

DATE: March 29, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0317

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated October 31, 2001, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge's favorable conclusions concerning Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law; and (2) whether the Administrative Judge's favorable conclusions concerning Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated June 21, 2001. The SOR was based on Guideline B (Foreign Influence), and Guideline C (Foreign Preference). A hearing was held on September 21, 2001. The Administrative Judge issued a written decision in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from the Judge's favorable 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. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

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 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. *See, e.g.,* ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

Administrative Judge's Findings and Conclusions

Applicant was born and raised in a foreign country (FC 1) by parents who are FC 1 citizens. Applicant performed compulsory military service in FC 1. Applicant later emigrated to the United States in 1976 and became a naturalized U.S. citizen in 1987.

The only time Applicant traveled to FC 1 was in 1984 to visit his family. Applicant allowed his FC 1 passport to expire and he does not currently hold an FC 1 passport or any other foreign passport, and he has no intention of acquiring one.

Applicant owns no land in FC 1 and has no foreign business interests in FC 1. Applicant does not believe he is entitled to receive any benefits from FC 1, and he has no intention of returning to FC 1.

Applicant would not want to take up arms for the United States against FC 1, but he cannot conceive of the United States and FC 1 ever being adversaries of each other. Applicant would not take up arms against the United States for FC 1 and would defend U.S. interests whenever he was called upon. Applicant would be willing to bear arms for FC 1 if it were not in a confrontation or conflict with the United States.

Since becoming a U.S. citizen, Applicant has maintained irregular contacts with his parents and other relatives living in FC 1 and another foreign country (FC 2), and he does not provide them with any financial assistance. Applicant assures that he has no reason to believe that any of his family or relatives are vulnerable to coercion or pressure.

Applicant's father was a high-ranking officer in the FC 1 military, but retired more than 17 years ago. Applicant's father is in no known position to be pressured or coerced by FC 1 authorities.

Applicant has demonstrated that his preference is for the United States because: (a) since becoming a naturalized U.S. citizen, he has not exercised any privileges associated with FC 1 citizenship, and has demonstrated firm support of the United States and its institutions; (b) he holds no property or financial interests in FC 1; (c) Foreign Preference Mitigating Condition 1 ⁽¹⁾ applies; (d) he is a dedicated and trustworthy defense contractor; and (e) his love of FC 1 does not fall under Foreign Preference Disqualifying Condition 9. ⁽²⁾ Favorable conclusions are warranted with respect to the allegations covered by Guideline C.

Because Applicant's parents reside in FC 1, their status raises security concerns under Guideline B. Investigative requirements under Department of Defense Regulation 5200.2-R refer to security risks associated with an individual having family ties in a foreign country whose interests are inimical to the interests of the United States. Although the Adjudicative Guidelines pertaining to Guideline B (Foreign Preference) are ostensibly neutral as to the character of the foreign country involved, the Adjudicative Guidelines should not be construed to ignore the geopolitical aims and policies of the particular foreign regime involved. FC 1 is not considered to be a hostile country. Furthermore, FC 1 has a considerable history of stable democratic institutions and no history of exerting pressure or influence to compromise the security interests of the United States. Accordingly, Foreign Influence Mitigating Condition 1 ⁽³⁾ applies. The presence of Applicant's immediate family members in FC 1 does not present any potential risk of a hostage situation, and it poses an acceptable security risk. Favorable conclusions are warranted with respect to the allegations covered by Guideline B.

It is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues

1. Whether the Administrative Judge's favorable conclusions concerning Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable conclusions concerning Guideline C are erroneous because: (a) the Judge failed to address SOR paragraph 1.b. as amended at the hearing; (b) the Judge erred by failing to apply Foreign Preference Disqualifying Condition 3⁽⁴⁾; and (c) the Judge failed to give due consideration to the security significance of Applicant's willingness to bear arms for FC 1.

(a) In the SOR, paragraph 1.b. read as follows: "You would not bear arms for the United States against [FC 1]." At the hearing, Department Counsel moved to amend SOR paragraph 1.b. to read as follows: "You are willing to bear arms for [FC 1]." The motion to amend was granted by the Administrative Judge and Applicant was given the opportunity to explain his response to the amended SOR paragraph 1.b. *See* Hearing Transcript at pp. 60-68. In the written decision, the Judge discussed the evidence concerning Applicant's position on what he might do if there were a conflict between the United States and FC 1. *See* Administrative Judge's Decision at pp. 3, 6. Department Counsel persuasively argues that the Judge's findings and conclusions focused on the original, unamended SOR paragraph 1.b. and failed to address the amended SOR paragraph 1.b., apart from a passing reference in one sentence.

(b) Given Applicant's statements that he would be willing to bear arms for FC 1, it was arbitrary and capricious for the Administrative Judge to not apply Foreign Preference Disqualifying Condition 3. *See* Directive, Section 6.3 (noting that pertinent provisions of Adjudicative Guidelines must be considered).

(c) A person who is willing to bear arms for a country demonstrates a willingness to risk life and limb for that country. Such a willingness is strong evidence of a profound, deeply personal commitment to the interests and welfare of that country. A person who is willing to bear arms for a country may be willing to perform other acts (which do not entail risk to life and limb) to advance the interests and welfare of that country and its armed forces. Accordingly, a willingness to bear arms for a foreign country raises serious security concerns about an applicant seeking to be granted access to U.S. classified information.

The United States has a compelling interest in protecting classified information,⁽⁵⁾ and must be able to repose a high degree of trust and confidence in persons granted access to classified information.⁽⁶⁾ Furthermore, a person granted access to classified information is in a fiduciary relationship with the United States.⁽⁷⁾ A person who has expressed a willingness to bear arms for a foreign country has indicated a profound, deeply personal commitment to the interests and welfare of the foreign country that could place the person in a serious quandry if the foreign country wishes access to U.S. classified information that it believes would be necessary or desirable for its national security, but which the United States declines to share with the foreign country. The federal government need not take the risk of waiting to see how the person with access to classified information would act if faced with such a quandry at some future date.⁽⁸⁾

Given the serious implications of a person's willingness to bear arms for a foreign country, it was arbitrary and capricious for the Administrative Judge to fail to specifically address the security significance of Applicant's statements that he is willing to bear arms for FC 1.⁽⁹⁾ The Judge's failure to do so is particularly troubling given Applicant's statement that he would want to be neutral if the United States were ever to find itself in conflict with FC 1. An expression of a willingness to bear arms for FC 1, coupled with an expressed desire to remain neutral if the United States were ever to find itself in conflict with FC 1, raises serious questions about Applicant's preferences *vis-a-vis* the United States and FC 1. Equivocal preferences with respect to the United States or a foreign country raise serious security concerns under the "clearly consistent with the national interest" standard.⁽¹⁰⁾

2. Whether the Administrative Judge's favorable conclusions concerning Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable conclusions concerning Guideline B are erroneous because: (a) the Judge gave undue weight to his conclusion that FC 1 is a friendly country unlikely to use coercive means against Applicant or his relatives in FC 1; and (b) the Judge improperly applied the provisions of Section 2-403 of Department of Defense Regulation 5200.2-R.

(a) The Board has held that an Administrative Judge errs by analyzing Foreign Influence Mitigating Condition 1 only in

terms of whether a foreign country might seek to apply coercive means of pressure or influence to an applicant's family members in that foreign country. Under Guideline B, the presence of family members in a foreign country must be evaluated both in terms of (i) possible vulnerability to coercive pressure or influence being brought to bear on, or through, an applicant's family members in a foreign country, and (ii) possible vulnerability to noncoercive means of influence being brought to bear on, or through, an applicant's family members in a foreign country. ⁽¹¹⁾ Department Counsel correctly notes the Judge in this case addressed the issue of possible coercive pressure or influence, but failed to address the issue of possible noncoercive influence. The Judge's failure to do so was arbitrary and capricious.

The Administrative Judge's failure to address Applicant's potential vulnerability to noncoercive means of influence through his family members in FC 1 is significant in of itself. The absence of such an analysis is aggravated by Applicant's acknowledged preference for FC 1 through his willingness to bear arms for FC 1. Once an applicant has expressed a preference for a foreign country then the applicant's other ties to the foreign country are subject to greater scrutiny. ⁽¹²⁾

The Administrative Judge's assumption that FC 1 does not pose a serious security risk in the context of Guideline B because it is friendly to the United States ignores the historical reality that (i) relations between nations can shift, sometimes dramatically and unexpectedly; (ii) even friendly nations can have profound disagreements with the United States over matters that they view as important to their vital interests or national security; and (iii) not all cases of espionage against the United States have involved nations that were hostile to the United States. These historical realities caution against reliance on overly simplistic distinctions between "friendly" nations and "hostile" nations when adjudicating cases under Guideline B. Moreover, any analysis that seeks to rely in part on distinctions between "friendly" nations and "hostile" nations must articulate a rational explanation for why the distinction is relevant when Guideline B fails to articulate such a distinction.

(b) The Administrative Judge's reliance on Section 2-403 of Department of Defense Regulation 5200.2-R is arbitrary, capricious, and contrary to law. Section 2-403 appears in a section of that Regulation which deals with investigations, not adjudications. Furthermore, the silence of Section 2-403 about non-hostage situations is not dispositive because Section 2-403 fails to address a wide variety of clearly security-significant issues. The Judge's reliance on Section 2-403 is patently contrary to a past Board ruling. ⁽¹³⁾ Furthermore, to interpret or construe Section 2-403 as setting the limits or parameters of what constitutes security-significant circumstances would have the practical effect of eviscerating and nullifying large portions of the Adjudicative Guidelines, a result that must be avoided in adjudicating security clearance cases. ⁽¹⁴⁾

Conclusion

Department Counsel has met its burden of demonstrating error below that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable security clearance decision.

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. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."
2. "Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States."
3. "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."
4. "Military service or a willingness to bear arms for a foreign country."
5. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).
6. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).
7. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at pp. 3-4 (citing other Board decisions). The Board notes that a fiduciary duty "is the highest standard of duty implied by law." *Black's Law Dictionary, 6th edition* (West Publishing Co., 1990) at p. 625.
8. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)(government need not wait until a person mishandles or fails to properly safeguard classified information before it can deny or revoke access to such information), *cert. denied*, 397 U.S. 1039 (1970). *Accord Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973).
9. An Administrative Judge's decision can be arbitrary and capricious if: 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. 99-0228 (March 12, 2001) at p. 5.
10. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 8 (an applicant's ambivalent statements about his commitment to the United States can raise doubts about whether the applicant reasonably can be expected to faithfully carry out the fiduciary obligations associated with being granted a security clearance).
11. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at pp. 10-11.
12. *See, e.g.*, ISCR Case No. 99-0532 (February 27, 2001) at p. 5 (indicating an applicant's conduct and circumstances may have security significance under both Guideline B and Guideline C). *See also* Directive, Adjudicative Guidelines, E2.2 (indicating "whole person" concept should be applied in adjudicating a person's eligibility).
13. *See* ISCR Case No. 99-0511 (December 19, 2000) at p. 11 n.5 (explaining why Section 2-403 of Department of Defense Regulation 5200.2-R does not set the limits or parameters of what constitutes security-significant circumstances under the Adjudicative Guidelines).
14. *See, e.g.*, ISCR Case No. 98-0395 (June 24, 1999) at p. 4 n. 2 ("The Directive should be construed broadly to effectuate the purposes of the industrial security program, including the protection of classified information."); ISCR

Case No. 97-0783 (August 7, 1998) at p. 4 (Adjudicative Guidelines should not be construed in a manner that would operate to the detriment of the industrial security program or the national security).