

DATE: October 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19006

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), dated August 25, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline F (Financial Considerations). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated March 18, 2005.

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 Administrative Judge erred in concluding that the security concerns raised under Guideline C (Foreign Preference) had not been mitigated, (2) whether the Administrative Judge erred in concluding that the security concerns raised under Guideline B (Foreign Influence) had not been mitigated, and (3) whether the Administrative Judge erred in concluding that the security concerns raised under Guideline F (Financial Considerations) had not been mitigated. 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⁾

1. Whether the Administrative Judge erred in concluding that the security concerns raised under Guideline C (Foreign Preference) had not been mitigated. Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude that he had rebutted, mitigated or extenuated the security concerns raised under Guideline C (Foreign Preference). Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge misapplied Foreign Preference Mitigating Condition 4. ⁽²⁾ For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

Applicant does not challenge the Administrative Judge's findings that: (1) Applicant emigrated from Nigeria in 1988 and became a United States citizen in 1998, (2) Applicant applied for and was issued a Nigerian passport, even though he had a valid United States passport, (3) Applicant used his Nigerian passport instead of his United States passport to enter and exit Nigeria in 2002, and (4) Applicant renounced his Nigerian citizenship and returned his Nigerian passport several days before the hearing. The Judge acknowledged that Applicant had produced evidence falling under the parameters of Mitigating Condition 4. However, the Judge concluded that mitigating evidence was not of sufficient weight to overcome the security concerns of Applicant's disqualifying conduct because of the seriousness of the disqualifying conduct, and the fact that Applicant had not renounced his Nigerian citizenship and surrendered his passport until just before the hearing.

The Board need not agree with the Administrative Judge's conclusion to conclude that it is sustainable. The application of Adjudicative Guidelines disqualifying and mitigating conditions is not reducible to mechanical formula adjudication.

Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and reach a reasoned conclusion as to whether Applicant met his burden of presenting evidence sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Judge applied the relevant mitigating condition and explained why he concluded Applicant had not sufficiently mitigated the security concerns raised under Guideline C. ⁽³⁾ Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Applicant has not showed that the Judge's adverse conclusions under Guideline C are arbitrary or capricious in light of the totality of the facts and circumstances of this case.

2. Whether the Administrative Judge erred in concluding that the security concerns raised under Guideline B (Foreign Influence) had not been mitigated. Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude that he had rebutted, mitigated or extenuated the security concerns raised under Guideline B (Foreign Influence). Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge misapplied Foreign Influence Mitigating Conditions 1 ⁽⁴⁾ and 3. ⁽⁵⁾ For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

Applicant does not challenge the Administrative Judge's findings that: (1) Applicant's mother and six siblings are citizens of Nigeria residing in that country, (2) one of Applicant's brothers works for the Federal Ministry of Finance of the Government of Nigeria, and (3) Applicant had traveled to Nigeria in 2002 to visit his family and relatives, using a Nigerian passport. Given those findings, the Judge concluded that Applicant's ties with his immediate family members raised security concerns under Guideline B and that Foreign Influence Disqualifying Condition 1 ⁽⁶⁾ applied.

Applicant contends that the Administrative Judge gave insufficient weight to evidence that: (1) most of Applicant's relatives in Nigeria are not agents of the Nigerian government, (2) Applicant's brother's position with the Nigerian Federal Ministry of Finance does not pose a threat to the United States, and (3) Applicant's ties to Nigerian citizens are casual and infrequent, and would not subject him to coercion, exploitation, or pressure. In support of his contentions, Applicant argues for a different weighting of the evidence and cites to a Hearing Office decision in which an applicant in ostensibly similar circumstances was granted a clearance.

Applicant's arguments do not demonstrate that it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had not met his burden of presenting evidence that is sufficient to overcome the security concerns raised under Guideline B (Foreign Influence) and warrant a favorable security clearance decision. As noted above, the Board does not review a case *de novo*. Mere disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error without a showing that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law. Moreover, the decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases and the cited cases are not legally binding precedent on the Board. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decisions by Hearing Office Judges).

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's ability to cite to record evidence that he contends the Judge should have given greater weight--such as length of Applicant's United States citizenship and the extent of his ties to the United States--is not sufficient to overcome that rebuttable presumption. Merely because a Judge does not give greater weight to record evidence cited by the appealing party, it does not follow that the Judge simply ignored that evidence. Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had not met his burden of producing sufficient evidence to warrant the application of Foreign Influence Mitigating Conditions 1 and 3.

3. Whether the Administrative Judge erred in concluding that the security concerns raised under Guideline F (Financial Considerations) had not been mitigated. Applicant contends the Administrative Judge should have concluded that the security concerns raised by his substantial indebtedness were mitigated by application of Financial Considerations

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Mitigating Conditions 3, 4, and 6. In support of that contention Applicant argues that: (1) his financial difficulties were due to his loss of employment and his wife's illness, (2) he has paid off some of the smaller debts, (3) he has taken responsibility for the debts, (4) there are Hearing Office decisions in which applicants in ostensibly similar circumstances were granted clearances, and (5) his job performance and character references are excellent. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

The Administrative Judge's finding that many of the Applicant's original financial problems could be traced in part to conditions that were largely beyond his control did not compel the Judge to make a favorable security clearance decision. Even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge could consider whether Applicant acted in a reasonable manner when dealing with his financial difficulties. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 99-0012 (December 1, 1999) at p. 4. In this case, it was not arbitrary or capricious for the Judge to consider such factors as: (1) the length of Applicant's history of financial difficulties, (2) the amount of his indebtedness, and (3) the fact that some of the larger debts were still unpaid. Therefore, the Judge was not required to conclude, as a matter of law, that Applicant's history of financial difficulties was mitigated under Financial Considerations Mitigating Conditions 3, 4 and 6.

As noted above, the decisions in other DOHA cases cited by Applicant on appeal do not demonstrate error by the Administrative Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases. The cited cases are not legally binding precedent on the Board in this or any other appeal.

With regard to Applicant's final argument, the Board notes that the federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. The Guidelines set forth in the Directive address a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole person analysis to determine an applicant's security eligibility. A whole person analysis, by its very nature, is not confined to the workplace. *See* ISCR Case No. 03-11231 (June 4, 2004) at p. 3. The favorable evidence cited by Applicant did not compel the Administrative Judge to make a favorable security decision. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6. Considering Applicant's burden of persuasion and the record as a whole, the Board concludes that Applicant has not shown the Judge's adverse conclusions under Guideline F (Financial Considerations) are arbitrary, capricious or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, 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. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 3.c, 3.e, 3.h, and 3.k. Those favorable findings are not at issue on appeal.
2. Directive, Adjudicative Guidelines, Item E2.A3.1.3.4 ("Individual has expressed a willingness to renounce dual citizenship").
3. Decision at p. 4.
4. Directive, Adjudicative Guidelines, Item E2.A2.1.3.1 ("A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brother, 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").
5. Directive, Adjudicative Guidelines, Item E2.A2.1.3.3 ("Contact and correspondence with foreign citizens are casual and infrequent").
6. Directive, Adjudicative Guidelines, Item E2.A2.1.2.1 ("An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country").
7. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.3).
8. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.4).
9. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).