

DATE: November 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26826

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Willard P. McCrone, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated December 14, 2002 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 Richard A. Cefola issued a favorable security clearance decision dated May 14, 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.

Department Counsel's appeal presents the following issue: 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) are 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

The Administrative Judge made findings and reached conclusions favorable to Applicant with respect to the SOR subparagraphs alleged under Guideline C (Foreign Preference). Those findings and conclusions have not been challenged by Department Counsel. Accordingly, the Board need not address them to resolve this appeal. The substance of some of the allegations under Guideline C will be discussed where they have some bearing on the parties' arguments with respect to the Administrative Judge's finding and conclusions under Guideline B (Foreign Influence).

The Administrative Judge concluded that Department Counsel had presented a case under Guideline B by establishing that Applicant's father, mother and sister are Turkish citizens residing in Turkey. The Administrative Judge concluded that the government's security concerns had been mitigated because none of Applicant's immediate family are presently connected to any foreign government and there is no evidence that their presence in Turkey can be exploited by any foreign government. The Administrative Judge further concluded that it would be unlikely that Applicant would ever countenance any such attempt at exploitation.

Department Counsel's brief sets forth the following claims of error: (1) the Administrative Judge erred by applying Foreign Influence Mitigating Condition 1 [\(1\)](#)

because the record lacks sufficient evidence to satisfy the requirements of the second part of the mitigating condition, namely, that Applicant's immediate family members are not in a position to be exploited by the Turkish government; and (2) the Administrative Judge's determination that the potential for coercion of the Applicant does not exist runs contrary to the record evidence. In making this second argument, Department Counsel points to the following specific evidence surrounding Applicant's relationships with his immediate family and to specific evidence concerning Applicant's father: (a) Applicant calls his parents in Turkey almost every weekend and he calls his sister on a monthly basis; (b) Applicant's father was an officer in the Turkish Army for 38 years and was only recently retired; (c) Applicant's father is still connected to his former colleagues in the Turkish Army; and (d) while on active duty in 1997,

Applicant's father was able to obtain a NATO security clearance for his son as a favor from the Turkish Foreign Ministry.

Applicant asserts the following on appeal in support of his position that the Administrative Judge correctly applied Foreign Influence Mitigating Condition 1: (a) no record evidence was presented regarding any conduct on the part of Applicant or his father that would support the claim that they were currently acting as agents for the Turkish government or were subject to exploitation; (b) Applicant clearly indicates a preference for the United States by obtaining U.S. citizenship, by obtaining and using a U.S. passport, by renouncing his claims to Turkish citizenship without conditions or reservations, by registering to vote in the U.S. and registering with the Selective Service System, and by refusing to acknowledge any obligation to the Turkish involuntary reserves after becoming a U.S. citizen; (c) Applicant's father is no longer employed by the Turkish government; and (d) Applicant's family members are not currently agents of the Turkish government.

Department Counsel has the burden of presenting evidence to establish controverted SOR allegations. *See* Directive, Additional Procedural Guidance, Item E3.1.14. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15. The applicant's burden of persuasion includes the burden of presenting evidence sufficient to warrant application of Adjudicative Guidelines mitigating conditions. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5. Because of the "clearly consistent with the national interest" standard, an applicant's burden of persuasion under Item E3.1.15 is a heavy one. *See e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 3 n.2. Finally, even if a case is a "close" one, it must be resolved in favor of the national security, not in favor of an applicant. *See e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 10.

The record evidence supports the Administrative Judge's finding that Applicant's immediate family living in Turkey are not currently agents of the Turkish government. However, Department Counsel correctly notes that analysis of an applicant's case does not end simply because a Judge finds the applicant's relatives are not agents of a foreign power. Even if an applicant's relatives living in a foreign country are not agents of a foreign power, the Judge must consider whether the applicant's relatives are in a position that poses a risk that they could be exploited by a foreign power. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 10 (discussing bifurcated nature of Foreign Influence Mitigating Condition 1). Deciding whether to apply Foreign Influence Mitigating Condition 1 in a given case is not a simple proposition because of its bifurcated 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 (i) agents of a foreign power, nor (ii) in a position to be exploited by a foreign power. *See also* ISCR

Case No. 98-0507 (May 17, 1999) at p. 10 ("The security significance of an applicant's family ties in a foreign country does not turn on the simple question of whether the applicant's relatives have official ties with a foreign government."). *Accord* ISCR Case No. 99-0295 (October 20, 2000) at p. 8.

Department Counsel persuasively argues that there is insufficient evidence in the record to support the Administrative Judge's conclusion that Applicant's family members are not in a position to be exploited by the Turkish government. Moreover, the Administrative Judge's concluded that the Foreign Influence case against Applicant had been mitigated because "there is no evidence that their [Applicant's immediate family] presence in Turkey can be exploited by any government." The Judge's analysis had the practical effect of concluding Applicant was entitled to application of Foreign Influence Mitigating Condition 1 because Department Counsel had not presented evidence to disprove its applicability. The Judge's analysis was arbitrary, capricious and contrary to law and this erroneous analysis was crucial to his favorable conclusions under the Foreign Influence Guideline.

Department Counsel also contends the Administrative Judge erred by failing to address the record evidence that Applicant's father helped Applicant obtain a NATO security clearance by asking a Turkish Foreign Ministry official for a favor. Such evidence is highly relevant to the matter of possible foreign influence under Guideline B-⁽²⁾

and the Judge's failure to discuss it is indicative of arbitrary and capricious action by the Judge.

A review of the record reveals that the only evidence that speaks to the absence of possible exploitation of Applicant's immediate family by the Turkish government or any government are two brief, uncorroborated statements made by Applicant. He stated that he had no knowledge of his family dealing with terrorist organizations. (3)

Additionally, he stated his belief that none of his foreign relatives or anyone else could ever influence him to do anything to harm the national defense interests of the United States. (4)

Otherwise, the record is devoid of any evidence that could support a conclusion that Applicant's relatives were not in a position to be exploited. Statements by an applicant about what he or she will do in the future in response to any attempt to exploit his or her family ties, however sincere or credible, cannot be taken simply at face value. An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in an identical or similar manner in the past under identical or similar circumstances. As a matter of common sense, a person's stated intention to engage in future conduct that is identical or similar to the person's past conduct is entitled to be given more weight than a person's stated intention to engage in future conduct of a kind that the person has never engaged in before. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 11.

The Administrative Judge's conclusion that Applicant's immediate family in Turkey is not in a position to be exploited is problematic in light of the overall record in this case. Given the record evidence of (a) the strength of Applicant's ties with family members in Turkey, (b) the longstanding position of Applicant's father as an officer in the Turkish army which ended quite recently, and (c) the strength of Applicant's father's ties to the Turkish government as manifested by his success in using contacts to help Applicant obtain a NATO security clearance, Applicant had a heavy burden of persuasion to demonstrate he is not at risk of being vulnerable to foreign influence due to his family ties to Turkey. *See, e.g.*, ISCR Case No. 00-0628 (February 23, 2003) at pp. 4-5 (noting that under Guideline B foreign influence covers influence exercised by coercive or noncoercive means). Department Counsel persuasively argues that Applicant has not met that burden. The Administrative Judge failed to articulate a rational basis for his favorable conclusions under Guideline B.

Applicant argues that the evidence concerning Applicant's embrace of United States citizenship and his exercise of that citizenship together with his unconditional renunciation of his Turkish citizenship supports the Administrative Judge's favorable conclusions on the issue of possible exploitation of Applicant's family ties in Turkey. Applicant's argument is not persuasive. Applicant's exercise of United States citizenship and his renunciation of his Turkish citizenship support the Judge's favorable findings and conclusions under Guideline C (Foreign Preference). However, the Judge's favorable findings and conclusions under Guideline C does not diminish or negate the security concerns raised by Applicant's family ties to Turkey. Even in the absence of a preference for Turkey, Applicant's family ties in Turkey raise security concerns under Guideline B. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5.

In his appeal brief, Applicant cites a number of past Board decisions dealing with the issue of Administrative Judges' findings and conclusions regarding application of Foreign Influence Mitigating Condition 1. After a review and consideration of the cases cited, the Board concludes that nothing in those Board decisions undercuts our finding of error in the present case.

Included in Department Counsel's appeal brief is an assertion that the Administrative Judge erred by not explicitly incorporating into his decision an amendment to the SOR that was made at the latter stages of the hearing to allow the SOR to better conform to the evidence. Department Counsel contends that the omission may have affected the manner in which the Administrative Judge resolved the Foreign Influence issues in the case. Given our previous findings of error regarding the Judge's analysis under the Foreign Influence Guideline, the Board need not address the issue of whether the Judge erred by not identifying the SOR amendment in the body of his decision.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, 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. "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. Guideline B is not limited to cases involving influence or exploitation through coercion and duress, but also expressly covers situations involving influence or exploitation through noncoercive means such as affection or obligation.

3. Hearing Transcript at p. 98.

4. Government Exhibit 3.