

DATE: April 13, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-24358

## **APPEAL BOARD DECISION AND REVERSAL ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn Antigone Trowbridge, Esq., Department Counsel

#### **FOR APPLICANT**

Jerome P. Friedlander II, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 9, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline K (Security Violations), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued a favorable security clearance decision dated September 16, 2003.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge's findings and conclusions about Applicant's security violations were unsupported by the record evidence; (2) whether it was arbitrary and capricious for the Administrative Judge to conclude that Applicant had mitigated the security concerns under Guideline B (Foreign Influence); (3) whether the Administrative Judge erred by concluding Applicant had mitigated the security concerns under Guideline E (Personal Conduct); and (4) whether the Administrative Judge erred by evaluating Applicant's case in a piecemeal manner. For the reasons that follow, the Board reverses the Administrative Judge's 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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider

relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

### Appeal Issues<sup>(1)</sup>

1. Whether the Administrative Judge's findings and conclusions about Applicant's security violations were unsupported by the record evidence. The Administrative Judge found that in 1998 Applicant was unable to account for six documents, classified at the Confidential level,<sup>(2)</sup> from the classified library in the federal agency where he was employed at the time. The Judge concluded Applicant's failure to account for the six classified documents constituted a security violation that was mitigated under Security Violations Mitigating Conditions 1<sup>(3)</sup> and 2<sup>(4)</sup> because:

- (a) the head of Applicant's office "rebutted the allegation and pointed out the actual practices of the office in a credible manner that successfully mitigated the allegation";
- (b) "there was no indication or proof of prior security breaches"; and
- (c) "Applicant was permitted to retire and did not suffer any consequences or lose his clearance for the past six years."

Department Counsel contends the Administrative Judge erred because: (i) the record evidence does not support the Judge's characterization of the loss of six classified documents as "isolated or infrequent"; (ii) the record evidence does not support the Judge's finding that Applicant's mishandling of the six classified documents was "inadvertent"; (iii) it was arbitrary and capricious for the Judge to conclude Applicant's security violations were mitigated by the practices of the office where he was employed; (iv) the record evidence does not support the Judge's finding that the six documents probably were placed in the burn bag when no longer needed and not returned to the classified library; and (v) the Judge

erred by concluding that Applicant's retirement in 1998 meant that Applicant's security violations were accepted and forgiven. These arguments have mixed merit.

Given the record evidence in this case, it was arbitrary and capricious for the Administrative Judge to characterize Applicant's security violations as "isolated or infrequent." The record evidence shows Applicant was responsible for properly handling and safeguarding the six classified documents for which he was not able to account in 1998. <sup>(5)</sup> Applicant had acquired these documents from his company's technical library on different occasions over the course of approximately ten years. The record also contains a reference to a lax attitude on the part of Applicant regarding security requirements made in the course of an official investigation. Given these facts, it was error for the Administrative Judge to make the inference that Applicant's security violations were "isolated or infrequent," notwithstanding the fact that the loss of all six documents was discovered at one time in 1998.

The office practices referred to by the Judge did not relieve Applicant of his individual responsibility for the six classified documents; nor did they make his inability to account for those six documents an inadvertent security violation. Security violations are no less serious just because other personnel in the same office may handle classified documents in a casual manner or fail to properly account for them. <sup>(6)</sup> The security significance of Applicant's personal failure to properly handle and account for classified documents entrusted to him is not extenuated or mitigated by security lapses by other persons in his office. Furthermore, the record evidence concerning the lax handling of classified documents by Applicant and others in his office undercuts the Judge's characterization of Applicant's lapses as inadvertent.

The Administrative Judge's decision does not make a specific finding that the six documents probably were placed in the burn bag when no longer needed and not returned to the classified library. Rather, the Judge stated "Documents such as those at issue in this matter were often put in the burn bag when no longer needed and not returned to the library" (Decision at p. 3). Although the Judge's statement is vague and not specific about the fate of the six classified documents for which Applicant was unable to account, Department Counsel's interpretation of that statement is a plausible one in light of the explanations Applicant offered about the status of the six unaccounted for classified documents. There is insufficient record evidence in this case to support a finding that the six classified documents for which Applicant was unable to account for were burned. <sup>(7)</sup> Given the record evidence that classified documents were being handled in a somewhat casual manner by Applicant and other persons in his office, and the vague and equivocal statements made about the status and disposition of the six classified documents in question, it would be conjecture and surmise for the Judge to find the six classified documents had been burned.

The favorable inferences the Administrative Judge drew from Applicant's retirement in 1998 do not reflect a reasonable or plausible interpretation of the record evidence. There is no record evidence that Applicant's retirement could have been delayed or halted by his agency. There is no record evidence that Applicant's retirement was allowed to proceed because of a favorable determination concerning the status of the six unaccounted for classified documents. There is no record evidence that Applicant's agency had any jurisdiction or authority to take action against Applicant (for the six classified documents for which he could not account) once he retired and left the agency. Accordingly, the Judge's favorable inferences lack any support in the record evidence, and reflect arbitrary and capricious reasoning.

2. Whether it was arbitrary and capricious for the Administrative Judge to conclude that Applicant had mitigated the security concerns under Guideline B (Foreign Influence). The Administrative Judge concluded Applicant had mitigated the security concerns under Guideline B because: (a) Applicant's daughter no longer lives in the People's Republic of China; (b) Applicant's contacts with two citizens of the People's Republic of China were casual and infrequent; and (c) Applicant reported his contacts with the two citizens of the People's Republic of China. Department Counsel contends the Judge erred because: (i) the record evidence does not support the Judge's application of Foreign Influence Mitigating Condition 1 to Applicant's daughter; (ii) the record evidence does not support the Judge's characterization of Applicant's contacts with two citizens of the People's Republic of China as casual and infrequent; and (iii) the record evidence shows that Applicant did not promptly report to authorities all his contacts with the two citizens of the People's Republic of China. Department Counsel's claims of error have mixed merit.

(a) Given the record evidence in this case, it was not harmful error for the Administrative Judge to apply Foreign

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Influence Mitigating Condition 1 to Applicant's daughter. Absent record evidence that Applicant's daughter had contacts or ties with the People's Republic of China that continued after her return to the United States, it was not arbitrary or capricious for the Judge to conclude that whatever security concerns existed when Applicant's daughter lived and worked in the People's Republic of China ended when she returned to the United States. Since the record evidence showed Applicant's daughter has returned to the United States, there was not need for the Judge to apply Foreign Influence Mitigating Condition 1. Absent evidence of facts and circumstances which raise a security concern under Guideline B with respect to Applicant's daughter, there is nothing to be mitigated. <sup>(9)</sup>

(b) Given the record evidence in this case, the Administrative Judge erred by concluding Applicant's contacts with two citizens of the People's Republic of China were casual and infrequent and warranted application of Foreign Influence Mitigating Condition 3. <sup>(10)</sup> Foreign Influence Mitigating Condition 3 is conjunctive, not disjunctive, in nature (*i.e.*, "Contact and correspondence with foreign citizens are casual **and** infrequent" not "Contacts and correspondence with foreign citizens are casual **or** infrequent")(emphasis added). Furthermore, there is a difference between (i) the nature of a contact between an applicant and other persons, and (ii) the frequency of contacts between an applicant and other persons. Although the frequency of contacts could have some probative value with respect to assessing the nature of such contacts, there is not a simple or necessary correlation between the two. <sup>(11)</sup> Although the Judge had a rational basis for concluding Applicant's contacts with the two citizens of the People's Republic of China were infrequent, the record evidence about the totality of those contacts <sup>(12)</sup> does not support his conclusion that those contacts were casual in nature.

(c) As will be discussed later in this decision, the Administrative Judge erred by concluding Applicant had mitigated the security concerns under Guideline E with respect to his failure to fully report contacts with two citizens of the People's Republic of China. Given the record evidence of Applicant's contacts with two citizens of the People's Republic of China, Applicant's failure to fully report those contacts raises security concerns that the Judge did not adequately address in reaching his favorable conclusions under Guideline B.

3. Whether the Administrative Judge erred by concluding Applicant had mitigated the security concerns under Guideline E (Personal Conduct). The Administrative Judge concluded Applicant had mitigated the security concerns under Guideline E because "Applicant's reports of his trips to international conferences including his contacts at the conferences show that these contacts were well known in his agency and provide a reasonable basis for his determination that these government contacts need not have been reported" (Decision at p. 6). Department Counsel challenges the Judge's favorable conclusion, arguing: (a) the Judge could not reach a favorable conclusion under Guideline E without applying one or more of the Personal Conduct mitigating conditions; and (b) the Judge failed to articulate a rational basis for his favorable conclusion.

(a) Department Counsel's first argument proves no error by the Administrative Judge in this case. Indeed, by making an argument that has been rejected by the Board in other cases <sup>(13)</sup> -- and failing to make either a good faith argument as how those Board decisions are distinguishable, or a good faith argument for why the Board should reconsider and modify or overrule those decisions -- Department Counsel imposed a needless burden on Applicant's counsel <sup>(14)</sup> and the Board.

(b) Although the Administrative Judge did not make specific findings of fact as to each of the SOR allegations under Guideline E (Personal Conduct), the Administrative Judge applied Personal Conduct Disqualifying Conditions 2 <sup>(15)</sup> and 3 <sup>(16)</sup> and concluded Applicant's conduct under Guideline E "was successfully mitigated by providing correct information to the officials and by Applicant's reasonable interpretation of the requirements." The Board construes the Judge's application of Personal Conduct Disqualifying Conditions 2 and 3 and the Judge's finding of mitigation, <sup>(17)</sup> viewed together, as the functional equivalent of findings that Applicant failed to make disclosures as alleged in SOR paragraphs 3.b, 3.c, <sup>(18)</sup> and 3.d.

The Administrative Judge's finding of mitigation is arbitrary and capricious for several reasons, taken cumulatively. First, the federal government is entitled to receive candid, frank, and complete answers to its questions at all times, not just when an applicant decides to make disclosures on a selective basis. Second, there is no record evidence that

indicates Applicant had any reasonable basis for thinking he did not have to report his contacts with foreign citizens in response to questions on the personnel security questionnaire. Third, there is no record evidence that indicates Applicant had a reasonable basis for thinking he did not have to report fully his contacts with foreign citizens to the DIS special agent when he was interviewed. Fourth, Applicant did not merely fail to fully disclose to the DIS Special Agent his contacts with foreign citizens, but rather, he misrepresented the nature of his contacts with foreign citizens. Fifth, there is no record evidence that Applicant's disclosures to his agency were known by personnel who handled his personnel security questionnaires, the DIS special agent who interviewed him, or government personnel responsible for evaluating or reevaluating his security eligibility over the years. Sixth, the testimony of Applicant's former supervisor indicates he was not fully aware of the nature of Applicant's contacts with two citizens of the People's Republic of China.

4. Whether the Administrative Judge erred by evaluating Applicant's case in a piecemeal manner. Department Counsel contends the Administrative Judge erred by evaluating Applicant's case in a piecemeal manner that failed to take into consideration the totality of the facts and circumstances of: (a) Applicant's security violations; (b) Applicant's contacts with two citizens of the People's Republic of China; and (c) Applicant's failure to disclose fully to the federal government his contacts with two citizens of the People's Republic of China.

Department Counsel's arguments in support of this contention are variations of its other appeal arguments. As discussed earlier in this decision, Department Counsel's claims of error generally have merit. Accordingly, there is no need for the Board to discuss this claim of error separately.

### **Conclusion**

Department Counsel has demonstrated various errors in the Administrative Judge's decision that are harmful. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Judge's 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. Nothing in Department Counsel's appeal brief appears to challenge the Administrative Judge's formal finding in favor of Applicant with respect to SOR paragraph 3.a. Accordingly that formal finding is not at issue on appeal.

2. The six documents were classified at the Confidential level. Applicant's reply brief suggests that Applicant's conduct should be considered less serious because the six documents were not classified at a higher level. That suggestion is not well founded. The classification of Confidential is given to information "the unauthorized disclosure of which

reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." Executive Order 12958, "Classified National Security Information" (April 17, 1995), Section 1.3 (a)(3). [Although Executive Order 12958 was amended last year, the definition of information classified at the Confidential level remains the same. *See* Executive Order 13292, "Further Amendment to Executive Order 12958, as Amended, Classified National Security Information" (March 25, 2003), Section 1.2(a)(3).]

3. "[The security violations] [w]ere inadvertent" (Directive, Enclosure 2, Item E2.A11.1.3.1).

4. "[The security violations] [w]ere isolated or infrequent" (Directive, Enclosure 2, Item E2.A11.1.3.2).

5. Failure to properly secure classified documents is not a minor matter, but rather a violation of basic security requirements. *See, e.g.*, ISCR Case No. 99-0109 (March 1, 2000) at p. 5.

6. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at pp. 4-5 (applicant's personal responsibility for properly handling and safeguarding classified information is not diminished by evidence that others may not be carrying out their own security responsibilities properly).

7. On appeal, the Board must determine whether there is sufficient record evidence to support an Administrative Judge's factual findings. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Whether there is sufficient record evidence to support an Administrative Judge's findings of fact is a question of law, not one of fact. *See, e.g.*, ISCR Case No. 98-0370 (January 28, 1999) at p. 2.

8. "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" (Directive, Enclosure 2, Item E2.A2.1.3.1).

9. *See* footnote 17 of this decision.

10. "Contacts and correspondence with foreign citizens are casual and infrequent" (Directive, Enclosure 2, Item E2.A2.1.3.3).

11. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p.9.

12. *See, e.g.*, ISCR Case No. 01-22693 (September 22, 2003) at p. 8 (in evaluating claim of error by Administrative Judge with respect to Foreign Influence mitigating Condition 3, Board noted the record evidence concerning the totality of applicant's contacts with family members in a foreign country); ISCR Case No. 00-0628 (February 24, 2003) at p. 5 (noting the totality of an applicant's contacts with foreign citizens must be taken into account)

13. The Board has repeatedly held that an Administrative Judge is not limited to Adjudicative Guidelines mitigating conditions when deciding whether an applicant has demonstrated extenuation, mitigation, or changed circumstances. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 5 n.7; ISCR Case No. 99-0452 (March 21, 2000) at p. 7; ISCR Case No. 97-0765 (December 1, 1998) at p. 6.

14. Applicant's counsel had to read Department Counsel's appeal brief and decide whether to respond to Department Counsel's specific appeal arguments. A party should not be forced to decide whether or how to respond to groundless appeal arguments.

15. "The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities" (Directive, Enclosure 2, Item E2.A5.1.2.2).

16. "Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or

trustworthiness determination" (Directive, Enclosure 2, Item E2.A5.1.2.3).

17. Implicit in the concepts of extenuation and mitigation is the predicate that some conduct occurred for which a claim of extenuation or mitigation may be raised. *See* ISCR Case No. 02-13568 (February 13, 2004) at p. 3 n.1.

18. On appeal, Applicant notes that he did not speak with one of the two citizens of the People's Republic of China until 1999 and did not meet with him until 1990, and therefore, could not have reported having contacts with that individual when he was interviewed in 1987.