

DATE: January 19, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-22831

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), dated May 19, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline B (Foreign Influence), Guideline C (Foreign Preference) and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated June 22, 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 B (Foreign Influence) had not been mitigated, and (2) whether the Administrative Judge erred in finding the Applicant's falsification of his security clearance application was deliberate. 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<sup>(1)</sup>

1. 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: (1) misapplied Foreign Influence Mitigating Condition 1,<sup>(2)</sup>

(2) failed to consider mitigating evidence, and (3) made an unfavorable decision that is unsupported by the record as a whole. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

The Administrative Judge made findings that: (1) Applicant's mother-in-law, father-in-law, three brothers, and two sisters are citizens of Egypt residing in that country, (2) one of Applicant's brothers is a retired senior officer of the Egyptian military, (3) Applicant's father-in-law is a retired employee of the Egyptian government, (4) Applicant maintains a rental apartment in Egypt, (5) Applicant had traveled to Egypt three times since he became a naturalized United States citizen, and (6) Applicant is reasonably close to his Egyptian relatives and telephones his siblings on a rotating basis once every two or three weeks. 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<sup>(3)</sup>

applied. That conclusion shifted the burden of persuasion to Applicant. Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant contends that the Administrative Judge gave insufficient weight to evidence that: (1) Applicant's relatives in

Egypt are not agents of the Egyptian government, (2) Applicant's contacts are exclusively familial and devoid of political context, and (3) Applicant is a loyal American citizen, with strong family and financial ties to the United States. 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.

The Administrative Judge concluded that, even assuming none of Applicant's family members are agents of the Egyptian government, Applicant still had the burden of demonstrating that his family members in Egypt were not in positions where they are likely to be exploited by a foreign power. 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 establishing that his relatives were not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to those relatives and the United States. As noted above, the Board does not review a case *de novo*. There is a rebuttable presumption that a 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. The 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).

The absence of evidence that Applicant's family members in Egypt are currently employees or agents of the Egyptian government is not dispositive. Having relatives, cohabitants or associates who are connected with a foreign government is a disqualifying condition under Guideline B. [\(4\)](#)

However, even if such a connection had not existed here, this does not mean that there is no security concern under Guideline B. *See, e.g.*, ISCR Case No. 02-29665 (November 10, 2004) at p. 5. A reading of Guideline B in its entirety shows that security concerns can be raised by a variety of foreign connections, not just having family members with foreign government connections. Additionally, the absence of a particular disqualifying condition does not compel a favorable security clearance decision. *See, e.g.*, ISCR Case No. 02-08052 (June 23, 2003) at p. 3.

Regarding the Administrative Judge's overall unfavorable security clearance decision, 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, the extent of his financial and family ties to the United States, favorable character references, and commendable work performance--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 Condition 1, or that Applicant had not met his burden of presenting evidence sufficient to rebut the security concerns raised under Guideline B.

2. Whether the Administrative Judge erred by finding the Applicant's falsification of his security clearance application was deliberate. The Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose his ownership of an apartment in Egypt and the fact that he had served in the Egyptian military. Rather, he contends the omission of the information in question was inadvertent--the result of a misunderstanding. Applicant's argument does not persuade us that the Judge erred.

The Administrative Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question. The Judge was not bound--as a matter of law--to accept or reject Applicant's explanation. Rather, the Judge had to consider Applicant's explanation in light of the record evidence as a whole. Considering the record as a whole, the Judge had a sufficient basis to find that Applicant's omissions were deliberate and intentional. Accordingly, the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

## 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 D. Hipple

Michael D. Hipple

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 the Guideline C allegations. Those favorable findings are not at issue on appeal.

2. Directive, Adjudicative Guidelines, Item E2.A2.1.3.1 ("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").

3. Directive, Adjudicative Guidelines, Item E2.A2.1.2.1 ("An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country").

4. Directive, Adjudicative Guidelines, Item E2.A2.1.2.3. ("Relatives, cohabitants, or associates who are connected with any foreign government").