

DATE: May 21, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-00677

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn A. Trowbridge, Esq., Department Counsel

#### **FOR APPLICANT**

Peter J. Muse, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated October 19, 2001, in which she 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 erred by concluding Applicant has demonstrated a foreign preference under Guideline C; and (2) whether the Administrative Judge erred by concluding Applicant is susceptible to foreign influence under Guideline B.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated April 25, 2001. The SOR was based on Guideline B (Foreign Influence) and Guideline C (Foreign Preference). A hearing was held on August 28, 2001. The Administrative Judge issued a written decision, dated October 19, 2001, in which she 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.

### **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 entered favorable formal findings with respect to SOR paragraphs 1.b, 2.a, and 2.d. Those favorable formal findings are not at issue on appeal.

The Administrative Judge made extensive findings of fact in her decision. Applicant does not challenge the Judge's factual findings. Accordingly, the Board will discuss the Judge's factual findings only to the extent necessary to address the issues raised on appeal.

On appeal, Applicant relies on five decisions by DOHA Administrative Judges and cites to another decision he attributes to the Board. The Administrative Judge decisions are ISCR Case No. 99-0532 (March 17, 2000); ISCR Case No. 00-0185 (March 22, 2001); ISCR Case No. 00-0460 (May 15, 2001); ISCR Case No. 00-0485 (May 11, 2001); and ISCR Case No. 00-0489 (April 3, 2001). The purported Board decision is cited as ISCR Case No. 00-125. There is no Board decision with such a case number, and we have not identified any Board decision that resembles the one described by Applicant.<sup>(1)</sup> As for the Administrative Judge decisions cited by Applicant, the Board notes those decisions are not legally binding on the Judge in this case, just as a decision by one trial judge is not legally binding on the trial judge's colleagues. Furthermore, as an appellate tribunal, the Board is not bound by decisions by DOHA Judges, but may consider whether it finds the reasoning of such decisions to be persuasive authority. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 4 (discussing precedential value of Administrative Judge decisions).<sup>(2)</sup>

1. Whether the Administrative Judge erred by concluding Applicant has demonstrated a foreign preference under Guideline C. The Administrative Judge concluded Applicant demonstrated a foreign preference under Guideline C because:

- (a) Applicant sought to become recognized as a citizen of a foreign country (FC) but was "thwarted only because of his inability to produce his mother's birth certificate";
- (b) since 1996, Applicant has served as a representative for FC in international softball sporting (as a coach, an umpire, and a non-voting delegate); and
- (c) Applicant has acted on his own initiative to raise funds for FC softball activities.

The Judge noted that there was no evidence that Applicant had made any decisions inimical to the United States, but concluded Applicant "remains personally invested in [FC's] softball program to such an extent to engender security significant doubts as to whether he can be counted on to make decisions without regard to foreign interests."

Applicant contends the Administrative Judge erred by concluding he has demonstrated a foreign preference under Guideline C. In support of that contention, Applicant argues:

- (i) he never applied for an FC passport, let alone carry and use one;
- (ii) his motivation for inquiring about applying for an FC passport related to his desire to umpire at the Olympics, not a preference for a foreign country;
- (iii) the evidence shows he denied any intent to apply for FC citizenship or an FC passport in the future;
- (iv) his involvement with FC softball programs "is minimal when compared to a lifetime of involvement with [similar]

programs in the United States and only occurs during limited time periods";

(v) the motivation for his ongoing involvement with FC softball programs stems from humanitarian motives, and he has not sought any financial benefit or personal gain for his actions;

(vi) his involvement with FC softball does not raise security concerns because the evidence shows he has served "only as an advisor," he does not set policy for the program, he never has had voting rights when appearing at conferences, and his role will diminish in the future; and

(vii) he has lived his entire life in the United States, has been educated in the United States, his immediate family is in the United States, and he has no ties or loyalties to any place other than the United States.

Department Counsel contends the Administrative Judge made no legal errors with respect to Guideline C. In support of that contention, Department Counsel argues: the Judge's findings are not in dispute; the facts of Applicant's case fall under the Concern section of Guideline C (Foreign Preference); and the totality of the Applicant's conduct shows a foreign preference.

The Administrative Judge's analysis of the facts and circumstances of Applicant's case under Guideline C is not arbitrary, capricious, or contrary to law. Applicant chose to participate in international softball activities as a representative of FC, not the United States. The fact that softball is a sport or that participation in international sporting events is not inherently objectionable is not significant.<sup>(3)</sup> What is significant to this case is that Applicant's actions show he has chosen to act as a representative of FC in international softball activities and has made a significant personal commitment toward advancing the interests of FC in international softball activities. As a matter of common sense and practical experience, a national sports team and national sports officials act as representatives of their country in international sporting activities and are perceived as such. A person who chooses to act as a representative of a foreign country or foreign entity shows a commitment to act on behalf of, and in furtherance of, the interests of that foreign country or foreign entity. Furthermore, a person who chooses to act as a representative of a foreign country or foreign entity is an agent of that foreign country or foreign entity, at least for purposes of the representation.<sup>(4)</sup> Given the record evidence in this case, the Judge had a rational basis for concluding the facts and circumstances of Applicant's participation in FC softball activities demonstrates a foreign preference within the meaning of Guideline C.

Applicant correctly notes he does not have, and has never possessed an FC passport. However, the Administrative Judge had a rational basis for finding that Applicant actively sought to obtain FC citizenship, but was thwarted in obtaining it only because he was unable to obtain certain documentation. Serious security concerns are raised when a U.S. citizen voluntarily obtains foreign citizenship. *See, e.g.*, ISCR Case No. 98-0331 (May 26, 1999) at p. 7. The security significance of Applicant's effort to obtain FC citizenship is not materially diminished by the fact that he failed to achieve his objective. It was not arbitrary, capricious, or contrary to law for the Judge to consider, under the whole person concept, the security significance of Applicant's failed effort to obtain FC citizenship, which was undertaken in connection with Applicant's efforts to advance and enhance his role in FC softball activities.

Applicant notes his motivation has been to achieve personal goals and argues that the nature of his motivation removes his conduct from the realm of Guideline C. The personal nature of Applicant's motivation is not significant. As a general proposition, the mere fact that an applicant is motivated by purely personal desires or goals does not immunize the applicant's conduct from scrutiny for its possible security significance.<sup>(5)</sup> A foreign preference under Guideline C can be demonstrated even if the person's conduct is motivated by personal convenience or personal reasons. *See, e.g.*, ISCR Case No. 01-01331 (February 27, 2002) at p. 3; ISCR Case No. 99-0424 (February 8, 2001) at p. 13. Similarly, a person who chooses to act as a representative of a foreign country or entity is no less an agent of the foreign country or entity merely because the person undertook the representation for purely personal reasons. Applicant has chosen to act as a representative of FC in international softball activities in order to achieve his personal goals. The personal nature of Applicant's motivation does not significantly diminish the consequences of his actions -- that he has chosen to act as an FC representative in international sporting activities and, in doing so, he has chosen to represent the interests of FC in those activities.

Time will tell whether Applicant's involvement with FC softball activities diminishes in the future. In any event, it was

not arbitrary, capricious, or contrary to law for the Administrative Judge to consider the security significance of Applicant's past and present involvement with FC softball activities. The basic security concerns raised by the *nature* of Applicant's involvement with FC softball activities are not materially diminished merely because the *frequency* of his involvement may decrease in the future. Stated otherwise, actions indicative of a foreign preference under Guideline C do not lose their security significance merely because they may continue in the future with diminished frequency.

The Administrative Judge specifically considered Applicant's personal and family ties with the United States. The presence of such favorable evidence did not preclude the Judge from considering the security significance of Applicant's conduct under Guideline C. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 10. Applicant's argument fails to persuade the Board that the Judge weighed that evidence in a manner that is arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge erred by concluding Applicant is susceptible to foreign influence under Guideline B. The Administrative Judge concluded Applicant was at risk of being vulnerable to foreign influence because:

- (a) Applicant has professional and personal ties to two high-level FC softball officials;
- (b) Applicant "shares a particularly close personal relationship" with one of the two high-level FC softball officials;
- (c) Applicant maintains contacts with those two officials even during the off-season; and
- (d) Applicant's activities as an FC representative at international tournaments and as a non-voting delegate at meetings increases his vulnerability to possible coercion or pressure.

The Judge concluded that because of Applicant's "ongoing relationship with these foreign nationals, the risk of undue influence cannot be completely discounted."

Applicant contends the Administrative Judge erred by concluding he is susceptible to foreign influence under Guideline B. In support of that contention, Applicant argues:

- (i) there is nothing about his relationships with the two high-level FC softball officials that would suggest he is subject to undue influence;
- (ii) there is no evidence that the two officials are agents of FC who could cause Applicant to compromise his allegiance to the United States;
- (iii) his contacts with the two officials "have only developed during the last few years," are infrequent, and only revolve around softball; and
- (iv) his decreasing involvement with the FC softball program will diminish his contacts with the two officials.

Department Counsel contends the Administrative Judge made no legal errors with respect to Guideline B. In support of that contention, Department Counsel argues the facts support the Judge's adverse conclusions under Guideline B.

Applicant's arguments fail to demonstrate the Administrative Judge's analysis under Guideline B is arbitrary, capricious, or contrary to law. First, the Judge articulated a rational basis, supported by the record evidence, for concluding Applicant's relationships with two high-level FC softball officials raise security concerns under Guideline B. Second, the fact that those relationships revolve around softball is not material. As discussed under Guideline C, the security significance of the facts and circumstances of Applicant's case does not turn on the nature of softball. Third, Applicant's relationships with two high-level FC softball officials are not totally independent of his actions in furtherance of FC softball activities. Given the Judge's findings about the degree of Applicant's commitment to furthering the interests of FC softball activities as a means to realize his dream of umpiring at the Olympics, it was not arbitrary or capricious for the Judge to conclude that the role of the two high-level FC softball officials could place them in a position to exercise influence over Applicant. Fourth, under Guideline B, foreign influence is not limited to influence exercised through coercion or duress; rather it can include noncoercive forms of influence. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6.

It is not necessary for an Administrative Judge to find that an applicant is a "clear and present danger" to national security before the Judge can make an adverse security clearance decision. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). In this case, the Judge articulated a rational basis why the facts and circumstances of Applicant's case raised security concerns under Guideline B and Guideline C. Furthermore, the Judge articulated reasons why those security concerns were not satisfactorily resolved. If a Judge is faced with unresolved security concerns or doubts that have a rational basis in the record evidence, the Judge acts properly by resolving them in favor of the national security. *See Directive, Item E2.2.2* ("Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security.").

### **Conclusion**

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse 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. Apart from the problem of identifying which DOHA decision Applicant is referring to, Applicant's argument about character testimony and an applicant's statements is not persuasive. The weight given to character testimony and an applicant's statements in another case is no measure of what weight the Administrative Judge should give to similar evidence in Applicant's case.
2. One of the Administrative Judge decisions cited by Applicant (ISCR Case No. 99-0532) was reversed by the Board on February 27, 2001. Accordingly, that decision has no persuasive authority with the Board.
3. *See, e.g.*, ISCR Case No. 00-0516 (December 7, 2001) at p. 5 (legality of an applicant's actions does not preclude consideration of the security significance of the applicant's actions); ISCR Case No. 99-0511 (December 19, 2000) at p. 12 ("An applicant's good intentions do not trump the negative security implications of conduct or circumstances indicative of foreign influence (Guideline B) or foreign preference (Guideline C).").
4. *Cf.* 22 U.S.C. Sections 611(b) and 611(c)(definitions of "foreign principal" and "agent of a foreign principal").
5. For example, alcohol abuse, a history of financial difficulties, or falsification have security significance even if an applicant's conduct is motivated purely by personal, private reasons.