

DATE: October 28, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17496

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Claude R. Heiny issued a decision, dated May 14, 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 issues: (1) whether the Administrative Judge erred by applying Foreign Influence Mitigating Condition 1; (2) whether the Administrative Judge erred by applying Foreign Influence Mitigating Condition 3; and (3) whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated December 13, 2001. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on February 27, 2002. The Administrative Judge issued a written decision, dated May 14, 2002, 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 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).

Administrative Judge's Findings and Conclusions

Applicant was born in a foreign country (FC 1). At age five, she moved to another foreign country (FC 2). At age 13, Applicant moved to a third foreign country (FC 3), where she became an FC 3 citizen. Applicant lived in FC 3 from 1966 to 1984. Applicant served two years of compulsory military service for FC 3 between the ages of 18 and 20. Following that military service, Applicant attended college in FC 3.

From 1984 to 1987, Applicant lived in the United States with her husband, who was obtaining a graduate degree. Applicant and her husband returned to FC 3 after her husband graduated. From 1987 to 1989, Applicant lived and worked in FC 3.

In May 1989, Applicant and her husband returned to the United States with their two children. In February 1999, Applicant and her husband became naturalized U.S. citizens. Applicant, her husband, and their two children are dual U.S.-FC 3 citizens.

Applicant owns no real estate in FC 3, and has no other financial interests there. Applicant is not entitled to receive from FC 3 retirement, pension, educational benefits, or social welfare benefits. Applicant and her husband own a home in the United States worth approximately \$400,000, and have bank and retirement accounts in the United States worth approximately \$140,000.

Applicant has not voted in any United States or foreign elections since becoming a U.S. citizen.

Applicant's sister is an FC 3 citizen living in FC 3 who is married and has two children. Applicant talks with her sister by telephone each week. Applicant sends no presents or cards to her sister or her nephews in FC 3. Applicant's mother-in-law, age 83, is an FC 3 citizen living in FC 3. Applicant's mother-in-law is retired. Applicant talks with her mother-in-law once or twice a week by telephone. Applicant sends no presents or cards to her mother-in-law.

Applicant's choice is to live in the United States and her loyalties are with the United States. When asked how she would react if her family members in FC 3 were ever to be threatened, Applicant stated she did not know what she would do. Not knowing does not mean Applicant would choose to go against the United States. Applicant does not think her uncertainty is unique to her relative overseas because she sees threats can occur to anyone living anywhere. Applicant's uncertainty should not be held against her.

In 1976, Applicant obtained an FC 3 passport, which she renewed several times. Applicant renewed the FC 3 passport most recently in November 2001. In February 1999, Applicant obtained a U.S. passport, which she has used for all travel except when she visits FC 3. On Applicant's most recent trip to FC 3, in January 2002, she was told she must use her FC 3 passport to enter and leave FC 3.

On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) issued a memorandum concerning adjudication of security clearance cases involving foreign passports. When Applicant became aware of the ASDC3I memorandum, she took immediate steps to surrender her FC 3 passport. In March 2002, Applicant surrendered her FC 3 passport to the FC 3 embassy. Applicant was told she had to renounce her FC 3 citizenship in order to surrender her FC 3 passport. Applicant renounced her FC 3 citizenship in April 2002.

The government satisfied its initial burden of proof under Guideline C based on Applicant's exercise of dual citizenship. Applicant satisfied the provisions of the ASDC3I memorandum by surrendering her FC 3 passport.

The government satisfied its initial burden of proof under Guideline B based on Applicant's family ties with relatives living in FC 3. Applicant's relatives in FC 3 are not agents of a foreign power and they are not in a position to be exploited by a foreign power in a way that could force Applicant to choose between loyalty to her relatives and the United States.

Applicant's husband has surrendered his FC 3 passport and has started the procedure to renounce his FC 3 citizenship. Applicant's husband and their two children do not work for a foreign government.

It is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues

The Administrative Judge's formal findings in favor of Applicant concerning Guideline C (SOR paragraphs 1.a through 1.c) are not at issue on appeal.

1. Whether the Administrative Judge erred by applying Foreign Influence Mitigating Condition 1. On appeal, Department Counsel challenges the Administrative Judge's application of Foreign Influence Mitigating Condition 1. ⁽¹⁾ In support of its challenge, Department Counsel argues: (A) the Judge improperly shifted the burden of proof from Applicant to the government; (B) there is no evidence that Applicant's relatives living in FC 3 are not in a position to be exploited by a foreign power; and (C) application of that mitigating condition is not supported by the record evidence. ⁽²⁾

Before addressing Department Counsel's arguments, the Board needs to consider an argument made by Applicant that raises the question of whether Department Counsel waived its position concerning Foreign Influence Mitigating Condition 1. Applicant argues that during closing argument Department Counsel conceded her family member in FC 3 are not in a position to be exploited by a foreign power. Applicant's argument is not a frivolous one. During closing argument, Department Counsel used language that seems to concede the point in Applicant's favor. However, during closing argument Department Counsel also used language that indicates it was asserting Applicant could be vulnerable to duress or pressure in the future. While it is possible that the Board might conclude a party has waived its position on a particular issue by making consistent, unequivocal statements on the issue during the proceedings below that amount to a concession to the other party, the Board is not inclined to find a waiver based on the equivocal statements made by Department Counsel during closing argument in this case.

Department Counsel's first argument is not persuasive. An applicant has the burden of presenting evidence to warrant application of an Adjudicative Guidelines mitigating condition, and Department Counsel does not have the burden of proving the inapplicability of a mitigating condition. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 3. In this case, Department Counsel fails to demonstrate the Administrative Judge improperly shifted the burden of proof concerning the applicability of Foreign Influence Mitigating Condition 1. Applicant persuasively argues that the Judge properly recognized the appropriate burden of proof on this aspect of the case.

Department Counsel's remaining arguments overlap and can be addressed together. The Administrative Judge properly recognized that the record evidence concerning Applicant's family members living in FC 3 raises security concerns under Guideline B. Furthermore, the record evidence supports the Judge's finding that Applicant's relatives living in FC 3 are not agents of a foreign power. ⁽³⁾ However, Department Counsel correctly notes that analysis of an applicant's case does not end simply because a Judge finds the applicant's relatives are not agents of a foreign power. Even if an applicant's relatives living in a foreign country are not agents of a foreign power, the Judge must consider whether the applicant's relatives are in a position that poses a risk that they could be exploited by a foreign power. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 10 (discussing bifurcated nature of Foreign Influence Mitigating Condition 1). Department Counsel argues that Applicant's acknowledgment that she is unsure what she would do if faced with a situation where her family members in FC 3 were threatened runs contrary to the Administrative Judge's favorable conclusions.

Applicant correctly notes that the security significance of her family ties in FC 3 should not be considered in isolation, but rather should be assessed in light of the totality of her conduct and circumstances. Applicant goes on to argue that

her renunciation of FC 3 citizenship and surrender of her FC 3 passport supports the Administrative Judge's favorable conclusions about her family ties with relatives in FC 3. Applicant's argument is not persuasive. Applicant's renunciation of FC 3 citizenship and surrender of her FC 3 passport support the Judge's favorable findings and conclusions under Guideline C (Foreign Preference). However, the Judge's favorable findings and conclusions under Guideline C does not diminish or negate the security concerns raised by Applicant's family ties in FC 3. Even in the absence of a preference for FC 3, Applicant's family ties in FC 3 raise security concerns under Guideline B.

Applicant asserts Department Counsel's appeal arguments are predicated on a hypothetical situation involving a possible attempt by a foreign power to threaten or exploit her family members in FC 3. Although Applicant's observation is correct, it misses an important point. Security clearance decisions are not an exact science and involve predictive judgments of about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Furthermore, the government need not wait until a person actually mishandles or fails to safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Thus, the government is entitled to consider an applicant's conduct and situation to determine whether the applicant may be at risk of mishandling or failing to safeguard classified information. Like many other risk assessments, the assessment of an applicant's security eligibility involves consideration of the applicant's past and present conduct and circumstances to extrapolate how the applicant might act or fail to act in the face of possible future events. Accordingly, it is entirely appropriate for Department Counsel to argue about the possibility that Applicant's family ties in FC 3 may place her in a position of vulnerability. Indeed, such a possibility is an important consideration under Guideline B.

Applicant also argues that even if there were the possibility that a foreign power might seek to exploit her family members in FC 3, Department Counsel has not presented evidence that shows she would act against the interests of the United States. Applicant's argument is not persuasive because Department Counsel is not required to present evidence that her family ties in FC 3 pose a clear and present danger to national security, *Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975), or affirmatively prove that Applicant would mishandle classified information. *Adams v. Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

The Administrative Judge's conclusion that Applicant's relatives living in FC 3 are not in a position to be exploited is problematic in light of the overall record evidence in this case. Given the record evidence of (a) the length, nature, and significance of Applicant's ties to FC 3, (b) the strength of Applicant's ties with family members in FC 3, and (c) Applicant's acknowledgment that she is unsure of what she would do if faced with a situation where her family members in FC3 were threatened, Applicant had a heavy burden of persuasion to demonstrate she is not at risk of being vulnerable due to her family ties in FC 3. *See Directive, Additional Procedural Guidance, Item E3.1.15.* The Judge failed to explain how he reached the conclusion that Applicant met her heavy burden of persuasion despite record evidence that runs contrary to that conclusion.

2. Whether the Administrative Judge erred by applying Foreign Influence Mitigating Condition 3. On appeal, Department Counsel challenges the Administrative Judge's application of Foreign Influence Mitigating Condition 3.⁽⁴⁾ In support of its challenge, Department Counsel argues the record evidence does not support application of that mitigating condition.

Department Counsel's claim of error is persuasive. Given the record evidence in this case, it was arbitrary and capricious for the Administrative Judge to apply Foreign Influence Mitigating Condition 3 to Applicant's contacts with family members in FC 3. The record evidence shows that Applicant's contacts with family members in FC 3 are neither casual nor infrequent.

Applicant correctly points out there is no record evidence that she has ever disclosed classified information to her relatives in FC 3. However, under Foreign Influence Mitigating Condition 3, the nature and frequency of Applicant's contacts with her relatives in FC 3 does not turn on whether she ever discussed or disclosed classified information to her relatives in FC 3.

3. Whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable security clearance decision should be reversed because:

(A) the Judge improperly shifted the burden of proof;

(B) the Judge erred in his application of Foreign Influence Mitigating Conditions 1 and 3; and

(C) the Judge did not consider all the relevant factors or evidence, the Judge failed to consider an important aspect of the case, and the Judge's decision runs contrary to the record evidence.

For the reasons discussed earlier, Department Counsel's first argument is not persuasive, but its second argument is persuasive. Department Counsel's third argument is based on a variation of its other arguments. As discussed earlier in this decision, Department Counsel has demonstrated the Judge erred in his application of Foreign Influence Mitigating Conditions 1 and 3. Furthermore, because the Judge failed to articulate a rational basis for his favorable conclusions under Guideline B, the Judge's favorable decision is based on arbitrary and capricious reasoning.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, 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. "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. Department Counsel breaks down its arguments about Foreign Influence Mitigating Condition 1 in terms of SOR paragraphs 2.a and 2.c (taken together) and SOR paragraph 2.d (taken separately from SOR paragraphs 2.a and 2.c). Given the particular wording of those SOR paragraphs and considering the Directive's requirement for a "whole person" analysis, the totality of the facts and circumstances of Applicant's personal and family ties to FC 3 is relevant under Guideline B. Accordingly, the Board will consider Department Counsel's appeal arguments in terms of their logical applicability to any SOR paragraph pertinent to the appeal issues raised.

3. Applicant correctly notes that Department Counsel's appeal brief concedes there is no record evidence that

Applicant's family members in FC3 are agents of a foreign power.

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