Department Counsel's arguments in support of this claim of error have some merit.

Department Counsel correctly asserts that the August 16, 2000 memorandum concerning foreign passports applies to Applicant's case. Given the applicability of the August 16, 2000 memorandum concerning foreign passports, it was arbitrary, capricious, and contrary to law for the Administrative Judge to apply Foreign Preference Mitigating Condition 1 to Applicant's possession and use of an Iranian passport. [\(10\)](#)

The legal effect of the August 16, 2000 memorandum cannot be avoided or circumvented by the invocation of Foreign Preference Mitigating Condition 1.

It is not clear from the decision below whether the Administrative Judge applied Foreign Preference Mitigating Condition 1 to Applicant's conduct in voting in an Iranian election in 2001, after he had become a naturalized U.S. citizen. Nor is it clear from the decision below as to what weight the Judge gave to Foreign Preference Mitigating Condition 1. However, Department Counsel correctly notes that the applicability of Foreign Preference Mitigating Condition 1 in a given case does not relieve a Judge from the need to consider record evidence that shows an applicant has exercised the rights and privileges of foreign citizenship after the applicant becomes a naturalized U.S. citizen. [\(11\)](#)

In this case, Applicant exercised the rights and privileges of Iranian citizenship -- by possessing and using an Iranian passport and voting in an Iranian election -- after he became a naturalized U.S. citizen. [\(12\)](#)

The Judge's decision does not articulate any discernable analysis or reasoning as to how or why Applicant's exercise of the rights and privileges of Iranian citizenship after acquiring U.S. citizenship was mitigated by the application of Foreign Preference Mitigating Condition 1. [\(13\)](#)

Accordingly, the Judge's application of Foreign Preference Mitigating Condition 1 is not sustainable. [\(14\)](#)

Department Counsel makes several arguments in support of its challenge to the Administrative Judge's application of Foreign Influence Mitigating Condition 1: (a) the Administrative Judge erred by concluding Iran did not pose a serious security risk in this case because there was no evidence that the Iranian government has sought to apply pressure, directly or indirectly on Applicant in the past; (b) the Judge erred by focusing solely on the possibility that the Iranian government might try to exert coercive pressure on Applicant, without considering the possibility that the Iranian government might try to exert noncoercive influence on Applicant; (c) the Judge failed to articulate a rational basis for his conclusion that Applicant's desire to protect his wife and child in the United States would make him unwilling to cooperate with the Iranian government if his siblings in Iran were threatened; and (d) there is no record evidence to support the Judge's statement that he is confident that Applicant understands that he must restrain his wife and child from traveling to Iran in order to diminish his vulnerability to possible pressure from the Iranian government. For the reasons that follow, some of those arguments have merit.

Under Guideline B (Foreign Influence), Department Counsel is not required to prove that a foreign country has specifically targeted a particular applicant with immediate family members living in that foreign country. [\(15\)](#) Facts and circumstances that raise security concerns about an applicant's security eligibility can warrant an adverse security clearance decision without any proof that a foreign intelligence or security service has specifically targeted the applicant or sought to exploit those facts and circumstances. For example, falsification (Guideline E), a history of financial difficulties (Guideline F), alcohol abuse (Guideline G), or substance abuse (Guideline H) can warrant adverse security clearance decisions without any evidence that a foreign intelligence or security service has targeted the particular applicant with such problems or sought to exploit the particular applicant's situation. There is no good reason to require such proof in a Guideline B (Foreign Influence) case. [\(16\)](#) Applicant's vulnerability to possible foreign influence through his siblings in Iran is the same whether or not the Iranian government has sought to exert such influence or pressure in the past. [\(17\)](#) The Judge's conclusion that the Iranian government is not likely to target Applicant in the future has no basis in the record evidence in this case. [\(18\)](#)

Department Counsel persuasively argues that there is no record evidence that supports the Administrative Judge's stated confidence that Applicant understands that he must restrain his wife and child from traveling to Iran in order to diminish his vulnerability to possible pressure from the Iranian government. Absent such record evidence, the Judge's statement provides no legally sustainable basis for his favorable conclusions under Guideline B (Foreign Influence). Given the record evidence in this case and the Judge's own findings of fact, the Judge's statement has the practical effect of resolving an acknowledged doubt about Applicant's security eligibility in favor of Applicant. Such action is arbitrary, capricious, and contrary to law. [\(19\)](#)

Department Counsel correctly notes that security concerns can be raised under Guideline B (Foreign Influence) by facts and circumstances indicating an applicant is vulnerable to coercive or noncoercive influence or pressure. [\(20\)](#)

However, Department Counsel does not articulate a persuasive argument that shows the Judge's decision commits that error.

Department Counsel's claim of error concerning Foreign Influence Mitigating Condition 5 is not persuasive. The applicability of Adjudicative Guidelines disqualifying or mitigating conditions is not solely dependent on the specific wording of SOR allegations. Rather, the applicability of Adjudicative Guidelines disqualifying or mitigating conditions turns largely on whether there is record evidence that would support their application. [\(21\)](#)

Furthermore, given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to note and take into account the record evidence showing that Applicant does not have financial interests in Iran. Finally, Department Counsel's reliance on the Board's decision in ISCR Case No. 98-0507 (May 17, 1999) is not persuasive in demonstrating the Judge erred by applying Foreign Influence Mitigating Condition 5. Although that Board decision contains a discussion of Foreign Influence Mitigating Condition 5 which is on point, it is factually distinguishable from this case. The Board does not read the Judge's decision in this case as committing the same kind of reasoning error that occurred in ISCR Case No. 98-0507.

In response to Department Counsel's appeal brief, Applicant cites to language in the Administrative Judge's decision to support his position that the Judge's decision is supported by the record evidence and is not arbitrary, capricious, or contrary to law. Applicant's argument is not persuasive. Under the Directive, the Board reviews Hearing Office Judge decisions. [\(22\)](#)

If the Board were bound to follow and accept a Judge's findings, conclusions, or rulings, then no appealing party -- either applicant or Department Counsel -- would have any meaningful appeal.

Conclusion

Department Counsel has demonstrated error below that warrants reversal. 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. Applicant's reply brief indicates he "would like to formally append the following to the records of my case as a response to issues raised by [Department] Counsel after I had made my closing statements during the [hearing]." That statement is followed by some factual assertions that constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

2. On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence issued a memorandum concerning the possession and use of foreign passports, entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline."

3. *See, e.g.*, ISCR Case No. 02-07625 (May 24, 2004) at pp. 3-4; ISCR Case No. 00-0489 (January 10, 2002) at p. 7.

The Administrative Judge quotes a passage from a Board decision issued in December 1997 to contrast it with the August 16, 2000 memorandum (Decision at p. 13). Apart from noting the Judge's error of citing a Board decision on a point where applicable DoD policy has changed after the cited Board decision was issued-- *see* ISCR Case No. 02-24254 (June 29, 2004) at pp. 7-8; ISCR Case No. 99-0295 (October 20, 2000) at p. 6 -- the Board emphatically rejects any attempt by a Judge or a party to cite a Board decision to explicitly or implicitly criticize DoD policy. The Board cannot and does not presume to review or pass judgment on the policy decisions of DoD officials. *See, e.g.*, ISCR Case No. 01-06337 (September 24, 2002) at p. 3. Accordingly, no Board decision, or passage from a Board decision, should be cited or relied on to explicitly or implicitly criticize or disagree with DoD policy.

4. *See* Directive, Section 5. The authority of DoD officials to set policy in security clearance matters is not subject to, or contingent on, the approval of Hearing Office Administrative Judges or the Board.

5. *See, e.g.*, Directive, Section 5.2.13; Directive, Additional Procedural Guidance, Item E3.1.25; Directive, Additional Procedural Guidance, Item E3.1.32.3.

6. *See, e.g.*, ISCR Case No. 01-22693 (September 22, 2003) at p.6 ("However, application of the whole person concept does not permit the Judge to ignore, disregard, or fail to apply the Assistant Secretary of Defense for Command, Control, Communications and Intelligence's August 16, 2000 memorandum on foreign passports.").

7. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.1).

8. "A determination that the immediate family member(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).

9. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.5).

10. Given the passage in the decision below where the Administrative Judge discusses Foreign Preference Mitigating Condition 1, the Board construes that passage as showing the Judge concluded Applicant's possession and use of an Iranian passport was mitigated by Foreign Preference Mitigating Condition 1.

11. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at pp. 10-11.

12. Applicant's reply brief cites the oath he took when becoming a naturalized U.S. citizen. There is no dispute in this case that Applicant took the required oath to become a naturalized U.S. citizen. Furthermore, the SOR does not allege and there is no record evidence that indicates or suggests Applicant did not take the required oath in an honest and sincere manner. However, becoming a naturalized U.S. citizen does not preclude the federal government from considering whether an applicant's conduct or circumstances raise security concerns.

13. The Administrative Judge's conclusion that Applicant's goal in voting in an Iranian election "would seem to be identical to that of the U.S. government" lacks any support in the record evidence.

14. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4 (adjudicators do not have unfettered discretion in the application of Adjudicative Guidelines).

15. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 4-5; ISCR Case No. 00-0628 (February 24, 2003) at p. 5.

16. *See also Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)(government is not required to prove there is "a clear and present danger" to classified information before it can make an unfavorable security clearance decision), *cert. denied*, 397 U.S. 1039 (1970).

17. A person who is in a position of being vulnerable to blackmail or pressure is not less vulnerable to being

blackmailed or pressured merely because the person has not been subjected to a previous attempt at blackmail or pressure. The person's vulnerability is no less a vulnerability merely because the person has been fortunate enough to have no one - to date - try to exploit that vulnerability. Similarly, a person who is in a conflict of interest situation is no less in an conflict of interest situation merely because there is no evidence to date that anyone has specifically sought to exploit the situation. The risks associated with vulnerability to blackmail or pressure, or a conflict of interest situation, are not reduced, diminished, or rendered acceptable merely because there is no evidence that anyone has sought to exploit those risks, to date.

18. The Administrative Judge's conclusion also is inconsistent with his recognition that the travel of Applicant's wife and child to Iran places Applicant in a position of vulnerability.

19. *See Directive, Adjudicative Guidelines, Item E2.2.2* (requiring doubts about an applicant's security eligibility to be resolved in favor of the national security).

20. *See, e.g., ISCR Case No. 02-02195* (April 9, 2004) at p. 6; *ISCR Case No. 00-0628* (February 24, 2003) at pp. 4-5.

21. *See, e.g., ISCR Case No. 99-0480* (November 28, 2000) at p. 4.

22. *See Directive, Additional Procedural Guidance, Item E3.1.32.*