

DATE: February 1, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0484

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Katherine M. Allen, Esq.

Administrative Judge Paul J. Mason issued a decision, dated June 8, 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.

This appeal presents the following issues: (1) whether the Administrative Judge misapplied Foreign Influence Mitigating Conditions 1 and 3; and (2) whether the Administrative Judge's favorable security clearance decision should be sustained or reversed.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 11, 2000. The SOR was based on Guideline B (Foreign Influence) and Guideline C (Foreign Preference). A hearing was held on January 30, 2001.

The Administrative Judge issued a written decision, dated June 8, 2001, 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 security clearance 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).

Appeal Issues

The Administrative Judge found in favor of Applicant with respect to the SOR paragraphs concerning Guideline C (Foreign Preference) and entered formal findings for Applicant in connection with those SOR paragraphs. The Judge's favorable conclusions under Guideline C are not at issue on appeal.

1. Whether the Administrative Judge misapplied Foreign Influence Mitigating Conditions 1 and 3. The Administrative Judge concluded that Foreign Influence Mitigating Conditions 1 and 3 applied. Department Counsel challenges the Judge's application of those two provisions of the Adjudicative Guidelines. For the reasons that follow, the Board concludes Department Counsel's arguments have mixed merit.

a. Foreign Influence Mitigating Condition 1. (1) Department Counsel contends the Administrative Judge misapplied this provision of the Adjudicative Guidelines because: (i) the Judge improperly shifted the burden of proof from Applicant to the government with respect to Foreign Influence Mitigating Condition 1; (ii) the Judge failed to consider the possibility that other forces might influence or coerce Applicant through his sister in a foreign country (FC); (iii) the Judge ignored the fact that FC has an authoritarian regime with a history of hostage-taking; and (iv) the Judge ignored evidence that showed Applicant complied with directions of FC officials concerning the use of an FC passport because he was afraid of confronting them over the issue and that evidence is relevant to considering how Applicant might act if the FC government were to exert influence or pressure on Applicant's sister in FC.

(i) Applicant correct notes that the Administrative Judge properly stated the burdens of proof for Department Counsel and Applicant. However, after properly stating the burdens of proof for each party, the Judge proceeded to analyze Applicant's case under Foreign Influence Mitigating Condition 1 in a manner that had the practical effect of deviating from the burdens of proof for Department Counsel and Applicant.

There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also Dorfman v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)(there is no presumption in favor of granting a security clearance), *cert. denied*, 499 U.S. 905 (1991). Furthermore, an applicant has the burden of presenting evidence to: (a) refute or rebut the government's case against the applicant, or (b) extenuate or mitigate the facts and circumstances of the applicant's case that have been admitted or proven. *See* Directive, Additional Procedural Guidance, Item E3.1.15. (2) Accordingly, an applicant has the burden of demonstrating that a mitigating condition under the Adjudicative Guidelines applies and that burden of proof is not met merely because a Judge concludes that Department Counsel did not present evidence to disprove the applicability of a mitigating condition. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 11); ISCR Case No. 99-0519 (February 23, 2001) at p. 12; ISCR Case No. 99-0601 (January 30, 2001) at p. 7 and n.1.

The record evidence that Applicant had a sister in FC gave rise to a security concern that placed the burden on Applicant to demonstrate his ties with his sister in FC did not place him in a position of vulnerability through possible foreign influence. *See, e.g.*, ISCR Case No. 00-0737 (September 7, 2001) at p. 5; ISCR Case No. 99-0532 (February 27, 2001) at p. 7. In this case, the Judge's analysis had the practical effect of concluding Applicant was entitled to application of Foreign Influence Mitigating Condition 1 because Department Counsel had not presented evidence to disprove its applicability. The Judge's analysis was arbitrary, capricious, and contrary to law. Furthermore, the Judge's erroneous analysis was crucial to his favorable conclusions under Guideline B (Foreign Influence).

(ii) Our reading of the decision does not lead us to conclude that the Administrative Judge was unaware of the need to

consider whether Applicant might be at risk if others tried to coerce or pressure Applicant's sister in FC. Department Counsel's conclusory contention to the contrary is not persuasive.

(iii) Applicant correctly notes that at the hearing Department Counsel did not present or develop evidence about the nature or history of the FC government and did not ask the Administrative Judge to take official or administrative notice of the nature or history of the FC government. If Department Counsel wanted the Judge to take into account the nature or history of the FC government in connection with evaluating Applicant's security eligibility, then Department Counsel could have presented or developed evidence at the hearing concerning that subject or asked the Judge to take official or administrative notice of it. To the extent that Department Counsel did not present or develop such evidence at the hearing, Department Counsel cannot fairly contend the Judge erred. The Board concludes that if a party does not ask for a Judge to take official or administrative notice of a fact during the proceedings below, that party has a very heavy burden on appeal of demonstrating it was arbitrary or capricious for the Judge to not take official or administrative notice *sua sponte*.⁽³⁾ Department Counsel's appeal argument fails to meet that heavy burden in this case.

(iv) The record evidence cited by Department Counsel in support of this appeal argument falls far short of supporting its assertion that Applicant's conduct demonstrated that "Applicant's attitude toward [FC], even after he became a United States citizen, has been one of unquestioning acquiescence." However, the record evidence cited by Department Counsel does have some probative value as to the issue of whether Applicant complied with directions of FC officials concerning the use of an FC passport because he was afraid of confronting them over the issue, and that evidence is relevant to a consideration of how Applicant might act if the FC government were to exert influence or pressure on his sister in FC. Standing alone, this argument is not sufficient to demonstrate the Administrative Judge erred. However, this evidence is relevant to analyzing the facts and circumstances of Applicant's case under Guideline B (Foreign Influence). *See, e.g.*, DISCR Case No. 91-0775 (August 25, 1992) at pp. 3-4 (noting that pieces of evidence should not be viewed in isolation, and recognizing that matters which may appear to be innocuous when viewed individually may be significant when viewed with other evidence)(citing federal cases).

b. Foreign Influence Mitigating Conditions 3.⁽⁴⁾ Department Counsel argues the Administrative Judge misapplied this mitigating condition because although Applicant's contacts with his sister in FC may be infrequent, they cannot be considered casual. Applicant argues that nothing in the language of this mitigating condition precludes its application to an applicant's immediate family members, and the record evidence shows that his contacts with his sister in FC since 1978 have been casual.

Nothing in the plain language of Foreign Influence Mitigating Condition 3 precludes its application to an applicant's immediate family members. *See, e.g.*, ISCR Case No. 98-0592 (May 4, 1999) at p. 7. Given the security concerns of Guideline B (Foreign Influence),⁽⁵⁾ the language of Foreign Influence Disqualifying Condition 1,⁽⁶⁾ and the common sense observation that family ties are generally stronger than nonfamily ties, evidence that an applicant has contacts with an immediate family member in a foreign country raises a rebuttable presumption that those contacts are not casual in nature. As noted earlier, an applicant has the burden of presenting evidence to refute or rebut the government's case against the applicant, or extenuate or mitigate the facts and circumstances of the applicant's case that have been admitted or proven. Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant had demonstrated that his contacts with his sister in FC fell within the scope of Foreign Influence Mitigating Condition 3. However, application of Foreign Influence Mitigating Condition 3 does not demonstrate much about the vulnerability of Applicant to pressure or coercion that could be exercised through or upon his sister in FC.

2. Whether the Administrative Judge's favorable security clearance decision should be sustained or reversed.

Department Counsel contends the Administrative Judge's decision should be reversed. Applicant contends that the Judge's decision should be affirmed because: (a) the Judge did not err as contended by Department Counsel, or (b) in the alternative, the Judge's favorable decision is sustainable on other grounds in the record. As discussed earlier in this decision, Department Counsel's appeal arguments have mixed merit. To the extent that the Board has concluded that Department Counsel's arguments have merit, it is necessary to consider Applicant's alternative argument.

Applicant correctly notes that an nonappealing party is entitled to urge affirmance of the decision below on the basis of any argument supported by the record. *See, e.g.*, ISCR Case No. 00-0057 (April 4, 2001) at p. 5; ISCR Case No. 00-

0244 (January 29, 2001) at p. 7. Accordingly, it is legally permissible for Applicant to argue that even if the Judge erred as claimed by Department Counsel, the Board should affirm the Judge's decision on alternate grounds supported by the record below.

As discussed earlier, the Administrative Judge erred by concluding Applicant was entitled to application of Foreign Influence Mitigating Condition 1 because Department Counsel had not presented evidence to disprove its applicability. Applicant argues that even if the Judge erred by placing an improper burden of proof on Department Counsel, the record "is more than sufficient to support affirmance of the Administrative Judge's decision in favor of [Applicant] on Guideline B." Although legally permissible, Applicant's argument is not persuasive. Considering the record as a whole, the Judge's error concerning Foreign Influence Mitigating Condition 1 was crucial to his favorable security clearance decision.

Furthermore, the record evidence that showed Applicant complied with directions of FC officials concerning the use of an FC passport is relevant and has some probative value under Guideline B (Foreign Influence) and cannot be ignored by the Board when it considers Applicant's argument for affirming the decision below on alternate grounds.

Applicant also relies on his testimony about what he would do if anyone ever tried to pressure him for information. However sincere and credible Applicant's testimony may be on that matter, his statements about what he would do if faced with a possible future situation are not entitled to much weight. *See, e.g.*, ISCR Case No. 99-0532 (February 27, 2001) at pp. 7-8. Moreover, the record evidence of Applicant's opinion about the security significance of his sister living in FC is not controlling or dispositive. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 12; ISCR Case No. 99-0601 (January 30, 2001) at pp. 8-9. Accordingly, Applicant's testimony and statements on these matters do not support a conclusion that the Administrative Judge's decision should be affirmed on alternate grounds.

Finally, the Board's ruling that the Administrative Judge did not err by applying Foreign Influence Mitigating Condition 3 does not lead it to conclude the Judge's favorable decision should be affirmed on alternate grounds. Pertinent provisions of the Directive (including applicable provisions of the Adjudicative Guidelines) must be considered and applied in adjudicating an applicant's security eligibility. However, the applicability *vel non* of an Adjudicative Guidelines disqualifying condition or mitigating condition is not dispositive of a case. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 10. Rather, application of pertinent disqualifying or mitigating conditions must be considered in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 10.

Considering Applicant's arguments in light of the record as a whole and pertinent provisions of the Directive, the Board concludes the Administrative Judge's decision is not affirmable on alternate grounds. At most, Applicant's arguments demonstrate that his case is a close one. However, given the "clearly consistent with the national interest" standard, close cases must be resolved in favor of the national security. Directive, Section E2.2.2. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 8.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Applicant has not persuaded the Board that the Administrative Judge's favorable decision should be affirmed on alternate grounds. Accordingly, the Board reverses the 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. "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."
2. Because of the "clearly consistent with the national interest" standard, an applicant's burden under Item E3.1.15 is a heavy one. *See, e.g.*, ISCR Case No. 00-0291 (August 13, 2001) at pp. 7-8.
3. The taking of official or administrative notice could have consequences that might require an Administrative Judge to inform the parties that such notice would be taken of certain facts.
4. "Contact and correspondence with foreign citizens are casual and infrequent."
5. "A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure."
6. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."