

DATE: April 29, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-15339

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

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Esq., Department Counsel

#### **FOR APPLICANT**

Gary L. Rigney, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated April 30, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Kathryn Moen Braeman issued a favorable security clearance decision dated September 26, 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 issue has been raised on appeal: whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are not supported by the record evidence or are otherwise arbitrary, capricious, or contrary to law. 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 Issue<sup>(1)</sup>

Whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are not supported by the record evidence, or are otherwise arbitrary, capricious, or contrary to law. The Administrative Judge concluded that Applicant had mitigated the security concerns raised under Guideline B because of her ties with: (a) her parents and one sister, who are citizens of the People's Republic of China and who live in that country; and (b) her husband's mother, who is a citizen of the People's Republic of China but who currently lives in the United States.

On appeal, Department Counsel challenges the Administrative Judge's favorable conclusions about Applicant's parents and one sister.<sup>(2)</sup> In support of that challenge, Department Counsel argues: (1) the Judge's application of Foreign Influence Mitigating Condition 1 is not supported by the record evidence, and is arbitrary and capricious; and (2) the Judge's application of Foreign Influence Mitigating Condition 3 is not supported by the record evidence, and is arbitrary and capricious. Applicant counters by arguing the Judge's favorable conclusions are supported by the record evidence and the Judge's favorable credibility determination. For the reasons that follow, the Board concludes Department Counsel has demonstrated harmful error by the Judge.

An Administrative Judge does not have unfettered discretion when deciding whether particular provisions of the Adjudicative Guidelines are applicable. Rather, a Judge must exercise sound judgment within the parameters set by the Directive when deciding which Adjudicative Guidelines disqualifying or mitigating conditions are applicable to the particular facts of a given case.<sup>(3)</sup> Accordingly, when a Judge's application of the Adjudicative Guidelines is challenged on appeal, the Board must consider whether the appealing party has shown the Judge's application is (a) not supported by the record evidence; (b) arbitrary or capricious; or (d) contrary to law.

The Administrative Judge gave two reasons for applying Foreign Influence Mitigating Condition 1<sup>(4)</sup>: (i) Applicant's parents and one sister in the People's Republic of China have no ties to the government of that country; (ii) there is not a

substantial likelihood that Applicant's parents and one sister in the People's Republic of China would exercise foreign influence over her (Decision at p. 7). The Judge's reasons are inadequate, individually and cumulatively, to support her application of Foreign Influence Mitigating Condition 1.

On its face, Foreign Influence Mitigating Condition 1 is bifurcated in nature. Foreign Influence Mitigating Condition 1 can be applied if the record evidence supports a determination that an applicant's immediate family members in a foreign country are neither (a) agents of a foreign power, nor (ii) in a position to be exploited by a foreign power.<sup>(5)</sup> Accordingly, although the Administrative Judge reasonably could find that Applicant's immediate family members in the People's Republic of China do not have ties with that country's government, that finding is not sufficient to support the Judge's application of Foreign Influence Mitigating Condition 1. The Judge's finding does not address or satisfy the second prong of Foreign Influence Mitigating Condition 1.

The Administrative Judge's second reason for applying Foreign Influence Mitigating Condition 1 also is insufficient to warrant its application. Indeed, the Judge's second reason reflects an arbitrary and capricious analysis because it offers a justification that is not consistent with the Judge's findings and conclusions concerning the security risks posed by the government of the People's Republic of China (Decision at p. 7). Given those security concerns, it was arbitrary and capricious for the Judge to focus on the absence of evidence that Applicant's immediate family members would exert pressure on her and ignore Applicant's vulnerabilities through her relatives in the People's Republic of China.<sup>(6)</sup>

The Administrative Judge's application of Foreign Influence Mitigating Condition 3<sup>(7)</sup> is arbitrary and capricious. There is a rebuttable presumption that contacts with immediate family members are not casual.<sup>(8)</sup> Given the record evidence in this case concerning Applicant's contacts with her immediate family members in the People's Republic of China, and the Judge's own findings of fact about those contacts (Decision at p. 3), the Judge's perfunctory conclusion that Foreign Influence Mitigating Condition 3 applies (Decision at p. 7) is arbitrary and capricious.<sup>(9)</sup> Given the record evidence in this case, and the Judge's own findings about Applicant's contacts with her immediate family members in the People's Republic of China, there is no rational basis for the Judge's application of Foreign Influence Mitigating Condition 3.

Besides arguing in support of the Administrative Judge's application of Foreign Influence Mitigating Conditions 1 and 3, Applicant also urges the Board to affirm the Judge's favorable decision based on (a) "the Applicant's testimony that she would not succumb to any attempt by a foreign government to induce her to act contrary to U.S. Government interests"; and (b) the corroboration of that testimony by other record evidence (Reply Brief at pp. 2-3). Applicant's argument for affirming on alternate grounds is a legally permissible one.<sup>(10)</sup> However, considering the record as a whole, the Board is not persuaded that it should affirm the decision below on alternate grounds.

### **Conclusion**

Department Counsel has demonstrated harmful error below. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, 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. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline C (Foreign Preference). Those favorable formal findings are not at issue on appeal.
2. Department Counsel's appeal arguments focus on the Administrative Judge's findings and conclusions about Applicant's parents and one sister, and do not refer to the Judge's findings and conclusions about Applicant's father-in-law (deceased) and mother-in-law (living in the United States). Because there is no presumption of error below and the appealing party has the burden of raising claims of error with specificity, the Board construes Department Counsel's brief as not challenging the Administrative Judge's favorable formal finding with respect to SOR paragraph 2.c.
3. *See* ISCR Case No. 01-20906 (January 10, 2003) at pp. 6-7 (elaborating on the constraints under which an adjudicator acts when applying the Adjudicative Guidelines).
4. "A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are nor 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).
5. *See, e.g.*, ISCR Case No. 02-26826 (November 12, 2003) at pp. 4-5; ISCR Case No. 99-0511 (December 19, 2000) at p. 10.
6. *See, e.g.*, ISCR Case No. 99-0424 (February 8, 2001) at p. 11 ("Furthermore, by considering only how Applicant's relatives in [a foreign country] might exercise influence on him, the Judge failed to give any consideration to whether *other* persons or entities might be able to seek to exercise pressure, influence or coercion over Applicant through his immediate family members in [a foreign country]. The Judge's failure to do so reflects an arbitrary and capricious approach to this case.")(*italics in original*). *Accord* ISCR Case No. 02-02195 (April 9, 2004) at pp. 5-6.
7. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Enclosure 2, Item E2.A2.1.3.3).
8. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5.
9. As discussed earlier in this decision, an Administrative Judge's decision is arbitrary and capricious if: 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.
10. As noted earlier in this decision, the nonappealing party can argue that the decision below should be affirmed on alternate grounds.