

DATE: December 11, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10870

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 20, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 21, 2006, after the hearing, Administrative Judge LeRoy F. Foreman denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. [\(1\)](#)

Applicant raised the following issue on appeal: whether the Administrative Judge's unfavorable security clearance decision under Guideline B is arbitrary, capricious, or contrary to law.

(1) Applicant contends that the Administrative Judge's adverse decision should be reversed because the government did not follow appropriate administrative procedures in the processing of her background investigation and as a result did a more extensive investigation than was necessary for her position. In support of this contention, Applicant notes that her level of clearance was downgraded for administrative reasons in 2004 from Top Secret to Secret. Applicant also argues that the Defense Industrial Security Clearance Office (DISCO) did not advise her of the risks involved in marrying a French military officer. Applicant's contentions lack merit.

Under the Directive, there is no jurisdiction or authority to adjudicate, in DOHA proceedings, the adequacy of a background investigation. *See, e.g.*, ISCR Case No. 02-07191 at 3 (App. Bd. Mar. 25, 2004). The scope and methods of such investigations are outside the scope of review of the Appeal Board. *See, e.g.*, ISCR Case No. 02-14772 at 4 (App. Bd. July 16, 2004). A favorable clearance determination cannot be made unless there is an affirmative finding that it is clearly consistent with the national interest to grant access to a particular applicant. The actions or inactions of the investigating agency are not probative of an applicant's judgment, reliability, or trustworthiness. *See, e.g.*, ISCR Case No. 02-05854 at 4 (App. Bd. Apr. 15, 2004). Additionally, an applicant is not entitled to a favorable clearance determination based on a claim of equitable estoppel. *See, e.g.*, ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003). Therefore, the level of clearance being sought for the Applicant was not relevant or material to the issues in this case and the Judge had no obligation to discuss it or take it into account when making his clearance determination. *See, e.g.*, ISCR Case No. 02-26976 at 4 (App. Bd. Oct. 22, 2004). [\(2\)](#) In this case, the Judge specifically commented on and considered Applicant's clearance history in reaching his conclusion.

(2) Applicant argues that the Administrative Judge's unfavorable clearance decision should be reversed because Applicant's husband is not an agent of a foreign power, as defined in the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801(b), he is not in a position to be exploited by a foreign power in a way that could force Applicant to choose between loyalty to him and the United States, and Applicant's strong ties to the United States are sufficient to mitigate the government's security concerns. Therefore, Applicant contends that the Judge erred, as a matter of law, in not applying Guideline B Mitigating Condition 1, ⁽³⁾

and made an unfavorable decision that is not supported by the record as a whole. The Board does not find Applicant's arguments persuasive.

In this case, the Administrative Judge made a sustainable finding that Applicant's husband is a citizen of France, residing in France, and is an officer in the French Army. Given those findings, the Judge concluded that Applicant's ties with her husband raised security concerns under Guideline B and that Disqualifying Conditions 1 and 3 applied. ⁽⁴⁾ That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). As the trier of fact, the Administrative Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Given the record in this case, it was not arbitrary and capricious for the Administrative Judge to conclude that Applicant had not met her burden of demonstrating that her husband was not an agent of a foreign power, and was not in a position to be exploited by a foreign power in a way that could force the Applicant to choose between loyalty to him and the U.S. The Board has previously held that reliance on the narrow definition of "agent" in the FISA is inappropriately applied to the security clearance process. *See* ISCR Case No. 03-10954 at 4 (App. Bd. Mar. 8, 2006). The definitions in the FISA are self-limiting, as the introductory phrase "As used in this subchapter" denotes. For the purposes of defining "agent of a foreign power" as used in the security clearance process, where the Guidelines and Directive do not have specific definitions, the case law of this Board must be followed. *See* ISCR Case No. 03-22861 at 3 (App. Bd. June 2, 2006). In that regard, the Judge followed established precedent in finding that Applicant's husband is an agent of a foreign power. A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. The Judge articulated a rational basis for not favorably applying any mitigating conditions or factors and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Judge was not required, as a matter of law, to favorably apply Guideline B Mitigating Condition 1, and the Judge's overall adverse security clearance decision is sustainable.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.b, 1.c, and 1.d. Those favorable findings are not at issue on appeal.
2. Directive ¶ 3.2 makes no distinction concerning basic clearance levels in its procedures for deciding whether access to classified information is clearly in the national interest. Possession of a previously granted clearance does not give rise to any right or vested interest, nor does any favorable clearance decision preclude the government from reassessing a person's security eligibility in light of current circumstances. ISCR Case No. 03-24144 at 6 (App. Bd. Dec. 6, 2005).
3. Directive ¶ E2.A2.1.3.1 ("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").
4. Directive ¶ E2.A2.1.2.1 ("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); Directive ¶ E2.A2.1.2.3 ("Relatives, cohabitants, or associates who are connected with any foreign government").