

DATE: June 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24254

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Robert R. Sparks, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated July 8, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence) and Guideline C (Foreign Preference). Administrative Judge Michael H. Leonard issued a favorable security clearance decision dated January 27, 2004.

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 favorable conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law; and (2) whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are 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 Issues

1. Whether the Administrative Judge's favorable conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law. The Administrative Judge concluded Department Counsel had presented established a *prima facie* case under Guideline C, but that Applicant had presented evidence sufficient to warrant the entry of formal findings in favor of Applicant under Guideline C. Department Counsel contends the Judge erred by reaching favorable conclusions under Guideline C. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Judge erred.

First, part of Department Counsel's claim of error lacks specificity. The Board has held an appealing party must raise claims of error with specificity because specificity serves several important purposes in the appeal process.⁽¹⁾ An appeal brief can lack specificity in different ways:

(a) an appeal brief can fail to identify or indicate anything about the Judge's decision or the proceedings below that the appealing party is challenging as being in error⁽²⁾;

(b) an appeal brief can make a claim of error, but make it in terms so general or vague that it fails to identify any particular error⁽³⁾; or

(c) an appeal brief can make an identifiable claim of error, but then fail to offer any argument, reason, or explanation in support of the claim of error.⁽⁴⁾

Department Counsel's perfunctory assertion that the Administrative Judge erred by applying Foreign Preference Mitigating Conditions 1 and 4 fails to articulate any discernable argument for why the Judge's application of those two

mitigating conditions was in error. Because there is no presumption of error below, and because Department Counsel does not make any discernable argument why the Judge should not apply Foreign Preference Mitigating Conditions 1 and 4, neither Applicant nor this Board should be left to guess or speculate as to how or why Department Counsel believes, thinks, or supposes the Judge erred -- as a matter of fact, law, reasoning, or some combination thereof -- by applying those two mitigating conditions.

Second, Department Counsel's other arguments concerning Guideline C (Foreign Preference) fail to articulate a cogent, persuasive basis for why the Board should conclude the Administrative Judge's overall favorable conclusions under Guideline C are arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable conclusions under Guideline B are arbitrary, capricious, or contrary to law because: (a) the Judge misapplied Foreign Influence Mitigating Condition 1; and (b) the Judge failed to articulate a rational basis for his favorable conclusions under Guideline B.

(2a) The Administrative Judge noted the bifurcated nature of Foreign Influence Mitigating Condition 1, ⁽⁵⁾ concluded that he could apply it if Applicant satisfied either of its two parts, and applied it in Applicant's case because Applicant's mother and siblings are not agents of a foreign power (Decision at p. 9). On appeal, Department Counsel contends the Judge erred in his analysis of Foreign Influence Mitigating Condition 1 because:

(i) the Judge's interpretation of that mitigating condition is contrary to (a) prior rulings of the Board, (b) established principles of statutory construction, and (c) common sense; and

(ii) the Judge's application of Foreign Influence Mitigating Condition 1 ignores the record evidence that Applicant's brother is employed by the Syrian Government.

In response, Applicant contends that if the Board concludes the Judge erred in his interpretation of Foreign Influence Mitigating Condition 1, the error is not harmful because the record evidence supports the application of that mitigating condition in this case.

Department Counsel correctly notes that the Board has ruled repeatedly that Foreign Influence Mitigating Condition 1 is bifurcated in nature and that an Administrative Judge cannot apply it unless there is record evidence that establishes both prongs of that mitigating condition. ⁽⁶⁾ In this case, the Judge's interpretation of Foreign Influence Mitigating Condition 1 is squarely inconsistent with those Board rulings. Accordingly, the Judge's interpretation was arbitrary, capricious, and contrary to law.

Even if the Board had not issued any decision interpreting Foreign Influence Mitigating Condition 1 before this appeal, Department Counsel has demonstrated the Administrative Judge erred in his interpretation of Foreign Influence Mitigating Condition 1 because it is contrary to established principles of statutory construction. ⁽⁷⁾ Department Counsel has identified federal cases that have explained why -- based on context, logic, or the need to give a statute or regulation practical effect without rendering any part of it meaningless or superfluous -- the word "or" will be construed as being the functional equivalent of the word "and." Moreover, Department Counsel points out that Foreign Influence Mitigating Condition 1 is logically equivalent to a statutory or regulatory provision in the form of "not (A or B)," where A stands for "agents of a foreign power" and B stands for "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." Department Counsel identifies a federal case that explains why the word "or" in a provision phrased in the form of "not (A or B)" is the equivalent of "not A and not B." ⁽⁸⁾ The reasoning of the federal cases cited by Department Counsel show it is untenable for the Judge to interpret Foreign Influence Mitigating Condition 1 as being the equivalent of "not A or not B." Moreover, the reasoning of those federal cases persuades the Board that its earlier decisions concerning the interpretation of Foreign Influence Mitigating Condition 1 were correctly decided.

Department Counsel argues the Administrative Judge's application of Foreign Influence Mitigating Condition 1 also is arbitrary and capricious because -- even under the Judge's interpretation of that mitigating condition -- the record evidence shows Applicant's brother is an employee of the Syrian Government. This argument has merit. An employee of

a foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of Foreign Influence Mitigating Condition 1. Given the record evidence that Applicant's brother is employed by the Syrian Government,⁽⁹⁾ it was arbitrary and capricious for the Judge to conclude "Applicant's mother and *siblings* are not employed by or connected with the Syrian military, law enforcement, or *a governmental agency*" (Decision at p. 8)(italics added).

In view of the foregoing, the Board need not address Department Counsel's remaining argument concerning Foreign Influence Mitigating Condition 1.

Applicant's argument that the Administrative Judge had a rational basis for applying Foreign

Influence Mitigating Condition 1 even under the Board's interpretation of that provision is unpersuasive. Even if the Judge could conclude Applicant's family members were not likely to place pressure on Applicant (Reply Brief at p. 5), such a conclusion would not warrant application of Foreign Influence Mitigating Condition 1. The absence of a risk that Applicant's family members would exert pressure on him is separate and distinct from the risk that the Syrian Government could exert pressure on him, directly or indirectly, because of his family ties.⁽¹⁰⁾ Even if Applicant's family members have no personal interest or desire to gain access to classified U.S. information, it does not follow that there is no risk that the Syrian Government could try to exploit Applicant's family members in Syria to influence, pressure or coerce Applicant.

(2b) The Administrative Judge noted that Syria has a history of difficult relations with the United States, has been on the U.S. list of state sponsors of terrorism since its inception in 1979, and has an authoritarian government (Decision at p. 5). However, the Judge concluded that the facts and circumstances of Applicant's ties with immediate family members in Syria "do not pose an unacceptable security concern or risk of foreign influence" in light of Applicant's ties to the United States (Decision at pp. 9-10).

Department Counsel challenges the Administrative Judge's favorable conclusions under Guideline B on the grounds that: (i) they rely on the Judge's erroneous application of Foreign Influence Mitigating Condition 1; (ii) the nature of the Syrian Government places a "very heavy burden" of persuasion on Applicant that he has not met; (iii) the Judge failed to give proper consideration to the position of vulnerability that Applicant's family members living in Syria are in; and (iv) the record evidence as a whole does not support the Judge's favorable conclusions. Applicant argues that the Judge's favorable conclusion should be sustained because it reflects a reasonable interpretation of the record evidence as a whole.

As discussed earlier in this decision, the Administrative Judge erred in applying Foreign Influence Mitigating Condition 1 in this case. There is no need to repeat that discussion here. To the extent the Judge relied on Foreign Influence Mitigating Condition 1 to reach his favorable conclusions under Guideline B, those favorable conclusions are undercut.

The Board decision in ISCR Case No. 98-0419 (April 30, 1999) cited by the Administrative Judge (Decision at p. 8) is distinguishable for a number of reasons, that taken cumulatively, make it not an apt case for the Judge to cite. First, that case involved a foreign country that had a friendly relationship with the United States, not a country with which the United States has had serious differences. Second, that case did not involve a foreign country that had an authoritarian regime and was on the U.S. list of countries sponsoring terrorism. Third, that case did not involve a finding that the applicant was vulnerable to coercion, exploitation, or pressure when traveling to the foreign country in question. Fourth, that decision was issued before there was a change in the pertinent language of the Adjudicative Guidelines. Specifically, the phrase "unacceptable security risk" appeared in the version of Foreign Influence Mitigating Condition 1 that was in effect at the time a Judge decided the case in ISCR Case No. 98-0419.⁽¹¹⁾ That phrase does not appear in the current version of Foreign Influence Mitigating Condition 1.⁽¹²⁾ Indeed, Foreign Influence Mitigating Condition 1 was rewritten entirely when the Adjudicative Guidelines were revised. The Board has held that a Judge cannot rely on language from an earlier version of the Directive to justify the Judge's decision,⁽¹³⁾ and that an applicant's security eligibility must be adjudicated under current DoD policies and standards, not past ones.⁽¹⁴⁾ Similarly, the precedential value of Board decisions is affected to the extent those decisions involve the interpretation of a provision of the Directive that is later revised or changed.⁽¹⁵⁾ Statements made by the Board in earlier decisions that are predicated on

then-existing language in the Directive cannot be simply assumed -- by a Judge or a party -- to be applicable in later cases after the pertinent provision(s) of the Directive have been revised or changed.

In light of the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant has a preference for the United States over Syria, and that Applicant's preference for the United States is a strong one. However, the absence of a foreign preference under Guideline C is separate and distinct from whether an applicant's ties with a foreign country pose security concerns under Guideline B. ⁽¹⁶⁾

The Administrative Judge acknowledged the authoritarian nature of the Syrian government, the history of difficult relations between the United States and Syria, the fact that Syria has been on the U.S. list of state sponsors of terrorism since its inception in 1979, and significance of the September 11, 2001 terrorist attacks against the United States. Yet, despite that, the Judge's decision lacks a plausible explanation for why Applicant's family ties with immediate family members living in Syria are extenuated or mitigated sufficiently to warrant a favorable security clearance decision under the "clearly consistent with the national interest" standard. Security clearance decisions are not an exact science and involve predictive judgments. ⁽¹⁷⁾ However, such predictive judgments must have a rational basis in the record evidence and be made consistent with the "clearly consistent with the national interest" standard. ⁽¹⁸⁾ Accordingly, the Judge's statement that he was making a predictive judgment in this case adds no independent support for his favorable conclusions.

Given the Administrative Judge's conclusion that Applicant's travel to Syria (to visit his mother and siblings) makes Applicant vulnerable to coercion, exploitation, or pressure (Decision at p. 8), the Judge failed to articulate any discernable explanation for why that travel does not pose a continuing security concern under Guideline B. The Board does not find persuasive Applicant's argument that "he [has] considerably reduced or eliminated altogether the possibility that he could be subjected to pressure or other coercion while he was in Syria" because he receives written assurances from the Syrian Embassy that he can "travel to and from Syria without any difficulties" (Reply Brief at p. 7). Other than Applicant's hope in the good will and forbearance of the Syrian Government, there is no record evidence that Applicant has reduced or eliminated his vulnerability to pressure or coercion when he travels to Syria. Given the evidence showing Syria has an authoritarian government, a human rights problem, and has been on the U.S. list of state sponsors of terrorism since 1979, Applicant's hope in the good will and forbearance of the Syrian Government is an exceedingly frail reed upon which to rely. Even though Applicant may be forced to rely on the continued good will and forbearance of the Syrian Government, the federal government is not required to place its compelling interest in protecting and safeguarding classified information ⁽¹⁹⁾ at risk in reliance on the good will and forbearance of the Syrian Government.

The Board need not decide whether each of the errors in the Administrative Judge's decision, standing alone, constitutes harmful error. Taken together, those errors are cumulatively harmful and warrant reversal of the Administrative Judge's favorable decision.

Conclusion

Department Counsel had demonstrated error that warrants reversal. 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. *See* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).
2. For example, the appealing party seeks to discuss the merits of the case as if the Administrative Judge's decision does not exist or is irrelevant, and asks or expects the Board to decide the case *de novo*.
3. For example, the appealing party makes a vague assertion -- such as "The Administrative Judge's findings of fact are erroneous"; "The decision is wrong"; "I was denied due process" -- but fails to identify which findings of fact by the Judge are supposedly erroneous, where or how the decision supposedly is wrong, or where or how the party supposedly was denied due process.
4. For example, the appealing party makes an identifiable claim of error -- "The Administrative Judge erred by finding X"; "The Judge erred by applying provision Y of the Directive"; "The Judge erred by failing to apply Mitigating Condition Z" -- but then leaves the nonappealing party and the Board to guess or speculate as to how or why the appealing party believes, thinks, or supposes the Judge erred by finding X, applying provision Y of the Directive, or not applying Mitigating Condition Z.
5. "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, Adjudicative Guidelines, Item E2.A2.1.3.1)(emphasis added).
6. *See, e.g.*, ISCR Case No. 02-26826 (November 12, 2003) at pp. 4-5; ISCR Case No. 01-03120 (February 20, 2002) at p. 4; ISCR Case No. 99-0511 (December 19, 2000) at p. 10.
7. Principles of statutory construction can be relied on as persuasive authority to interpret provisions of the Directive. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 7; ISCR Case No. 97-0783 (August 7, 1998) at p. 4 n.2.
8. *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 815 (3d Cir. 1994).
9. Applicant suggests that the record evidence shows his brother works for a city government in Syria, not the Syrian Government. Given the record evidence in this case (including the description of the Syrian Government contained in Government Exhibit 4), it is highly improbable that Applicant's brother works for a local government independent from the Syrian Government. Indeed, the *only* evidence suggesting Applicant's brother works for a local government entity is a single, equivocal statement that is inconsistent with Applicant's prior testimony, and that -- on its face -- is based on the untenable assumption that the only basis for a person to be a part of the Syrian Government is that the person is stationed in the Syrian capital.
10. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 5-6.
11. "[A] determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk."

12. The text of the current version of Foreign Influence Mitigating Condition 1 is quoted in footnote 5 of this decision.
13. *See, e.g.*, ISCR Case No. 99-0480 (November 28, 2000) at p. 5; ISCR Case No. 99-0557 (July 10, 2000) at p. 4 n.2.
14. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 8. *Cf.* DISCR Case No. 87-2214 (March 2, 1989) at p. 8 (noting diminished persuasive value of Hearing Examiner decisions handed down under prior edition of the Directive that did not contain Adjudication Policy factors).
15. *Cf.* ISCR Case No. 99-0511 (December 19, 2000) at p. 12 (Board decisions handed down before the issuance of the ASDC3I memorandum on foreign passports could not be relied on to the extent they were based on reasoning that was superseded or effectively overruled by that memorandum).
16. *See, e.g.*, ISCR Case No. 02-26826 (November 12, 2003) at p. 6; ISCR Case No. 02-04786 (June 27, 2003) at p. 8.
17. *See Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988).
18. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6 (security clearance decisions are not left to the unfettered discretion of adjudicators, but rather must be made within the parameters set by the Directive).
19. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).