

DATE: May 24, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-24267

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

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

Thomas M. Abbott, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 27, 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). Administrative Judge Kathryn Moen Braeman issued a favorable security clearance decision, dated August 30, 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 erred by applying Foreign Influence Mitigating Condition 1; (2) whether the Administrative Judge erred by applying Foreign Influence Mitigating Condition 3; and (3) if the Board concludes that Department Counsel has demonstrated the Administrative Judge erred in applying Foreign Influence Mitigating Conditions 1 and 3, whether the Board should affirm the Administrative Judge's favorable decision on alternate grounds. 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 erred by applying Foreign Influence Mitigating Condition 1. The Administrative Judge concluded that Applicant's ties to his parents and brothers living in Taiwan were mitigated under Foreign Influence Mitigating Condition 1 <sup>(1)</sup> because: (a) there is no evidence that Applicant's relatives are agents of Taiwan; (b) there is no evidence that Applicant could be influenced by agents of Taiwan because of his ties to relatives in Taiwan; (c) although Applicant's brothers work for agencies of the Taiwan government, they work for public utilities and not for any defense-related agency of Taiwan; (d) there is not a substantial likelihood that Applicant's immediate family members in Taiwan would exercise foreign influence over him; and (e) there is evidence that Applicant is not vulnerable to duress merely because of his family ties in Taiwan (Decision at p. 5).

Department Counsel contends the Judge erred by applying Foreign Influence Mitigating Condition 1. In support of this contention, Department Counsel argues the following:

(a) the record evidence shows that Applicant's brother worked for the agencies of the Taiwan government;

(b) nothing in the plain language of Foreign Influence Mitigating Condition 1 supports the Judge's distinction between (i) persons working in defense-related agencies or entities, and (ii) persons working in agencies or entities not related to defense matters;

(c) Applicant did not meet his burden of demonstrating that application of Foreign Influence Mitigating Condition 1 was

warranted;

(d) the Judge did not have a rational basis for concluding Applicant's immediate family members in Taiwan were not in a position to be exploited by the Taiwanese government;

(e) application of Foreign Influence Mitigating Condition 1 does not turn on what choice an applicant might make if a foreign government tries to exert influence or pressure on the applicant because of the applicant's ties to immediate family members in the foreign country; and

(f) the Judge erred by focusing on the possibility of Taiwan making threats or exerting coercive pressure on Applicant and ignoring the possibility of Taiwan trying to exert noncoercive influence on Applicant.

Applicant asks the Board to sustain the Administrative Judge's application of Foreign Influence Mitigating Condition 1 on the following grounds:

(i) the record evidence shows Applicant's brothers are not agents of a foreign power;

(ii) the record evidence shows Applicant's brothers work for companies "that have nothing to do with the Taiwanese government's magisterial functions, let alone its security apparatus";

(iii) the two Taiwanese companies for which Applicant's brothers work "were either privatized or nearly privatized," and Applicant's third brother "only works for the [Taiwanese] government in the most attenuated sense";

(iv) in the alternative, even if Applicant's brothers could be considered agents of the Taiwanese government, they are not connected to that government "in any meaningful way";

(v) the record evidence shows Applicant's immediate family members are not a position to be exploited by a foreign power in a way that could force him to choose between his family members and the United States; and

(vi) the Administrative Judge could take notice of the nature of the historic relationship between Taiwan and the United States and conclude it is unlikely that Taiwan would engage in conduct that would put at risk its relationship with the United States.

For the reasons that follow, the Board concludes the Judge's application of Foreign Influence Mitigating Condition 1 is not sustainable.

First, Department Counsel is correct that Applicant has the burden of presenting evidence sufficient to warrant application of Foreign Influence Mitigating Condition 1. Department Counsel does not have to disprove the applicability of Foreign Influence Mitigating Condition 1. <sup>(2)</sup> Moreover, the Administrative Judge does not have unfettered discretion when deciding whether or not application of Foreign Influence Mitigating Condition 1 is warranted. <sup>(3)</sup>

Second, given the record evidence in this case, Applicant's three brothers are agents of a foreign power for purposes of Foreign Influence Mitigating Condition 1. Nothing in the plain language of Foreign Influence Mitigating Condition 1 indicates or suggests that an Administrative Judge can conclude a person is not an agent of a foreign power merely because their employment with an agency, department or entity under the control of a foreign government is not defense-related. Nothing in the language of Foreign Influence Mitigating Condition 1 supports the Judge's distinction between (a) agencies, department, or entities under the control of a foreign government that are defense-related, and (b) agencies, departments or entities under the control of a foreign government that are not defense-related. Moreover, there is no rational basis for a Judge to assume or conclude that a foreign government can exert influence or pressure on or through its citizens only if they are employed by, or are associated with, a defense-related component of the foreign government.

Third, Department Counsel is correct in arguing that nothing in Guideline B (Foreign Influence) indicates or suggests that security concerns are raised only if an applicant is vulnerable to coercive forms of influence or pressure. <sup>(4)</sup> To the

extent that the Administrative Judge referred only to the possibility that coercive forms of influence or pressure might be used against Applicant, the Judge's analysis under Guideline B is flawed, incomplete, and not sustainable.

Fourth, it was arbitrary and capricious for the Administrative Judge to decide that Applicant was entitled to the application of Foreign Influence Mitigating Condition 1 based on the Judge's conclusion that even if the Taiwanese government were to try to exert influence or pressure on him because of his ties to immediate family members in Taiwan Applicant would report the matter to company security representatives and would not compromise classified information. Foreign Influence Mitigating Condition 1 refers to an applicant not being in a position where a foreign power could force the applicant to have to make a choice between immediate family members and the United States; it does not mitigate a case based upon what choice the applicant might make if forced to make such a choice.<sup>(5)</sup> A person in a conflict of interest situation based on family ties is still in a conflict of interest situation regardless of what decision the person might make if a third party seeks to influence or pressure the person through the person's family ties.<sup>(6)</sup> A federal employee in a conflict of interest situation does not alleviate the conflict of interest problem by asserting that he or she will make the right decision(s) despite the existence of the conflict of interest situation. Since the federal government is entitled to accept less risk with respect to security clearances than it does with routine civil service matters,<sup>(7)</sup> applicants in conflict of interest situations should not be held to a lesser standard than that required of federal employees.

Fifth, the Board does not find persuasive Applicant's arguments concerning the nature of U.S.-Taiwan relations and the absence of evidence that Taiwan is targeting classified U.S. information. The United States has a compelling interest in protecting classified information.<sup>(8)</sup> The United States is entitled to protect classified information from all entities and individuals not authorized to have access to such information, not just those entities and individuals who are hostile to the United States.<sup>(9)</sup> Moreover, Department Counsel is not required to prove that there is a clear and present danger or imminent threat to classified information before access to classified information is denied or revoked.<sup>(10)</sup> Nor does Department Counsel have to prove that a particular foreign country is targeting a particular applicant before access to classified information is denied or revoked.<sup>(11)</sup> Applicant has the ultimate burden of persuasion that his access to classified information is clearly consistent with national security.<sup>(12)</sup>

2. Whether the Administrative Judge erred by applying Foreign Influence Mitigating Condition 3. The Administrative Judge concluded Applicant's contacts with his immediate family members in Taiwan were mitigated under Foreign Influence Mitigating Condition 3<sup>(13)</sup> (Decision at pp. 4, 5). Department Counsel contends the record evidence does not support the Judge's application of Foreign Influence Mitigating Condition 3. Applicant counters by arguing the record evidence does support the Judge's application of that mitigating condition.

There is a rebuttable presumption that an applicant's contacts with immediate family members are not casual.<sup>(14)</sup> Furthermore, in assessing an applicant's contacts with foreign citizens, an Administrative Judge must consider the totality of those contacts, and not engage in a piecemeal evaluation of such contacts.<sup>(15)</sup> The Judge appears to be giving Applicant the benefit of Foreign Influence Mitigating Condition 3 because she concluded Applicant's contacts with his immediate family members have been casual and infrequent (Decision at p. 5). Given the Judge's own findings about Applicant's contacts with his mother in Taiwan (Decision at p. 3), it was arbitrary and capricious for the Judge to conclude those contacts were infrequent. Furthermore, Foreign Influence Mitigating Condition 3 refers to contacts that are "casual **and** infrequent" not "casual **or** infrequent." (emphasis added).<sup>(16)</sup> Accordingly, the Judge's decision to apply Foreign Influence Mitigating Condition 3 is arbitrary and capricious because: (a) it is not consistent with the plain language of the mitigating condition; (b) it is not supported by the record evidence as a whole; and (c) it runs contrary to the Judge's own finding about Applicant's contacts with his mother in Taiwan. Applicant's argument in support of the Judge's application of Foreign Influence Mitigating Condition 3 is wholly unpersuasive.

3. If the Board concludes that Department Counsel has demonstrated the Administrative Judge erred in applying Foreign Influence Mitigating Conditions 1 and 3, whether the Board should affirm the Administrative Judge's favorable decision on alternate grounds. As discussed earlier in this decision, Applicant argues the Board should affirm the Administrative Judge's decision. In the alternative, Applicant argues that if the Board concludes Department Counsel has demonstrated

the Judge erred, then the Board should affirm the Judge's favorable decision because the Judge's errors would be harmless since the Judge's favorable decision can be affirmed on "multiple, independent bases."

The errors identified on appeal, when viewed in their entirety, are not harmless. However, the Board notes that it has held that the nonappealing party can argue that the Board should affirm the Administrative Judge's decision on alternate grounds. <sup>(17)</sup> Construing Applicant's argument as raising that possibility -- because of its assertion that there are "multiple, independent bases" for affirming the Administrative Judge's decision -- the Board concludes that Applicant has not articulated persuasive reasons for affirming the Judge's decision on alternate grounds. Furthermore, the Board does not find persuasive Applicant's fallback position that the Board should not reverse the Judge's decision, but rather should remand it to the Judge with instructions to issue a new decision after correction of her errors.

### **Conclusion**

Department Counsel has demonstrated errors that, viewed in their entirety, warrant reversal of the Administrative Judge's decision. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the 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" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1).

2. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6.

3. *See, e.g.*, ISCR Case No. 03-16516 (November 26, 2004) at p. 6.

4. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 10; ISCR Case No. 02-11570 (May 19, 2004) at p. 6

5. *See* ISCR Case No. 03-15205 (January 21, 2005) at pp. 3-4 ("Department Counsel correctly points out that Foreign Influence Mitigating Condition 1 hinges not on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on the concept that Applicant should not be placed in a position where he is forced to make such a choice.").

6. *Cf.* ISCR Case No. 02-13595 (May 10, 2005) at p. 6 (a factor that does not relieve an applicant from the dilemma of being forced to choose between his family members and the United States does not provide an Administrative Judge with a rational basis to apply Foreign Influence Mitigating Condition 1).
7. *See Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973).
8. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).
9. *See, e.g.*, ISCR Case No. 02-26976 (October 22, 2004) at pp. 5-6. The unauthorized disclosure of classified information to a U.S. citizen, whether deliberate or inadvertent, is a security violation even if there is no evidence that the U.S. citizen is hostile to the United States. The unauthorized disclosure of classified information to a foreign person or entity, whether deliberate or inadvertent, is a security violation even if there is no evidence that the foreign person or entity is hostile to the United States.
10. *See, e.g.*, ISCR Case No. 03-16516 (November 26, 2004) at p. 7; ISCR Case No. 02-06478 (October 25, 2004) at p. 6.
11. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 4-5; ISCR Case No. 02-02892 (June 28, 2004) at p. 7; ISCR Case No. 00-0628 (February 24, 2003) at p. 5. Accordingly, Applicant's argument that Department Counsel did not present evidence that Taiwan is currently targeting U.S. classified information does not have the significance that Applicant seems to place on that argument.
12. *See* Directive, Adjudicative Guidelines, Item E2.2.2 and Additional Procedural Guidance, Item E3.1.15.
13. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).
14. *See, e.g.*, ISCR Case No. 02-27081 (November 10, 2004) at p. 6.
15. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5; ISCR Case No. 01-22606 (June 30, 2003) at p. 6.
16. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 9.
17. *See, e.g.*, ISCR Case No. 01-16328 (October 30, 2002) at p. 4.