DATE: January 29, 2001

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 00-0244

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael Leonard, Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Jerome H. Silber issued a decision, dated September 12, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge failed to properly consider Outside Activities Mitigating Condition 1 in his resolution of the case; (2) whether the Administrative Judge erred in his factual finding that the person who had supervisory authority over Applicant during approximately 1990 was an active duty military member; (3) whether the Administrative Judge erred in his conclusion that Applicant did not propose to terminate a conflict of interest between one job position and his security responsibilities with a defense contractor; and (4) whether the Administrative Judge erred when he relied on provisions of the United States Constitution and federal law to resolve the case.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated May 25, 2000 to Applicant. The SOR was based on Guideline L (Outside Activities).

A hearing was held on August 18, 2000. The Administrative Judge issued a written decision dated September 12, 2000 in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse decision.

Administrative Judge's Findings

Applicant served on active duty in the U.S. military as an officer from 1962 until his retirement in 1982. He has drawn military retired pay ever since. In 1988 he went to work for a private defense firm (hereinafter Company 1). In 1990 he was assigned by Company 1 to work with the foreign military sales (hereinafter FMS) section of a major U.S. Naval command. The government of a foreign country (hereinafter FC) was purchasing services from that command. The U.S.

Navy had contracted with Company 1 to perform the services required by FC. The job required Applicant to generally assist FC in finding appropriate offset work for FC's defense firms for increased sales by them to the U.S. Department of Defense. Applicant was the only employee in Company 1 assigned to that work.

Day-to-day control and supervision of the Applicant rested with an active duty U.S. naval officer. That officer filed periodic reports concerning Applicant's efforts with an assistant defense attache stationed in the embassy of FC in Washington D.C. The Naval officer in charge was frequently out of the office on temporary duty and in his absence Applicant often answered the phone calls made by FC's embassy to the FMS section. On one such occasion the FC embassy phoned and asked Applicant to drop what he was doing and come personally to the embassy to discuss a project. Applicant complied. The Naval officer in charge of the FMS section later told Applicant that he was not to go to the FC embassy unless he was personally authorized to do so by the Naval officer. On a second occasion Applicant went to the FC embassy while the Naval officer was absent even though Applicant told the embassy that he was not authorized to visit the embassy. Upon learning of the second visit the Naval officer told Applicant he was fired.

In about 1991 FC decided to terminate its FMS agreement with the U.S. government and to contract directly with Company 1 to obtain the continuation of Applicant's services, to cut out the U.S. Navy as "an unnecessary middleman" and to reduce administrative costs. Applicant was physically located within Company 1 and under revised agreements he submitted periodic reports of his efforts through Company 1 directly to the assistant defense attache at the FC embassy. He was the only employee of Company 1 assigned to that work.

About five years later the assistant defense attache retired from his tour at the FC embassy and left an empty office. Since Applicant had been routinely visiting the FC embassy, the embassy and Company 1 arranged for Applicant to permanently work in the vacant embassy office. Applicant submits his periodic reports directly to the Defense Department of FC. He has a business card with an FC title and an FC government seal. He continues to submit his time and attendance records to Company 1 in order to get paid by them. He considers his immediate superiors to be specified officials of the FC embassy. He has acknowledged that the FC officials have the ability to get him fired. He has traveled two or three times to FC on business to participate in export conferences. His travel expenses are reimbursed directly by the FC embassy outside the contract price with Company 1.

In October 1998 Applicant agreed to start working part-time for a U.S. Government contractor (hereinafter Company 2) as a consultant. Applicant estimates that he works about 20 hours or two days a week for Company 2 and about 40 hours or about three days a week at the FC embassy for Company 1. Applicant received permission from the FC embassy in 1998 to share his time as a contract employee of Company 2. Company 2 is aware of Applicant's work with the FC embassy and "support[s] a waiver of Guideline L (Outside Activities) in favor of [the Applicant] in order to allow him to receive a security clearance."

Administrative Judge's Conclusions

The Government has established its case with regard to Guideline L. Applicant is a retired regular officer of the U.S. military who is currently employed by Company 1 as an independent contractor assigned to work in the FC embassy under the supervision of embassy officials to assist the FC government by advising FC defense industries concerning expansion of their exports. Although Applicant continues to be paid by Company 1 pursuant to its contract with the FC government, the right to control the performance of Applicant's work and the manner in which it is done has rested with the FC embassy since about 1991. Applicant concedes that he could be effectively fired now by his embassy superiors. The fact pattern presented by Applicant's current service since 1991, whether it be considered outside employment or outside activities, falls *prima facie* within Outside Activities Disqualifying Condition 1[(1)] because it could raise a present security concern based on a conflict with the security responsibilities he seeks.

It is well-settled that a retired member of the U.S. Armed Forces holds an "Office of Profit or Trust" of the Federal Government. The history of Article I, Section 9, Clause 8[(2)] of the United States Constitution indicates that the evil intended to be avoided is the exercise of "undue influence" by a foreign government upon officers of the United States. For the last 23 years a statutory scheme has existed wherein Congress grants its consent to the civil employment by a foreign government of certain categories of persons otherwise subject o the Constitutional prohibition, including military personnel. The Constitutional provision is applicable where the retired military person is technically hired by a

private firm but is a de facto employee of a foreign government, as a series of decisions by the Comptroller General of the United States has "pierced the corporate veil" where the foreign government has the right to control the performance of the person's work and the manner in which his or her work is done. The rationale of those decisions is accepted for purposes of Guideline L. Under the facts of this particular case it is clear that Outside Activities itigating Condition 1[(3)] is not met.

The nature of Applicant's conduct and the surrounding circumstances are serious notwithstanding his contributions to the defense capabilities of FC, a U.S. ally. The potential for pressure and exploitation or inadvertent, unauthorized disclosure of U.S. classified information cannot be discounted. The Applicant does not propose to terminate his conflict of interest. On balance, Applicant is ineligible for a U.S. security clearance.

Appeal Issues

1. Whether the Administrative Judge failed to properly consider Outside Activities Mitigating Condition 1 in his resolution of the case. Applicant asserts that the Administrative Judge at no time in his discussion or conclusions appeared to take into account the "very basis" of his case, which is that Applicant's employment with the embassy of FC does not pose a conflict with his security responsibilities. In essence, Applicant is arguing that Outside Activities Mitigating Condition 1 should apply to his case because (a) a special relationship exists between FC and the United States, and (b) the circumstances of Applicant's position with Company 1 and the FC preclude any possibility that he could be the subject of undue influence. In conjunction with these assertions, Applicant requests that the Administrative Judge's conclusions be reviewed for specific lack of content and that the Judge's decision be reversed.

Applicant's comments about the Administrative Judge failing to take into consideration the basis of his case and the specific lack of content in the Judge's conclusions raises the initial issue of whether the Judge articulated with sufficiency matters in mitigation asserted by Applicant and explained adequately why he did not employ Outside Activities Mitigating Condition 1 in Applicant's favor. Administrative Judge's decisions are not measured against a standard of perfection and there is no general requirement that a Judge recite or comment upon each piece or portion of evidence in the record when issuing a decision. In the present case the Administrative Judge discusses Outside Activities Mitigating Condition 1 mostly in terms of a current conflict of interest created by operation of the Constitution and federal law. His decision focuses on these laws, the retired military status of the Applicant and the resulting conflict and there is no detailed discussion of how undue influence is established by the facts of the case. Nevertheless, at one point the Judge clearly indicates his concern about undue influence. He clearly states his conclusion that Outside Activities Mitigating Condition 1 does not operate to overcome the government's case against Applicant. The Judge does not engage in a sufficiently detailed analysis of the potential for undue influence based on the facts of this case. However, the Board finds that given the particular record evidence the Judge's failure constitutes harmless error.

Applicant argues that it was error for the Judge to fail to consider what he has labeled the "special relationship" between FC and the United States when evaluating this case. It should be noted at the outset that Applicant's discussion about that "special relationship" in his appeal brief contains numerous factual assertions that are not found in the record below. The Board is precluded from considering new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29.

Concerning the assertions of a special relationship between the United States and FC, the Administrative Judge's decision clearly reflects his understanding that FC is an ally of the United States and there is a close working relationship between the two governments. As for the Judge's failure to articulate reasons as to why that relationship was not mitigating, it was not error for the Administrative Judge to fail to discuss this aspect of the case for reasons that will be discussed below

Guideline L indicates that it addresses the security concerns created when an applicant engages in outside employment or activities that pose a conflict with a person's security responsibilities and could create a risk of unauthorized disclosure of classified information. Guideline L specifically indicates that employment with a foreign country or entity can raise such security concerns. The term "foreign" is not defined in Guideline L nor is it modified or qualified. Thus, nothing in the plain language of Guideline L requires that the foreign country in question have interests that are inimical

to the interests of the United States. The federal government is entitled to protect classified information from any person, organization, or nation not authorized to receive it, regardless of whether that person, organization, or nation has interests inimical to those of the United States. *See* ISCR Case No. 97-0699 (November 24, 1998) at p.3. *Accord* ISCR Case No. 98-0592 (May 4, 1999) at p. 3. "[T]he Government's 'compelling interest' in withholding national security information from unauthorized persons," *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988), is not reduced or diminished because the risk of unauthorized disclosure involves a foreign country that is an ally of, or is friendly to, the United States. Nothing in Executive Order 10865 or the Directive indicates or suggests that the unauthorized disclosure of classified information is any less a security concern if it is made to a foreign country that has friendly relations with the United States than if it is made to a foreign country that does not have friendly relations with the United States. The Applicant has not demonstrated that the Administrative Judge erred by failing to apply Outside Activities Mitigating Condition 1 in his favor based on the relationship between FC and the United States.

Applicant also advances his argument with regard to the applicability of Outside Activities Mitigating Condition 1 by providing reasons why he could not be the subject of undue influence. He claims that his duties with Company 1 and the FC embassy are very specific and are spelled out by contract or memorandum agreement and any attempt by an FC official to attempt to obtain classified information or otherwise assert undue influence in order to gain access to classified information would be outside his job description and contractual obligations. Applicant challenges the Judge's assertion that he could effectively fired from his job by FC embassy personnel by stating that although he would be removed from that particular position, he would still have a job with Company 1. Applicant further states that he could potentially make more money by working exclusively for Company 2. In other words, Applicant contends he cannot be the target of undue influence because he really doesn't need his position with Company 1 in the FC embassy.

Applicant's appeal brief advances his particular interpretation of the record evidence. That interpretation is neither conclusive nor is it binding on the Administrative Judge. It is the duty of the Administrative Judge to weigh all the evidence in the record, both favorable and unfavorable and to draw reasonable inferences therefrom. Absent a showing that the Judge acted in a manner that was arbitrary, capricious or contrary to law, his findings and conclusions will not be disturbed on appeal. While the Judge based much of his analysis of the applicability of Outside Activities Mitigating Condition 1 on federal case law that was outside the record, he also stated that "the potential for pressure and exploitation or inadvertent disclosure of U.S. classified information cannot be discounted here." As Department Counsel contends, there is record evidence supporting a conclusion that Applicant has failed to satisfy his burden of establishing that his position with Company 1 would not conflict with his security responsibilities at Company 2. The Judge's adverse conclusion is sustainable on alternate grounds supported by record evidence.

2. Whether the Administrative Judge erred in his factual finding that the person who had supervisory authority over Applicant during approximately 1990 was an active duty military member. For an unspecified period during 1990, Company 1 contracted with the U.S. Navy to perform work which included Applicant's job of interacting with the FC embassy. During this period an employee of the U.S. Navy had supervisory authority over Applicant. The Administrative Judge specifically identifies this person as an active duty military member. Applicant asserts on appeal that the person is a civilian. The record below does not reveal this person's status. Department Counsel concedes that the record is not clear on this point. A reading of the record and the Administrative Judge's decision reveals that the military or non-military status of this particular individual is not material to the issues in the case nor is it germane to the Judge's analysis. Accordingly, while the record does not support the Judge's finding that the individual was a member of the military, the Judge has committed harmless error. *See, e.g.*, ISCR Case No. 99-0500 (May 19, 2000) at p. 3 (error is harmless when there is not a significant chance that it fatally affects an otherwise sustainable decision).

3. Whether the Administrative Judge erred in his conclusion that Applicant did not propose to terminate a conflict of interest between one job position and his security responsibilities with a defense contractor. Applicant takes issue with the Administrative Judge's conclusion that Applicant does not propose to terminate his conflict of interest. Applicant asserts on appeal that the record evidence shows he merely expressed a hope that he would not have to make that decision. Applicant suggests that if forced to make a decision, he might well decide to terminate his position with Company 1. Although he does not say so explicitly in his decision, the Judge appears to be commenting on the applicability of Outside Activities Mitigating Condition 2.[(4)] That mitigating guideline operates only when a termination of the conflict has already taken place. *Cf.* ISCR Case No. 99-0447 (July 25, 2000) at p. 3 ("A promise to take remedial steps in the future is not evidence of reform or rehabilitation."). The Judge's statement that Applicant had

not proposed to terminate the conflict of interest was a fair characterization of Applicant's ambivalence on the matter. Applicant has failed to demonstrate that the Judge erred.

4. Whether the Administrative Judge erred when he relied on provisions of the United States Constitution and federal law to resolve the case. In his decision the Administrative Judge advanced the applicability of Article I, Section 9, Clause 8 of the United States Constitution, related federal laws and federal decisions interpreting those laws. He concluded that this body of law operated in Applicant's case to show the existence of a real conflict of interest as opposed to a hypothetical or potential one, essentially because of Applicant's status as a retired military officer. On appeal, Applicant complains that the Judge's reference to the Constitution was inappropriate. In its reply brief, Department Counsel notes that none of these matters raised by the Judge were included in the SOR and that nothing in Executive Order 10865 or the Directive makes an applicant's eligibility for military retirement pay material or relevant to a security clearance decision. Department Counsel states that the applicable legal standards are the Adjudicative Guidelines in the Directive and characterizes the Judge's reliance on the foreign employment restrictions in federal law as "arguably erroneous." Notwithstanding this assessment, Department Counsel argues that the Judge's ultimate decision is sustainable based on the record evidence and Guideline L. In essence, Department Counsel is arguing that the Administrative Judge's decision should be affirmed on alternate grounds. *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 ("Even in the absence of a cross-appeal, the non-appealing party is entitled to urge affirmance of the decision below on the basis of any matter supported by the record, even if the argument relies on matters overlooked, ignored, not relied on, or even rejected by the lower tribunal.").

As Department Counsel notes, there is no denial of procedural due process stemming from the Judge's consideration and use of federal law, even though it was outside the Directive and was not offered by either party. During the course of the proceedings below, the Judge informed both parties that he deemed the federal law materials relevant to the case and he gave both parties an opportunity both before and after the hearing to offer their comments about the materials. Applicant's objection on appeal goes to the appropriateness of relying on the material, not to any surprise or lack of notice of the Judge's decision to rely on matters outside the Directive and the record.

Even without prompting from the parties an Administrative Judge can take administrative notice of any pertinent federal court decision. ISCR Case No. 98-0507 (May 17, 1999) at p. 5. There is no obvious reason why a Judge could not take administrative notice of a pertinent decision by the Comptroller General of the United States or a pertinent opinion by the Attorney General of the United States. The larger question in this case is the appropriateness of the Judge's use of federal law and Applicant's retired military status as a principal underpinning of his decision that Applicant had failed to establish a case in mitigation under Outside Activities Mitigating Condition 1. The Judge analyzed the Constitution and other federal law along with Applicant's status as a retired military member to conclude there was a current, ongoing conflict of interest that rendered Applicant ineligible for a security clearance. The Judge's efforts to conclude a current conflict existed based on matters outside Guideline L was unnecessary. As Department Counsel argues, there is an adequate basis in the record for concluding that Applicant's duties with Company 1 are incompatible with any security responsibilities he would have by virtue of receipt of a security clearance while employed with Company 2.

Notwithstanding Applicant's assertions to the contrary, his attaining of a security clearance under his current employment circumstances would raise serious security concerns even if he was not a retired military member and had no connection to any federal office. The record evidence shows Applicant not only works with representatives of a foreign government in his Company 1 employment. He works with persons who are in the FC defense establishment. His work on defense projects for Company 1 and FC would be closely if not directly related to his defense-related work at Company 2. Under these circumstances, even if the likelihood of undue influence, coercion or pressure to disclose classified information could be discounted, the possibility of inadvertent disclosure cannot. The facts and circumstances of Applicant's case clearly raise the kinds of security concerns that fall under Guideline L. The record evidence in this case provides a rational basis for the Administrative Judge's conclusion that Applicant failed to overcome the government's case and failed to establish that his current employment situation would not pose a conflict of interest with his security responsibilities. Unless an applicant meets his or her ultimate burden of persuasion (Directive, Additional Procedural Guidance, Item E3.1.15), a Judge must resolve any security concerns in favor of the national security. *See* Directive, Item E2.2.2 ("Any doubts as to whether access to classified information is clearly consistent with the national security will be resolved in favor of the national security."). The facts and circumstances of Applicant's conduct and situation provide a rational basis for doubts concerning Applicant's security eligibility. Accordingly, those doubts must

be resolved in favor of the national security.

Conclusion

Applicant has failed to meet his burden of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's September 12, 2000 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. Disqualifying Condition 1 (Directive, E2.A12.1.2.1) reads as follows: "Conditions that could raise a security concern and may be disqualifying include any service, whether compensated, volunteer, or employment with: a foreign country."

2. The Clause reads in pertinent part: "[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the consent of Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

3. Outside Activities Mitigating Condition 1 (Directive, E2.A12.1.3.1.) reads as follows: "Evaluation of the outside employment or activity indicates that it does not pose a conflict with an individual's security responsibilities."

4. "The individual terminates the employment or discontinues the activity upon being notified that it is in conflict with his or her security responsibilities."