

DATE: November 17, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ADP Case No. 04-12331

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) proposed to deny or revoke access to automated information systems in ADP-I and ADP-II sensitivity positions for Applicant. On July 28, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested hearing. On April 20, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge's unfavorable trustworthiness determination under Guideline B is arbitrary, capricious, or contrary to law.

(1) Applicant contends that the Administrative Judge's adverse determination should be reversed because the government did a more extensive background investigation than was necessary for his position (ADP II). Specifically, Applicant argues that a full background investigation was not required for the level of trust being sought--only a National Agency Check and a Credit Check was required. In support of his contention, Applicant presents new evidence in the form of a Standard Form 85P, Questionnaire for Public Trust Positions, including instructions. Applicant's argument in this regard lacks merit.

Applicant did not raise this argument below, and the Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider Applicant's additional explanations and evidence, and they do not demonstrate error on the part of the Administrative Judge.

Under the Directive, there is no jurisdiction or authority to adjudicate, in DOHA proceedings, the adequacy of a background investigation. *See, e.g.*, ISCR Case No. 02-07191 at 3 (App. Bd. Mar. 25, 2004). The scope and methods of such investigations are outside the scope of review of the Appeal Board. *See, e.g.*, ISCR Case No. 02-14772 at 4 (App. Bd. July 16, 2004). A favorable clearance determination cannot be made unless there is an affirmative finding that it is clearly consistent with the national interest to grant access to a particular applicant. The actions or inactions of the investigating agency are not probative of an applicant's judgment, reliability, or trustworthiness. *See, e.g.*, 02-05854 at 4 (App. Bd. Apr. 15, 2004). Additionally, an applicant is not entitled to a favorable clearance determination based on a claim of equitable estoppel. *See, e.g.*, ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003). Therefore, the level of

clearance being sought for the Applicant was not relevant or material to the issues in this case and the Judge had no obligation to discuss it or take it into account when making her clearance determination. *See, e.g.*, ISCR Case No. 02-26976 at 4 (App. Bd. Oct. 22, 2004).

(2) Applicant argues that the Administrative Judge's unfavorable clearance decision should be reversed because Applicant's family members in the People's Republic of China (PRC) are not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to them and the United States, and Applicant's strong ties to the United States are sufficient to mitigate the government's security concerns. The Board does not find Applicant's arguments persuasive.

The Applicant had the burden of presenting evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proved or that Applicant admitted regarding his family ties to the PRC, and the Applicant also had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive ¶ E3.1.15. The Administrative Judge had to consider the record evidence as a whole, both favorable and unfavorable, evaluate Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive ¶ Item E3.1.15.

The fact that Applicant's explanations and his mitigating evidence did not lead the Judge to the decision desired by Applicant does not establish error. The presence of some mitigating evidence does not alone compel the Administrative Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. The Judge articulated a rational basis for not favorably applying any mitigating conditions or factors and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guideline B is sustainable.

Finally, Applicant cites several decisions by Hearing Office Judges in other cases, arguing that the favorable results in those cases constitute a reason for reversing the Administrative Judge's unfavorable decision in his case. A decision by a Hearing Office Administrative Judge is not legally binding precedent on other Hearing Office Judges or the Board. *See, e.g.*, ISCR Case No. 01-22606 at 3-5 (App. Bd. June 30, 2003). Accordingly, Applicant's ability to cite Hearing Office decisions in other cases that appear to support his position does not demonstrate the Judge's decision in this case is arbitrary, capricious, or contrary to law. Furthermore, the Board has no obligation to follow the Hearing Office decisions cited by Applicant, and no obligation to reconcile the Judge's decision below with the Hearing Office decisions cited by Applicant.

Order

The decision of the Administrative Judge denying Applicant eligibility for assignment to sensitive duties is **AFFIRMED**.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board