

DATE: October 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26176

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 to Applicant a Statement of Reasons (SOR), dated June 1, 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 Philip S. Howe issued an unfavorable security clearance decision, dated March 17, 2005.

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 certain comments made by the Administrative Judge about Applicant during the hearing show that Applicant was denied a fair and impartial hearing; and (2) whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with members of his wife's family, who are citizens and residents of the People's Republic of China (PRC). 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. Whether certain comments made by the Administrative Judge about Applicant during the hearing show that Applicant was denied a fair and impartial hearing. On appeal, Applicant complains that the Administrative Judge made comments at the hearing "which insinuate that I may not be very intelligent," are "innuendoes regarding my intelligence [that] totally disregard my academic and professional accomplishments," and are "outrageous and unsubstantiated innuendoes regarding my intelligence . . . [and] malign my good name, character and trustworthiness." In presenting this issue, Applicant focuses on two passages from the hearing transcript:

Judge: You're forty-two years old, right?

Applicant: Yes, your Honor.

Judge: And you have three children, one by your first marriage, and two

by this one. And the children by this marriage are both sons?

Applicant: I have a son, my oldest is a son, and my youngest is a daughter.

Judge: Okay. So, you will be sixty when she graduates from high school?

Applicant: Yes, your Honor.

Judge: I thought engineers were supposed to plan things very well,

drawing diagrams and graphs?

(Hearing Transcript, page 44)

Judge: So, it took you six years to get a Bachelor's Degree?

Applicant: Yes sir.

Judge: Why didn't you just go to a regular four-year college and get a four-year

Degree?

Applicant: Your Honor, I don't know. I didn't have the foresight to go there.

(Hearing Transcript at p. 39)

In the past, the Board has noted that the use of intemperate language by an Administrative Judge could give rise to a question of bias. *See, e.g.*, DISCR Case No. 94-0282 (February 21, 1995) at p. 5. Applicant does not raise a specific claim of bias in this appeal. Rather, he asserts that the Judge's comments were inappropriate and indicate that the Judge totally disregarded evidence establishing Applicant's academic and professional accomplishments, and unfairly maligned his good name and character.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless the Judge indicates the contrary. Likewise, there is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 5. A party seeking to rebut these presumptions has a heavy burden on appeal. In assessing the possible impact the Judge's earlier quoted remarks had on Applicant's right to a fair and impartial hearing and a consideration of all the evidence, the Board will not consider those passages in isolation, but will instead consider the Judge's decision in its entirety to determine any harmful effect. After a review of the Judge's decision in light of the record evidence as a whole and the procedural history of this case, the Board concludes: (a) the Judge's challenged comments could lead a disinterested person to question whether the Judge was indulging in personal criticism or disparagement of Applicant's conduct and situation having no apparent relevance to the issues in the case, but (b) the Judge's challenged remarks did not result in any identifiable impairment of Applicant's right to a fair and impartial hearing or result in a failure to consider record evidence.

2. Whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with members of his wife's family, who are citizens and residents of the People's Republic of China (PRC). On appeal, Applicant asserts that there was no basis for the Administrative Judge to deny him a security clearance based on the fact that Applicant's wife has parents and siblings who are citizens of and residents of the PRC. Applicant argues variously: (a) Since his in-laws are not considered family members under the Directive and Department Counsel conceded the point in closing argument, Applicant's relationship with them does not provide a basis for denying his security clearance; (b) DOHA Administrative Judges made favorable security clearance determinations in two cases similar to Applicant's case; (c) recent facts, statements, and reports concerning the PRC indicate that Applicant is not in a position of vulnerability because of his in-laws in the PRC; (d) the Administrative Judge's conclusion that Applicant's travel to the PRC places him in a vulnerable position is not supported by the record evidence; (e) the Administrative Judge's negative security clearance determination is in conflict with record evidence of Applicant's good character, reputation, trustworthiness, and loyalty and fidelity to the United States. The Board construes these arguments as raising the issue of whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with members of his wife's family, who are citizens and residents of the PRC. For the following reasons, Applicant's arguments are not persuasive.

(a) Applicant argues that it is incongruous for him to receive an adverse security clearance decision based on the status of his in-laws in the PRC when his in-laws are not considered family members under the Directive. He bases his assertion on the following statement made by Department Counsel in closing argument: "Now, in this case the in-laws aren't considered family members under the statute, -or the Directive." As a preliminary matter, neither an Administrative Judge nor the Board is bound by the representations of Department Counsel concerning matters of law.

Significantly, Applicant's argument leaves out the fact that Department Counsel specifically argued that Applicant's in-laws are clearly people that Applicant is at risk to be influenced by, because he has a relationship with them. The mere fact that a person might not be considered an immediate family member is not controlling or dispositive when evaluating whether or not an Applicant's ties to that person have security significance under Guideline B (Foreign Influence). Foreign Influence Disqualifying Condition 1 speaks in terms of immediate family members and persons to whom the individual has close ties of affection or obligation. Similarly, Foreign Influence Disqualifying Conditions 2, 3, and 4 cover associations with persons other than immediate family members that could raise security concerns. Thus, Applicant's in-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. *See, e.g.*, ISCR Case No. 01-03120 (February 20, 2002) at p. 4. The Judge's conclusion that the presence of Applicant's parents-in-law, sisters-in-law and brother-in-law in the PRC raised security concerns under Guideline B (Foreign Influence) is sustainable in light of the record evidence in this case.

(b) Applicant cites two Hearing Office decisions that were favorable to the applicants in those cases in support of his argument that the Administrative Judge should have ruled favorably in his case. Decisions of individual Hearing Office Judges are not binding on other Hearing Office Judges, nor are they binding on the Board. Because the decisions of Hearing Office Judges are not legally binding precedent in other cases, neither a Hearing Office Judge nor the Board is required to distinguish them or justify why they are not persuasive authority. Rather, a party citing such decisions has the burden of demonstrating that the cited decisions addressed similar or identical issues and facts, articulated a rational basis for their conclusions, relied on reasoning or analysis that can be applied to the facts and conclusions of the current case, relied on reasoning or analysis that is consistent with governing legal authorities, or that there are sound reasons the Board should follow the reasoning of the cited cases. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5. On appeal, Applicant has failed to demonstrate that the cited cases articulated a rational basis for their conclusions, or that the cited cases relied on reasoning or analysis that can be applied to the facts and circumstances of this case. Applicant has therefore failed to meet his burden of establishing error on the part of the Administrative Judge.

(c) Applicant proffers a lengthy argument the gist of which is his assertion that recent facts, statements, and reports concerning the nature of the PRC government and its intelligence-gathering activities indicate that he is not in a position of vulnerability because of the presence of his in-laws there. Applicant's argument is based wholly on matters outside the record evidence. The Board is precluded from considering new evidence on Appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, it is untenable to assert error on the part of the Administrative Judge through reference to matters that the Judge did not have before him. Applicant had an opportunity at the hearing to submit matters for the Judge's consideration regarding the nature of the PRC regime and its intelligence-gathering posture. He did not do so. The Judge's findings of fact and conclusions about conditions in the PRC and their effect upon Applicant's in-laws and ultimately Applicant are reasonably supported by the evidence that was included in the record before him.

(d) The Administrative Judge found that Applicant intends to return to the PRC often to visit his wife's family. The Judge then concluded that Applicant's travel to the PRC places him in a vulnerable position if he has access to classified information in his job if PRC agents search his luggage or monitor his phone calls and telefaxes. On appeal, Applicant complains that the Judge's conclusion totally ignores the fact that his travels to China are purely personal in nature and that he is not authorized to do business in the PRC and does not do so. Applicant's contention has merit. The record evidence establishes only that Applicant travels to the PRC for personal reasons. Given this state of the evidence, the Judge fails to articulate a basis for his conclusion that potential searches of Applicant's luggage and monitoring of Applicant's electronic communications has security significance independent of the fact that he has in-laws in the PRC and travels there to visit them. The Board considers this error harmless, however, considering the other conclusions in the Judge's decision that are sustainable.

(e) Applicant asserts that the Administrative Judge's unfavorable security clearance determination is inconsistent with record evidence of Applicant's solid record of achievement and his unquestioned loyalty to the United States. The Judge was required to consider all the record evidence, both favorable and unfavorable. The Judge's weighing of the evidence will not be disturbed on appeal unless there is a showing that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Here, it was not arbitrary or capricious for the Judge to conclude that the

favorable evidence presented by Applicant was not sufficient to rebut or otherwise overcome the security concerns raised under Guideline B (Foreign Influence).

Conclusion

Applicant has failed to satisfy his burden on appeal of demonstrating error requiring remand or reversal. Accordingly, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board