

DATE: March 7, 2006

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-04455

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

James Norman, Esq., Department Counsel

#### **FOR APPLICANT**

Elizabeth L. Newman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 10, 2002, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 5, 2002, after the hearing, Administrative Judge John G. Metz, Jr. denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

After considering Applicant's assertions of error, in a decision dated July 31, 2003, the Appeal Board remanded the case to the Administrative Judge with instructions to issue a new decision that was consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25. On October 6, 2005, the Administrative Judge issued his remand decision. Applicant appealed that remand decision.

Applicant raised the following issues on appeal: (1) whether it was arbitrary and capricious for the Administrative Judge to conclude that Foreign Influence Mitigating Condition 1 was not applicable; and (2) whether it was arbitrary and capricious for the Administrative Judge to conclude that Applicant's foreign contacts were not mitigated by Foreign Influence Mitigating Condition 3. For the reasons that follow, the Board concludes that Applicant has failed to demonstrate error on the part of the Administrative Judge.

Applicant contends it was arbitrary and capricious for the Administrative Judge to conclude the facts and circumstances of Applicant's ties to his father in South Korea preclude application of Foreign Influence Mitigating Condition 1. <sup>(1)</sup> In support of this argument, Applicant asserts that: (a) Applicant's father is not in a position to influence Applicant; and (b) the Judge did not weigh Government Exhibit 3 in a reasonable manner.

Applicant's argument that his father is not in a position to influence him does not establish that the Administrative Judge erred by not applying Foreign Influence Mitigating Condition 1 in Applicant's favor. The issue is not merely whether Applicant's father can influence him, but whether Applicant has presented evidence showing that his father is not in a position to be exploited by a foreign power in a coercive or noncoercive manner. Department Counsel does not have to disprove the applicability of Foreign Influence Mitigating Condition 1. Rather, Applicant has the burden of presenting evidence to warrant its application. The points raised by Applicant on appeal about his father's background and lifestyle

in South Korea amount to little more than Applicant's interpretation of the record evidence. The ability of Applicant to argue for an alternate interpretation of the record evidence fails to establish error on the part of the Administrative Judge.

Applicant argues on appeal that the Administrative Judge did not weigh Government Exhibit

3 (a government report) in a reasonable manner. In support of this argument, Applicant asserts that the Judge considered the very same exhibit in another Foreign Influence case involving South Korea and made different-indeed mutually exclusive-findings and conclusions concerning the South Korean government's propensity to engage in coercive action against its citizens to pressure people like Applicant. Applicant asserts that it is manifestly arbitrary and capricious for an Administrative Judge to come to mutually exclusive conclusions in two cases.

Applicant's claim on this point is not a frivolous one. Inconsistencies such as the one pointed out here are troubling and give, at least, the appearance of arbitrary and capricious action. However, the Board is duty bound to review the case that is in front of it, and not to reconcile that case with another case, whose record is not before the Board. The Board has no supervisory jurisdiction over the Hearing Office. Moreover, there is no meaningful and practical way for the Board to decide whether an applicant in a current appeal was prejudiced in his case in any measurable way by a Judge's inconsistent decisions over time. The issue raised by Applicant on this point is outside the scope of the Board's authority to resolve.

Applicant contends it was arbitrary and capricious for the Administrative Judge to conclude that Applicant's foreign contacts were not mitigated by Foreign Influence Mitigating Condition 3. [\(2\)](#)

In making this argument, Applicant specifically asserts that: (i) when considering evidence of Applicant's foreign contacts, the Judge impermissibly went beyond the scope of the SOR; and (ii) Applicant's foreign contacts were causal and infrequent.

Applicant's argument about the Administrative Judge's findings and conclusions regarding foreign contacts not specifically mentioned in the SOR does not establish error. An SOR is not held to the strict requirements of a criminal indictment, and, as long as an applicant has fair notice of the matters that are at issue in the case, an SOR need not allege every piece of evidence that is relevant and material to evaluating his or her security eligibility. Moreover, it is legally permissible for a Judge to consider evidence of conduct not alleged in the SOR to evaluate an Applicant's claim of extenuation, mitigation, or changed circumstances. In this case, Applicant did not object to being asked at the hearing about his ties or contacts with persons not alleged in the SOR. Additionally, there was no objection by Applicant to the admission of Government Exhibit 2, which also contained evidence of Applicant's ties and contacts with numerous South Korean citizens not mentioned in the SOR.

In his appeal brief, Applicant suggests that the Administrative Judge impermissibly expanded the scope of his inquiry in his remand decision. He states that the Judge made findings in his first decision about the two South Korean friends who were listed in the SOR. Applicant then states that, in the remand decision, the Judge made no new findings about the two friends, but instead made findings of fact about additional individuals who were not the subject of the SOR. After a review of both decisions, the Board concludes that the Judge did not impermissibly expand the scope of his inquiry in the second remand decision in that he had already considered in his first decision Applicant's foreign contacts other than the two specifically listed in the SOR.

Applicant also argues that the Administrative Judge erred by considering evidence in Government Exhibit 2 of Applicant's foreign contacts other than the two listed in the SOR. He asserts that there was no reference to these other individuals in the hearing transcript because the hearing was focused solely on the allegations in the SOR and that the Judge should not have relied on the evidence since he had no opportunity to assess credibility as to the nature of these contacts. Applicant's argument lacks merit. After a review of the hearing transcript, the Board concludes that it did contain references to the list of social contacts that was the subject of Government Exhibit 2. However, even assuming that Applicant's assertion about the lack of transcript evidence relating to Government Exhibit 2 is correct, Applicant's position on this point is untenable. A Judge's ability to consider a documentary exhibit- and indeed the weight the Judge can assign to it- is not dependent upon whether or not its contents are also the subject of hearing testimony. A party

cannot challenge a Judge's reliance on a hearing exhibit merely because its contents were not probed or otherwise scrutinized through witness testimony at the hearing.

Applicant's overall argument about the applicability of Foreign Influence Mitigating Condition 3 and whether his contacts with citizens of South Korea are casual and infrequent goes to the weight of the record evidence. The Board does not have to agree with the Judge's conclusions on this point to reject Applicant's contention that there is no rational basis for the Judge's conclusions. Applicant has failed to show that the Judge weighed the evidence in a manner that was arbitrary, capricious or contrary to law.

### **Order**

Applicant has failed to establish error on the part of the Administrative Judge in his remand decision. Thus, the Administrative Judge did not err in denying Applicant a clearance.

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

### **Concurring Opinion of Chairman Emilio Jaksetic:**

I agree with my colleague that the decision below should be affirmed.

Applicant's claim of error concerning the Administrative Judge's weighing of Government Exhibit 3 raises a novel, and somewhat legally intriguing, issue on appeal. Under the Directive, the Board should address material issues on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.32. However, implicit in that command is the premise that the Board should address material appeal issues when they fall *within the scope of the Board's jurisdiction and authority*. *See, e.g.*, ISCR Case No. 03-00112 at 4 (App. Bd. Aug. 10, 2004)(Board does not have jurisdiction and authority in a vacuum, but rather has jurisdiction and authority under the terms of the Directive). I concur with my colleagues' choice to decline to address the merits of Applicant's claim of error concerning the Judge's weighing of Government Exhibit 3 because: (a) I agree with my colleagues that the Board does not have supervisory jurisdiction over Hearing Office Administrative Judges; and (b) I agree with my colleagues that there would be no meaningful or practical way for the Board to evaluate a claim such as one made in this case. The question of whether a Judge's various decisions are consistent, over time, is a matter that must be raised and considered elsewhere. *Cf.* ISCR Case No. 02-29403 at 6 n.14 (App. Bd. Dec. 14, 2004)(Board has no jurisdiction or authority to impose consistency on decisions issued by various Hearing Office Judges).

What remains of Applicant's claim concerning the Administrative Judge's choice to not apply Foreign Influence Mitigating Condition 3 is Applicant's disagreement with the Judge's weighing of the record evidence concerning Applicant's contacts with various South Korean individuals. The application of the Adjudicative Guidelines for or against clearance is not reducible to a simple formula, but rather requires a Judge to exercise sound judgment, within the parameters of the Directive, after consideration of the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-09907 at 10 (App. Bd. Mar. 17, 2004). Beyond disagreeing with the Judge's weighing of the record evidence concerning his contacts with various South Korean individuals, Applicant has not demonstrated the Judge weighed that evidence in a

manner that is arbitrary or capricious, or reached conclusions that are unreasonable in light of the record as a whole.

My colleagues correctly note that Department Counsel did not have the burden of disproving the applicability of Foreign Influence Mitigating Condition 1, but rather that Applicant had the burden of presenting evidence sufficient to persuade the Judge that he had mitigated the security concerns raised under Guideline B (Foreign Influence) sufficient to warrant application of that mitigating condition.<sup>(3)</sup> Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred concerning Foreign Influence Mitigating Condition 1.<sup>(4)</sup> Applicant disagrees with the Judge's evaluation of the evidence concerning his contacts and ties with his father in South Korea, but Applicant has not shown that the Judge's evaluation of that evidence reflects a failure to weigh the evidence in a reasonable or common sense manner, or otherwise demonstrates the Judge acted in an arbitrary or capricious manner concerning Foreign Influence Mitigating Condition 1.

Applicant contends the Administrative Judge erred by going beyond the scope of the SOR when he considered Applicant's contacts with some South Korean individuals who were not specifically covered by the SOR. This claim of error is not persuasive. First, an SOR is not held to the strict requirements of a criminal indictment,<sup>(5)</sup> and not every relevant piece of evidence has to be cited in an SOR.<sup>(6)</sup> Matters not specifically alleged in an SOR, but fairly raised during a hearing (with the applicant having notice and an opportunity to respond) can be considered to be part of the case.<sup>(7)</sup> Applicant's contacts with South Korean individuals not alleged in the SOR were discussed in Applicant's January 2001 written statement (Government Exhibit 2), and at the hearing he did not object to the admission of that exhibit or its consideration by the Judge. Moreover, although the Judge referred -- in his first decision in this case -- to Applicant's contacts with South Korean individuals not alleged in the SOR, on the first appeal Applicant did not claim the Judge erred by considering his contacts with those persons, but only claimed the Judge erred in reaching certain conclusions about the nature of his contacts with those persons.<sup>(8)</sup> Accordingly, Applicant is not in a strong position to complain that the Judge considered record evidence concerning his contacts with various South Korean individuals not alleged in the SOR.<sup>(9)</sup>

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. "Contact and correspondence with foreign citizens are casual and infrequent."
3. Under the Directive, an applicant has the burden of presenting evidence to refute, rebut, explain, or mitigate facts and circumstances raising a security concern. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Presenting evidence for the Judge's consideration does not automatically compel a Judge to conclude that such evidence is sufficient to satisfy the applicant's burden of persuasion under Item E3.1.15. Even evidence that is relevant and material to a claim of refutation, rebuttal, explanation or mitigation has to be considered and weighed by the Judge. Although Department Counsel has the burden of proving controverted facts (Directive, Additional Procedural Guidance, Item E3.1.14), that burden of proof does not extend to disproving the applicability of Adjudicative Guidelines mitigating conditions. An applicant's burden of proof under Item E3.1.15 includes the burden of presenting evidence sufficient to warrant application of Adjudicative Guidelines mitigating conditions. *See, e.g.,* ISCR Case No. 02-02892 at 6 (App.Bd. Jun. 28, 2004).
4. Department Counsel persuasively argues that, under Foreign Influence Mitigating Condition 1, the question for the

Administrative Judge to consider is not merely whether Applicant's father can influence Applicant, but whether Applicant has presented evidence showing that his father is not in a position to be exploited by the South Korean government, in a coercive or noncoercive manner, in order to influence Applicant.

5. *See, e.g.*, ISCR Case No. 02-10215 at 4 (App. Bd. Jan. 30, 2004).

6. *See, e.g.*, ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004).

7. *See, e.g.*, ISCR Case No. 00-0633 at 4 (App. Bd. Oct. 24, 2003); ISCR Case No. 01-26479 at 4 (App. Bd. Sep. 16, 2003); ISCR Case No. 99-0710 at 2-3 (App. Bd. Mar. 19, 2001).

8. The Administrative Judge's findings about those other individuals in his initial decision were significantly less detailed than his findings about them in his remand decision. However, I do not consider that difference to be legally significant or otherwise indicative of error by the Judge.

9. I fully concur with my colleagues that an Administrative Judge's ability to consider an exhibit is not dependent on whether the contents of the exhibit were also covered by hearing testimony. No party can fairly challenge a Judge's reliance on a hearing exhibit merely because no one tried to explore or otherwise cover its contents through witness testimony at the hearing. A Judge may rely on a hearing exhibit in making findings of fact even if the contents of that exhibit were not the subject of any hearing testimony.