

DATE: December 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26387

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

James Norman, Esq., Department Counsel

Robert Coacher, Esq, Department Counsel

FOR APPLICANT

Philip D. Cave, Esq

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated May 13, 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), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated March 28, 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 the Board has an obligation to substitute its judgment for that of the Administrative Judge; (2) whether the Administrative Judge properly applied Guideline B (Foreign Influence) Mitigating Condition 1. 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 Issue⁽¹⁾

(1) Whether the Board has an obligation to substitute its judgment for that of the Administrative Judge. Applicant asserts that the Board "must substitute its judgement for that of the Administrative Judge" and grant Applicant a clearance. Applicant's assertion runs contrary to the Board's mandate as spelled out in the Directive, Additional Procedural Guidance, Item E3.1.32. The Board's authority is limited to reviewing a decision to ascertain whether a party has identified factual or legal error by the Judge. The Board cannot ignore a Judge's findings and conclusions, re-try a case *de novo*, or make findings of fact or reach conclusions of its own as if it were deciding the case in the first instance. Applicant is asking for relief to which he is not entitled under the Directive.

(2) Whether the Administrative Judge properly applied Guideline B (Foreign Influence) Mitigating Condition 1. The Administrative Judge concluded that the circumstances of Applicant's relatives present in foreign countries did not warrant the conclusion that the second prong of Guideline B (Foreign Influence) itigating Condition 1⁽²⁾

(MC1) applied to Applicant's situation. Applicant cites several items from the record to support his position that Applicant's family members in Iraq, Syria, Germany and Canada are not subject to exploitation in a way that could force Applicant to choose between his loyalty to them and his loyalty to the United States. The Judge made findings consistent with Applicant's citations of favorable evidence. The Judge's findings make clear that he considered Applicant's favorable evidence. Nonetheless, the Judge concluded that the circumstances of Applicant's relatives were such that Applicant had not shown that he met the standards set forth in MC 1. The Judge considered the relevant mitigating condition and concluded that Applicant had not sufficiently mitigated the security concerns raised under

Guideline B. (3)

Applicant's disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 03-12324 (April 21, 2005) at p. 5. At most, Applicant argues for a plausible, alternate interpretation of the record evidence, but fails to demonstrate the Judge's interpretation of the record evidence is arbitrary, capricious, or contrary to law. Applicant has failed to demonstrate error below.

Applicant's argument concerning his credibility does not demonstrate the Administrative Judge erred. A favorable credibility determination does not preclude an unfavorable security clearance decision. It is not arbitrary or capricious for an Administrative Judge to make a favorable credibility determination, but then consider whether the record evidence as a whole raises security concerns that are unrelated to an applicant's candor and honesty. In this case, the Judge's favorable conclusions about Applicant's credibility did not preclude the Judge from reaching unfavorable conclusions about the security concerns raised under Guideline B (Foreign Influence).

CONCLUSION

Applicant has failed to demonstrate error in the decision below. The Administrative Judge's March 28, 2005 decision is affirmed.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Those favorable formal findings are not at issue on appeal.

2. *See* 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." Regarding the bifurcated nature of MC 1, *see, e.g.*, ISCR Case No. 99-0511 (December 19, 2000), at p. 10.

3. Applicant refers to his history of handling classified information without incident. Security concerns can be raised by conduct and circumstances that do not involve a security violation. Indeed, the federal government is not required to wait until a security violation has occurred before it can deny or revoke access to classified information. *Adams v. Laird*,

420 F.2d 230, 239-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).