DATE: June 24, 2005

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-22643

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Leslie McAdoo, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 3, 2004, 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), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated December 7, 2004.

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 Board should remand the case to the Administrative Judge to allow Applicant an opportunity to submit additional evidence for consideration in his case; and (2) whether the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) are arbitrary or capricious. 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 Board should remand the case to the Administrative Judge to allow Applicant an opportunity to submit additional evidence for consideration in his case. Applicant asks the Board to remand the case to the Administrative Judge to allow him an opportunity to submit additional evidence in his case. In support of this request, Applicant: (a) makes factual assertions and offers documentation to show that his situation has changed since the hearing was held; (b) states that he appeared at the hearing under the incorrect impression, based on mistaken advice, that he had complied with DoD policy concerning possession of a foreign passport; and (c) asserts that although neither the Judge nor Department Counsel acted inappropriately nor intentionally deprived him of a fair hearing, the hearing did not allow him to adequately present his case due to his *pro se* status and the fact that English is not his native language.

Applicant properly concedes that new evidence cannot be considered on appeal,[(2)]

but tenders the new evidence as a proffer of what he would present to the Administrative Judge on remand, and asserts the proffer shows that there is a good faith basis for his request for a remand. Applicant seeks relief to which he is not entitled. Absent a showing that a party was denied a reasonable opportunity to present evidence during the proceeding below, a party is not entitled to have the case remanded so the party can have an additional opportunity to present more evidence for the Judge to consider.[(3)]

This legal principle is particularly appropriate with respect to claims that circumstances have changed after the hearing was conducted and the record evidence closed. As the Supreme Court has noted:

"'Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order the litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process would ever be consummated in an order that would not be subject to reopening.'" *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)(quoting earlier Supreme Court decision).

The Board has followed that reasoning because there must be some reasonable degree of administrative finality in DOHA adjudication.[(4)]

In this case, there has been no showing that Applicant was denied a reasonable opportunity to present evidence for the Administrative Judge to consider in his case. Furthermore, acceptance of Applicant's proffer of new evidence as a basis for remanding the case to the Administrative Judge would run afoul of the need for administrative finality in these proceedings. If the Board were to grant Applicant the relief he seeks, then many other applicants would be entitled -- as a matter of simple fairness and the right to expect impartial, evenhanded treatment -- to request similar relief in future cases. This case does not give the Board any reason to reconsider its adherence to the reasoning of the *Vermont Yankee* case concerning the practical need for administrative finality.

Applicant's *pro se* status when he appeared before the Administrative Judge did not relieve him of the obligation to prepare for the hearing and timely steps to protect his rights.[(5)]

Moreover, having decided to represent himself, Applicant cannot fairly complain about the quality of his self-representation or seek to be relieved of the consequences of his decision to represent himself at the hearing.[(6)]

Department Counsel persuasively argues that there is no indication in the record below that Applicant was not able to represent himself, that he failed to understand the nature of the proceedings, or that he asked for a continuance or otherwise gave the Administrative Judge reason to question his ability to proceed with the hearing. Applicant notes that English is not his native language. However, at the hearing, Applicant did not indicate or suggest to the Judge that his language skills were causing problems with his ability to prepare for the hearing, his ability to understand the proceedings, or to his ability to present his case. Furthermore, the Judge had the opportunity to personally assess Applicant's comprehension and use of English during the hearing. Considering all the circumstances, Applicant waived any claim that his skills with the English language precluded him from having a fair opportunity to prepare for the hearing and to present his case for the Judge's consideration.

Finally, the record of the proceedings below does not support Applicant's claim that he appeared at the hearing under the incorrect impression, based on mistaken advice, that he had complied with DoD policy concerning possession of a foreign passport. Applicant's claim of relying on mistaken advice is predicated on a factual assertion that constitutes new evidence, which the Board cannot consider.

2. Whether the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) are arbitrary or capricious. The Administrative Judge concluded that Applicant did not mitigate the security concerns raised under Guideline B or Guideline C.

Guideline C (Foreign Preference). In challenging the Administrative Judge's unfavorable conclusions under Guideline C, Applicant contends: (a) the weight of the record evidence does not support the Judge's finding that Applicant exercised his Lebanese citizenship after becoming a naturalized U.S. citizen; (b) the record evidence shows Applicant expressed a willingness to renounce his Lebanese citizenship; and (c) the totality of the record evidence shows Applicant has a clear preference for the United States and has demonstrated through his actions unwavering support for the United States and its interests.

The Administrative Judge did not err by finding that Applicant exercised the rights and privileges of Canadian citizenship and Lebanese citizenship (through the possession of Canadian and Lebanese passports) after he became a naturalized U.S. citizen in 1999. Applicant's argument concerning the absence of evidence that he voted in Lebanese

elections or served in the Lebanese military after he became a naturalized U.S. citizen does not demonstrate the Judge erred. The exercise of the rights and privileges of foreign citizenship is not limited to matters of voting in foreign elections or serving in a foreign military.[(7)]

Obtaining and possessing a foreign passport are indicia of the exercise of the rights and privileges of a citizen of the foreign country.[(8)]

Applicant's argument concerning his willingness to renounce Lebanese citizenship is based, in part, on a proffer of new evidence. As noted earlier in this decision, the Board cannot consider new evidence on appeal. What remains of Applicant's argument relies on a portion of his hearing testimony. The Administrative Judge erred by stating "Applicant failed to produce any evidence that he had renounced his Lebanese citizenship" (Decision at p. 4). As Department Counsel concedes in its reply brief, Applicant testified that he had renounced his Lebanese citizenship. However, given the totality of the facts and circumstances of this case, the Judge's error is harmless.

Applicant's argument concerning the whole person concept does not demonstrate the Administrative Judge erred. In support of Applicant's argument concerning the whole person concept, Applicant cites to record evidence indicative of his ties to the United States. That record evidence is relevant and material to his case. However, the presence of favorable record evidence, standing alone, is not dispositive of a case. An Administrative Judge must consider the record evidence as a whole, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and whether the favorable record evidence is sufficient to overcome the security concerns raised in the case and warrant a conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.[(9)]

Although Applicant disagrees with the Judge's weighing of the record evidence, Applicant has not demonstrated the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Given the record evidence in this case, the Judge was not compelled, as a matter of law or logic, to conclude that Applicant had presented favorable evidence sufficient to overcome the security concerns raised under Guideline C.

Guideline B (Foreign Influence). In challenging the Administrative Judge's unfavorable conclusions under Guideline B, Applicant contends: (i) the Judge erred by not applying Foreign Influence Mitigating Condition 1; (ii) the Judge's analysis is not consistent with the whole person concept; (iii) Department Counsel presented no evidence that Applicant's relatives in Kuwait and Lebanon pose any security risks or present any security concerns; (iv) there is no evidence that Applicant's relatives are likely to be targeted for exploitation by a foreign power; and (v) Applicant's situation is similar to another DOHA case in which a favorable security clearance decision was made.

Applicant's arguments are predicated, in part, on an erroneous assumption as to the burdens of proof that Department Counsel and Applicant, respectively, have in these proceedings. Department Counsel has the burden of presenting evidence to prove controverted facts.[(10)]

Department Counsel is not required to present direct or objective evidence of a nexus between an applicant's conduct and circumstances and an unfavorable security clearance decision.[(11)]

Nor is Department Counsel required to present evidence that an applicant poses a clear and present danger or imminent threat to national security.[(12)]

Furthermore, proof of conduct or circumstances that fall under one or more Guidelines gives rise to a presumption of nexus sufficient to shift the burden of persuasion to an applicant.[(13)]

Moreover, an applicant "is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."[(14)]

An applicant has a heavy burden of persuasion because: (i) there is no right to a security clearance[(15)]

; (ii) there is no presumption in favor of granting a security clearance[(16)]

; (iii) a security clearance should not be granted or continued unless there is an affirmative determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant[(17)]

; and (iv) doubts must be resolved in favor of the national security.[(18)]

Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude Applicant's admissions to the SOR and the record evidence presented by Department Counsel was sufficient to shift the burden of persuasion to Applicant explain, refute, extenuate or mitigate the security concerns raised under Guideline B by his ties and contacts with immediate family members and in-laws in Lebanon.[(19)]

Department Counsel did not have the burden of disproving the applicability of Foreign Influence mitigating conditions. Rather, Applicant had the burden of presenting evidence sufficient to warrant their application in his case.[(20)]

Moreover, Department Counsel did not have to prove that Applicant's relatives in Lebanon had been or were being targeted by a foreign power.[(21)]

A risk of vulnerability to coercive or noncoercive influence may exist whether or not there is evidence that a particular person or entity has actually sought to exploit that vulnerability.[(22)]

Applicant's appeal arguments do not show the Judge's adverse conclusions under Guideline B were arbitrary or capricious.[(23)]

Although Applicant disagrees with the Judge's weighing of the record evidence, Applicant has not demonstrated the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Given the record evidence in this case, the Judge was not compelled, as a matter of law or logic, to conclude that Applicant had presented favorable evidence sufficient to overcome the security concerns raised under Guideline B by his ties and contacts with immediate family members and in-laws in Lebanon.

Applicant also argues that vulnerability to foreign influence by individuals or entities that are not a foreign government is not an issue in his case. That argument is not persuasive. Guideline B (Foreign Influence) is not limited to cases involving vulnerability to influence exercised, directly or indirectly, by a foreign government. The "Concern" section of Guideline B uses language that does not limit foreign influence to only that influence exercised by a foreign government (or an agent of a foreign government). Moreover, although some of the Foreign Preference disqualifying conditions

refer to foreign governments or agents of a foreign government, other Foreign Preference disqualifying conditions refer to "foreign influence," "foreign nationals," and "nationals from a foreign country" without linking them to a foreign government or an agent of a foreign government. Finally, the Board does not find persuasive Applicant's assertion that "[t]here is very little, if any, rational relation between [the evidence of terrorist groups in Lebanon] and the question of whether [Applicant's] relatives are vulnerable to exploitation by such a group." The Board has rejected the contention that there is no rational connection between terrorism and threats to the security of classified U.S. information.[(24)]

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate harmful error below.

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. The Administrative Judge's favorable findings and conclusions under Guideline E (Personal Conduct) are not at issue on appeal. The Judge also entered formal findings in favor of Applicant with respect to SOR paragraph 1.a (under Guideline C) and SOR paragraph 2.f (under Guideline B). Those favorable formal findings are not at issue on appeal.

2. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

3. *See, e.g.*, ISCR Case No. 02-20403 (April 7, 2003) at p. 4.

4. *See, e.g.*, ISCR Case No. 03-17114 (November 29, 2004) at p. 3; ISCR Case No. 00-0250 (February 13, 2001) at pp. 3-4.

5. *See, e.g.*, ISCR Case No. 02-09793 (March 3, 2004) at p. 3; ISCR Case No. 01-07292 (January 29, 2004) at p. 5.

6. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4; ISCR Case No. 01-20579 (April 14, 2004) at p. 3.

7. *See, e.g.*, Foreign Preference Disqualifying Conditions, Directive, Adjudicative Guidelines, Item E2.A3.1.2 (listing examples of the exercise of rights and privileges of foreign citizenship beyond voting in a foreign election and serving in a foreign military).

8. *See, e.g.*, ISCR Case No. 01-10349 (February 15, 2005) at p. 5.

9. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5.

10. *See* Directive, Additional Procedural Guidance, Item E3.1.14.

11. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at p. 3.

12. *See, e.g.*, ISCR Case No. 02-06478 (October 25, 2004) at p. 6.

13. *See, e.g.*, ISCR Case No. 02-31188 (March 8, 2005) at p. 4.

14. Directive, Additional Procedural Guidance, Item E3.1.15.

15. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988).

16. *Dorfmont v. Brown* 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

17. Executive Order 10865, Section 2; Directive, Sections 3.2 and 4.2, Adjudicative Guidelines, Item E2.2.1, and

Additional Procedural Guidance, Item E3.1.25.

18. Directive, Adjudicative Guidelines, Item E2.2.2. *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

19. Applicant's argument relies, in part, on one sentence from the Board's decision in ISCR Case No. 99-0424 (February 8, 2001) that is taken out of context. Applicant correctly cites the one sentence, but ignores the following sentence that begins "However" and qualifies the sentence relied on by Applicant -- in a manner that undercuts Applicant's argument in this case.

20. *See, e.g.*, ISCR Case No. 03-06174 (February 28, 2005) at p. 10 n.23; ISCR Case No. 02-29665 (November 10, 2004) at p. 4.

21. *See, e.g.*, ISCR Case No. 03-06174 (February 28, 2005) at pp. 11-12; ISCR Case No. 03-16516 (November 26, 2004) at p. 7.

22. *See, e.g.*, ISCR Case No. 03-16516 (November 26, 2004) at p. 7 and n.17.

23. Applicant's reliance on the decision in ISCR Case No. 02-13593 (August 10, 2004) is misplaced. That decision was issued by a Hearing Office Administrative Judge, not the Board. As noted earlier, decisions by Hearing Office Judges are not legally binding precedent on their colleagues or the Board.

24. *See* ISCR Case No. 02-29403 (December 14, 2004) at pp. 4-5 (discussing various ways in which terrorists could pose a threat to classified U.S. information).