

DATE: February 24, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0628

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Claude R. Heiny issued a remand decision, dated June 25, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed.

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 material issue: whether the Administrative Judge failed to make an overall commonsense decision because he evaluated Applicant's conduct and circumstances under each Guideline in a piecemeal fashion rather than in its entirety. For the reasons that follow, the Board reverses the Administrative Judge's remand decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 22, 2001. The SOR was based on Guideline E (Personal Conduct), Guideline B (Foreign Influence); Guideline C (Foreign Preference), and Guideline L (Outside Activities).

A hearing was held on June 21, 2001. The Administrative Judge issued a written decision, dated September 17, 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 the Judge's favorable decision. On April 26, 2002, the Board issued an Appeal Board Decision and Remand Order, sending the case back to the Judge with various instructions.

On June 25, 2002, the Administrative Judge issued a written remand decision, in which he again concluded that 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 remand 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 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 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. *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 Issue

On appeal, Department Counsel: (a) challenges the Administrative Judge's findings and conclusions under Guidelines B, C, E, and L as being arbitrary, capricious, or contrary to law; and (b) contends the Judge did not make an overall commonsense decision because he evaluated each Guideline in a piecemeal fashion, rather than analyzing the Applicant's conduct and circumstances in their entirety. Applicant's reply brief: (i) takes exception to various statements in Department Counsel's appeal brief, arguing that many of them are factually inaccurate and do not accurately reflect the record evidence; (ii) presents various counterarguments to Department Counsel's appeal arguments; and (iii) contends the Judge's findings and conclusions should be upheld on appeal. The Board construes Department Counsel's appeal as raising the following material issue: whether the Administrative Judge failed to make an overall commonsense decision because he evaluated Applicant's conduct and circumstances under each Guideline in a piecemeal fashion rather than in its entirety.

Applicant contests many of Department Counsel's characterizations of the record evidence. On appeal, each party is entitled to characterize the record evidence in a manner most favorable to its position, provided it does so within the bounds of legitimate advocacy. In any event, the Board relies on the record evidence itself, not a party's characterization of that evidence, when considering appeal issues raised by the parties. If the nonappealing party identifies factual inaccuracies in the appealing party's appeal brief, the Board will take that into account when considering the appealing party's arguments.

Whether the Administrative Judge failed to make an overall commonsense decision because he evaluated Applicant's conduct and circumstances under each Guideline in a piecemeal fashion rather than in its entirety. Department Counsel alternates between challenging some of the Administrative Judge's findings and conclusions under each of the Guidelines alleged in the SOR, and arguing that the Judge's favorable security clearance decision should be reversed because the Judge failed to make an overall commonsense decision because he evaluated Applicant's conduct and circumstances under each Guideline in a piecemeal fashion rather than in their entirety. ⁽¹⁾

The Board does not find persuasive the following contentions made by Department Counsel: (a) the Administrative Judge improperly shifted the burden of proof onto Department Counsel; (b) the Judge ignored certain record evidence in making his findings of fact; and (c) the Judge erred by finding credible Applicant's testimony explaining the matters covered by SOR paragraphs 1.a and 1.b.

(a) After reviewing the decision below, the Board is not persuaded that the Administrative Judge improperly shifted the burden of proof onto Department Counsel. Although Department Counsel persuasively identifies some factual and legal errors by the Judge, none of the specific errors identified appear to involve an impermissible shifting of the burden of proof by the Judge.

(b) There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge

specifically states otherwise. Even if an appealing party persuasively argues that a Judge made factual or legal errors, it does not necessarily follow that those errors were the result of the Judge failing to consider record evidence. To the extent that Department Counsel argues the Administrative Judge failed to consider certain record evidence, it has failed to overcome that rebuttable presumption.

(c) Department Counsel contends the Administrative Judge erred by finding credible Applicant's testimony explaining the matters covered by SOR paragraphs 1.a and 1.b (these paragraphs pertain to Applicant's statements about providing a laptop computer to the Palestinian Intifada). A Judge's credibility determinations are entitled to deference on appeal (Directive, Additional Procedural Guidance, Item E3.1.32.1), and the party challenging a Judge's credibility determinations has a heavy burden of persuasion on appeal. The Board need not agree with the Judge's acceptance of Applicant's explanation about the matters covered by SOR paragraphs 1.a and 1.b to conclude Department Counsel's arguments fall short of demonstrating the Judge's favorable credibility determination is not sustainable. ⁽²⁾

The Board finds persuasive the following contentions made by Department Counsel: (d) the Judge erred by finding that Applicant's acceptance of benefits from the Swedish government ended in 1993; (e) the Judge's analysis erroneously assumed that Guideline B is limited to situations in which foreign governments attempt to coerce classified information from an applicant through intimidation; and (f) the Judge misapplied Foreign Influence Mitigating Condition 3.

(d) The Administrative Judge erred by finding that Applicant's acceptance of benefits from the Swedish government ended in 1993. There is record evidence that Applicant has accepted, up to the date of the hearing, benefits from a Swedish educational institution that is subsidized by the Swedish government.

(e) The Administrative Judge erred in his analysis of Applicant's foreign contacts by relying on his conclusion that some of those foreign contacts "are not agents of a foreign power and there is no evidence that they have been subject to any undue attention by foreign authorities." Under Guideline B, foreign influence is not limited to consideration of foreign contacts or connections that may place an applicant in a position of vulnerability to coercion or blackmail. Rather, foreign contacts or connections must be evaluated in terms of whether they place an applicant in a position of vulnerability to be influenced by coercive or noncoercive means. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6. Furthermore, a Judge needs to consider whether an applicant's conduct and circumstances place him or her in a position of vulnerability even if there is no evidence that a foreign country has in fact sought to exploit that vulnerability. *See, e.g.*, ISCR Case No. 01-10301 (December 30, 2002) at pp. 8-9; ISCR Case No. 01-26893 (October 16, 2002) at p. 10. And, in any event, although many of the foreign contacts Applicant has may seem relatively innocuous, their security significance cannot be considered in isolation, but rather must be considered in light of the other record evidence in this case. *See* pages 5-7 of this decision.

(f) Department Counsel persuasively argues the Administrative Judge erred by applying Foreign Influence Mitigating Condition 3 ⁽³⁾ in evaluating Applicant's contacts with various foreign citizens. Although the record evidence indicates Applicant's contacts with any given foreign citizen may be relatively infrequent, the totality of Applicant's contacts with various foreign citizens is not

minor or trivial. Furthermore, although some of Applicant's contacts with foreign citizens could be characterized as casual, some of them cannot fairly be so characterized. Considering the record evidence as a whole, the Judge failed to articulate a rational basis for applying this mitigating condition.

Department Counsel makes a variety of arguments in support of its contention that Administrative Judge failed to make an overall commonsense decision because he evaluated Applicant's conduct and circumstances under each Guideline in a piecemeal fashion rather than in its entirety. The Board need not specifically address each of Department Counsel's separate arguments (or Applicant's counterarguments) to conclude Department Counsel's claim of error is persuasive.

The Administrative Judge specifically concluded that Department Counsel had met its initial burden of proof with respect to each of the Guidelines alleged in the SOR. However, the Judge then proceeded to analyze Applicant's conduct and circumstances under each Guideline separately and concluded that Applicant had demonstrated extenuation or mitigation that overcome the security concerns under each Guideline. Department Counsel persuasively argues that the Judge's analysis was flawed because it failed to consider the totality of Applicant's conduct and circumstances.

The Administrative Judge was obligated to make findings of fact, apply pertinent provisions of the Adjudicative Guidelines, and reach conclusions as to each of the specific allegations set forth in the SOR. *See* Directive, Additional Procedural Guidance, Item E3.1.25. The Judge did so in this case. However, compliance with Item E3.1.25 does not end a Judge's obligations under the Directive. An applicant's security eligibility must be adjudicated in terms of the whole person concept. *See* Directive, Additional Procedural Guidance, Section 6.3; Enclosure 2, Item E2.2.1. Under the whole person concept, a Judge must avoid a piecemeal analysis of an applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 8 ("Under the whole person concept, an Administrative Judge must assess the totality of an applicant's conduct and circumstances in order to evaluate the applicant's security eligibility, not just consider an applicant's conduct and circumstances in a piecemeal manner."). Furthermore, a Judge must consider whether an applicant's conduct and circumstances alleged under different Guidelines have security significance when viewed together. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at pp. 6-7 (noting possible synergistic effect of matters alleged under Guideline B and Guideline C). Moreover, even if adverse information pertaining to any given Guideline is not sufficient to warrant an adverse security clearance decision, an applicant should not be cleared if the totality of the information "reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior." *See* Directive, Enclosure 2, Item E2.2.4. *See also* ISCR Case No. 00-0365 (May 16, 2001) at p. 4 ("Conduct or circumstances that, if considered in isolation, might not warrant an adverse security clearance decision still can be evidence of poor judgment, unreliability, or untrustworthiness that supports an overall adverse security clearance decision in light of the totality of the record evidence.").

Although the Administrative Judge indicated he was evaluating Applicant's conduct "based on the whole picture of the Applicant's judgment, reliability or trustworthiness," he erred in two ways: (a) he erred by concluding "the SOR alleges numerous unrelated allegations"; and (b) the substance of the Judge's analysis of Applicant conduct and circumstances under each of the Guidelines alleged in the SOR reflected a piecemeal analysis. By analyzing Applicant's conduct and circumstances under each Guideline separately, the Administrative Judge failed to evaluate Applicant's security eligibility under the whole person concept. The record evidence in this case shows Applicant:

accepting various benefits from Sweden over a period of years in connection with his educational and academic activities;

performing services for a Swedish university;

serving as a consultant to inspect a Swedish educational institution and the Swedish National Defense College in connection with information technology;

serving as a representative of the Swedish government in working groups and at conferences;

interacting with foreign nationals from a variety of countries (including Brazil, Canada, and Sweden) and developing close personal relationships with some of them;

maintaining a personal Internet Web page on information warfare that indicates he has worked as a consultant with the U.S. Air Force, and solicits comments and inquiries from anyone in the world; and

discussing or making statements about surreptitiously providing a laptop computer to the Palestinian Intifada.

Viewed in isolation, much of Applicant's conduct and circumstances may seem to not raise serious security concerns under any of the specific Guidelines alleged in the SOR. However, when viewed in their totality, Applicant's conduct and circumstances raise serious questions about his security eligibility that were not addressed by the Judge in his analysis of the case under each of the separate Guidelines alleged in the SOR. Much of Applicant's conduct and circumstances under each individual Guideline alleged in the SOR has added security significance when viewed in connection with his conduct and circumstances under the other Guidelines.

Conclusion

Department Counsel has met its burden of demonstrating harmful error below that warrants reversal. Pursuant to

Directive, Additional Procedural Guidance, Item E3.1.33.3, 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. Applicant contends that some of Department Counsel's appeal arguments are based on a "wholly speculative scenario." Applicant's contention on this point is not persuasive. The federal government need not wait until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Furthermore, security clearance decisions are not an exact science, but rather involve predictive judgments about whether a person poses a risk of deliberate or inadvertent disclosure of classified information based on consideration of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Accordingly, it is reasonable for Department Counsel to argue that the Administrative Judge was obligated to consider whether Applicant's conduct and circumstances could pose a risk of deliberate or inadvertent disclosure of classified information.

2. The Administrative Judge's finding that Applicant had not actually taken steps to provide a laptop computer to the Palestinian Intifada does not have the significance Applicant seeks to attribute to it. Under some circumstances, an applicant's statements may have security significance even though the applicant has not acted on his or her statements. *See, e.g.*, DISCR Case No. 85-1106 (March 17, 1986)(adverse security clearance decision based on an applicant's statements that she would be willing to disclose classified information to a foreign government if she thought doing so would save human lives), *aff'd* by Board (September 4, 1986). Under the facts and circumstances of this case, Applicant's statements about providing a laptop computer to the Palestinian Intifada raise questions about his judgment and reliability for purposes of assessing his security eligibility. Applicant's arguments to the contrary are not persuasive.

3. "Contact and correspondence with foreign citizens are casual and infrequent."