DATE: April 20, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-03974

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Eric F. Adams, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 18, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline L (Outside Activities) and Guideline B (Foreign Influence), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 6, 2005, after the hearing, Administrative Judge Carol G. Riccardello denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (a) whether the Administrative Judge erred in concluding that Applicant's vulnerability to coercion under Guideline B has not been mitigated; (b) whether the Administrative Judge was arbitrary and capricious in failing to satisfactorily explain how each of the allegations in paragraph 2 of the SOR had not been mitigated; (c) whether the Administrative Judge's decision was a clear error of judgment in light of record evidence; and (d) whether the Administrative Judge engaged in a piecemeal analysis in reaching her decision instead of considering the record evidence of the "whole person."

The dispositive findings of fact by the Administrative Judge that are relevant to this appeal are as follows:

Applicant works for a federal contractor as a consulting engineer. Applicant was born in France and was commissioned and served in a reserve capacity as a civil engineer with the French Ministry of Defense (FMD). He served from 1980 to 1996 and was discharged as a Major. As a reserve officer, Applicant could be recalled to military status but resigned his commission in 2005.

In 1970, Applicant became employed with the FMD as a civil engineer contractor. In essence his position was similar to a civil servant with the French government, and he was paid directly by the government. In 1979, the United States and European allies, one being France, entered into a joint international project to develop military weapon systems. In 1981, Applicant started coming to the United States on temporary duty assignments, as part of his engineering duties with the French government, to participate in the joint project. In August 1985, Applicant was assigned to the United States full-time to work on the program. Applicant worked for the FMD, in the United States with the joint program, until his retirement in 1996. He held a NATO secret security clearance until his retirement. Applicant lived in the United States during this entire period.

In 1996, subsequent to his retirement from the French government, Applicant started his own business. His first contract was with the FMD. Under French rules, in order to contract with a non-French, non-defense contractor, the contract must first go through a French defense contractor, who then contracts with the local contractor, in this case Applicant's company. Basically, the French defense contractor is a conduit to the local company. The FMD is not permitted to contract directly with non-French contractors. The contract Applicant received from FMD, after going through the conduit French company, was to write follow-up reports on the joint international project that Applicant had been working on as an engineer with the FMD. There was no longer a liaison officer assigned from France in the program, so Applicant was awarded a contract to summarize the worth of the program. His report was unclassified, and a copy was provided to the United States government.

In 1998, Applicant's business had another contract with the FMD, to research an American company that was interested in doing business with the French. Applicant was required to find information about this company and what their interests were and supply it to the FMD. Applicant completed the contract and has had no other contacts with the FMD or the French government. Additionally, Applicant's had a contract with a French company that was not defense-related. Applicant's business entity essentially stopped doing business in 2002, but was not formally dissolved until 2005. Applicant dissolved it because he believed it might effect his ability to obtain

a security clearance. Applicant entered into personal contracts with United States defense contractors starting in 1997 and continuing to the present.

Applicant has two grown sons who are French citizens. Applicant was required to support his ex-wife by paying the rent on a condominium in France, where she and the sons resided. He provided this support from 1990 to 2005. Applicant had contact with his ex-wife and sons on a regular basis during this period. Applicant has minimal communication with his ex-wife now that the support order has expired. Applicant maintains weekly contact with his younger son. His younger son graduated from college and is employed with a private company. He no longer lives in the condominium in France and is self-sufficient. Applicant contacts his older son once every six months. The contact is infrequent because his older son is educated with a masters degree, but has failed to secure full-time employment. He continues to reside in the condominium, and Applicant pays the required dues and fees.

Applicant's current spouse is an American citizen, and they live together in the United States. Applicant became a naturalized citizen of the United States in 2000.

Applicant's mother is a citizen and resident of France. She has never been employed. Applicant talks to her on the telephone once a month and visits her every time he goes to France, which is at least once a year. Applicant's sister is a an attorney who is a citizen and resident of France, and he visits her every time he goes to France. She has no work connections with the French government. Applicant made trips to France in February 1997, June 1997, September 1997, arch 1998, May 1998, November 1998, April 1999, December 1999, June 2000, March 2001 and February 2002.

Applicant owns stock in France[(1)] that is worth approximately $100,000 to $150,000, depending on how the stock is trading. He received these stocks from his mother as part of her estate plan. One of the stocks is defense related and the rest are invested in commercial products. The condominium he owns in France was valued at approximately $285,000 in 2002, and is likely worth more today. Applicant maintains a bank account in France so he can write checks to pay the condominium fees, and so dividends from his investments can be deposited directly into the account. There is approximately $2,000 in the account. Applicant expects to receive retirement benefits from the French government when he is eligible. Applicant's 92-year-old mother has assets of approximately one million dollars. When Applicant's mother passes away, he and his sister will inherit equal shares of her estate, pursuant to Applicant's understanding of French law. Applicant owns a house in the United States.

Applicant has an outstanding reputation in the community. He is considered professional and a man of integrity and good character who is trustworthy, candid, dedicated and exercises good judgment. Applicant is considered unquestionably loyal to the United States. Applicant possesses important skills in his field of expertise. Applicant volunteers his time to the community and participates in re-enactments of American history, which is an area of interest to him. Applicant takes his oath of allegiance to the United States very seriously and has renounced any allegiance to his former country.

The Administrative Judge found that France has a long and public history of economic espionage against the United States. France is listed as one of the top seven countries involved in economic espionage against the United States. France has been involved in collecting secret information against commercial targets in the United States to gain an economic edge internationally. Economic espionage is a priority in France, and theft of information from large United States companies has been a long term French policy. France actively recruits employees of big American companies to collect information against the interests of the United States.

The Administrative Judge made favorable formal findings with respect to Guideline L and two of the SOR paragraphs (2.h and 2.i) under Guideline B.[(2)] These favorable formal findings are not at issue on appeal. Applicant's second appeal issue includes the Judge's failure to explain why SOR paragraphs 2.h and 2.i under Guideline B were not mitigated, but the Judge mitigated them and made favorable formal findings for Applicant (Decision at 9-10). Applicant's basis for appealing them is not clear. In any event, given the circumstances of this case, the Board will treat Applicant's appeal as to these two paragraphs to be moot.

To put Applicant's appeal in context, Applicant does not dispute any of the Administrative Judge's specific findings of fact,[(3)] even though he emphasizes different evidence. Additionally, Applicant does not dispute that the Department Counsel established a *prima facie* case under the Foreign Influence Disqualifying Conditions. From that point, an 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 clearance decision. Directive ¶ E3.1.15.

In this regard, Applicant's appeal arguments emphasize the following: (1) Applicant's immediate foreign family members reside in France, a nation with interests not inimical to the United States, with no hostile security relationship and with political institutions sufficiently aligned with our own traditions (including the rule of law); (2) Applicant earned his foreign government pension before he became a U.S. citizen; (3) there is no evidence that any of Applicant's relatives abroad has ever come under any undue influence by foreign authorities and, given their occupations, such influence is unlikely; (4) Applicant is not a dual citizen; (5) there is no evidence that any of the family members or relatives have ties to the French government; (6) Applicant has maintained residence in the U.S. since 1985; (7) the Administrative Judge had the opportunity to observe Applicant's demeanor; (8) Applicant's explanations are sincere and consistent and "have the solid resonance of truth;" and (9) the Chief Engineer for a particular U.S. project office stated that he needs Applicant's services. Applicant contends that since the country in issue here is France, "any initial risk of any undue influence, coercion, or blackmail situation becomes unlikely, or at the very least, an acceptable one." Applicant also contends that "[o]verall, any potential security concerns attributable to Applicant's having immediate family members in France are sufficiently mitigated to permit safe predictive judgments about the Applicant's ability to withstand risks of exploitation and pressure attributable to his familial relationships in France." Applicant argues that there is no basis for the Judge to conclude that Applicant would be vulnerable to exploitation. Finally, Applicant claims bias and reversible error based on the Administrative Judge's unsupported conclusion that Applicant "does not intend on divesting himself of his acquired wealth." Applicant argues that the record does not indicate that Applicant was asked his intentions in this regard.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Administrative Judge concluded that, while Foreign Influence Mitigation Condition 1[(4)] "could be applied," "it cannot be viewed in a vacuum." The Judge considered the evidence on the other potentially mitigating conditions, including Foreign Influence Mitigating Conditions 3[(5)] and 5.[(6)] The Judge concluded that Applicant remains close to his family, the relationship is not casual or infrequent, and he has substantial financial interests in

France. The financial interests of the Applicant in France that the Judge considered are real property, stocks, a bank account, a pension from the French government upon reaching a certain age, and a possible inheritance from his mother. Considering the record, including France's history of economic espionage, the overall decision not to mitigate security concerns is sustainable under Guideline B, and, as explained below, under a "whole person" analysis. Given the size of the potential inheritance from the mother and the likelihood that Applicant would split it with his sister, the weight that the Judge accorded to the inheritance is also reasonable.

Applicant's bias argument is unpersuasive. First, based on the record, the Administrative Judge could reasonably draw the inference that Applicant, at least generally, does not intend to divest himself of his acquired wealth in France. *See*, *e.g.*, Applicant's Statement to the Defense Security Service agent dated April 9, 2002 (Government Exhibit 2 at 4-5)[(7)] and the absence of divestment up to the time of the hearing. Second, there is a rebuttable presumption that an Administrative Judge is fair and impartial, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. Bias is not demonstrated merely because a Judge found against the appealing party. Moreover, bias is not demonstrated merely because a party can demonstrate a Judge committed a factual or legal error. The standard is not whether a party personally believes a Judge was biased or prejudiced against that party, but rather whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *See* ISCR Case No. 03-07245 at 3-4 (App. Bd. May 20, 2005). In this case, while the record contains findings and conclusions against the Applicant, it also contains findings and conclusions favorable to Applicant, as explained earlier in this decision. Applicant's has not made a colorable claim of bias.

Finally, the Administrative Judge's decision shows that the Judge did more than merely verbalize an adherence to the "whole person" concept. The decision exhibits a discerning weighing of a number of variables to reach a common sense determination. Directive ¶ E2.2. In some instances, as explained earlier, this process led to favorable formal findings for Applicant. However, the Judge also articulated a reasonable concern that Applicant's financial interests could potentially make him vulnerable to coercion, exploitation or pressure, an important consideration in the "whole person" analysis. Directive ¶ E2.2.1.8. The concern is based on a combination of close family ties and substantial financial interests in France, especially considering France's active and aggressive policy of economic espionage. Examining Applicant's past, the Judge also considered the fact that Applicant was more than just a French citizen, but was a career government employee working for France in areas of high military interest. Against this concern Applicant relies on the argument that the risk of any undue influence, coercion, or blackmail is unlikely, or at the very least, acceptable because, in essence, France is a nation with traditions similar to the United States, including the rule of law. Applicant did not address France's economic policies or interests even though he had the ultimate burden of persuasion on obtaining a favorable security clearance decision. Also, Applicant did not provide any authority showing why the government must view the risk of granting him a security clearance as "acceptable" and why the Judge made a mistake in not viewing it as such. The fact that Applicant may be useful in a particular project or is well-regarded does not overcome the Judge's security concerns. The Judge's conclusion that it is not clearly consistent with the interests of national security to grant security clearance to Applicant is sustainable.

Order

In the absence of error, the decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The record indicates that Applicant owns stock in French companies, which is held by a bank located in France.

2. These two paragraphs under Guideline B are related to contacts with a French officer and civil servant.

3. Applicant does complain that the Judge placed too much weight on the possibility of a substantial inheritance from his 92-year old mother. That issue will be treated later in this decision.

4. "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 ¶ E2.A2.1.3.1).

5. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive ¶ E2.A2.1.3.3).

6. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities" (Directive ¶ E2.A2.1.3.5).

7. Applicant stated that he would attempt to remove his assets from France under threat of nationalization if he had prior warning, but would not jeopardize his U.S. citizenship to do so.