DATE: April 11, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-11765

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

FOR APPLICANT

Alexander Laughlin, Esq.; Rebecca L. Saitta, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 18, 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 October 14, 2004.

Department Counsel appealed the Administrative Judge's decision. The Board has jurisdiction on appeal 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 security clearance decision is arbitrary, capricious and 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

Before addressing the main appeal issues, the Board will discuss a threshold issue raised by a portion of the Department Counsel's brief, which sets forth "additions" to the Administrative Judge's Findings of Fact. Although the parties are free - within the bounds of zealous advocacy - to argue about what the record evidence shows, it is the Administrative Judge, not the parties, that makes the findings of fact in a case. Moreover, the Directive authorizes the Board to review a Judge's findings of fact, not engage in *de novo* fact-finding. Accordingly, the Board will consider Department Counsel's proffered "additions" only to the extent they constitute argument about the record evidence in support of any specific appeal issues raised by Department Counsel.

Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious and contrary to law.

The Administrative Judge found that Applicant is a native of Israel who served in Israel's military and foreign office prior to becoming a U.S. citizen in 1987. Applicant has been married four times. Applicant's first marriage was in Israel. While Applicant's second, third and fourth (current) wives are U.S. citizens, they are also citizens of other countries (Israel, U.K. and Poland). Applicant has four children, one of whom is a dual (U.S. and Israel) citizen. Applicant's mother lives in Israel. Applicant has two step children through his current wife, one is a citizen of the U.S., France and Poland, and the other is a citizen of France and Poland and lives in the U.S. Applicant's current wife has parents who live in and are citizens of Poland.

Department Counsel makes two arguments on appeal. Those arguments are (1) the Administrative Judge's application of Guideline B (Foreign Influence) itigating Conditions 1[(1)] and 3[(2)] were not reasonable given the totality of facts and circumstances in this case and (2) the Administrative Judge's conclusion that the government's case under Guideline C (Foreign Preference) was mitigated by Applicant's renunciation of his Israeli citizenship and surrender of his Israeli passport was not warranted given Applicant's conduct prior to the renunciation. Department Counsel's first argument is persuasive.

On appeal Department Counsel argues persuasively that the government had demonstrated that Applicant's family history and circumstances involved a complex web of countries and potential pressures which create multiple legitimate security concerns regarding Applicant. Department Counsel argues that the Administrative Judge concluded that the government's concerns were mitigated without adequate evidence to support such a conclusion given the quantity and complexity of Applicant's foreign ties. The Board agrees. In concluding that Foreign Influence Mitigating Condition 1 Applied the Judge relied solely on character testimony favorable to Applicant and Applicant's own testimony as to how he would behave under a hypothetical set of circumstances. Applicant relies heavily on the Administrative Judge's credibility determinations and "Applicant's unchallenged and unrebutted testimony" (Reply Brief at pp. 6-9). Although a favorable credibility determination means the Judge believes the veracity of the witness, it does not relieve the Judge of the obligation to weigh the witness's testimony in light of the record evidence as a whole and to reach reasonable conclusions based on the totality of the record evidence. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 6-7; ISCR Case No. 03-02486 (August 31, 2004) at p. 7. Given the Judge's findings about the extensive network of Applicant's family members in foreign countries and the dearth of evidence concerning whether these relatives were in a position to be exploited, the Judge's conclusion that Foreign Influence Mitigating Condition 1 applied was not warranted.

Similarly, the Judge made no findings of fact that support her conclusions that Foreign Influence Mitigating Condition 3 applied. The Judge applied Foreign Influence Mitigating Condition 3 without any explanation (Decision at pp. 6 and 9). Furthermore, given the Judge's sparse findings of fact, there is no discernable basis for the application of mitigating condition 3 in this case. *See, e.g.*, ISCR Case No. 01-27371 (February 19, 2003) at pp. 3-4 (application of Adjudicative Guidelines is not left to the unfettered discretion of Administrative Judges, but rather requires the exercise of sound judgment within the parameters set by the Directive). Department Counsel has demonstrated harmful errors in the Judge's conclusions.

Department Counsel also made other points which warrant discussion. Department Counsel implies that the Administrative Judge relied on a distinction between friendly and unfriendly nations to reach her favorable conclusions. The Board sees no evidence in the Judge's decision for such an implication. As Applicant points out, the Administrative Judge in her discussion under Guideline C (Foreign Preference) specifically cited the government's evidence as establishing "that even governments that are allies of the U.S. will not have identical interests on vital matters." On appeal, Department Counsel places great weight on the government's concerns about Israel's intelligence activities. The government's concern is supported by record evidence and entitled to some weight. But citing that concern, even vigorously, does not by itself demonstrate error in the Judge's decision.

Department Counsel's argument regarding Guideline C (Foreign Preference) is not persuasive. Department Counsel argues that Applicant's conduct with regards to his Israeli citizenship and passport were not mitigated by Applicant's recent renunciation of his Israeli citizenship and the cancellation of his Israeli passport. Department Counsel's argument is based in large part on the fact that Applicant did not relinquish his passport or renounce his citizenship until after he found out they were a problem just prior to the hearing. Department Counsel's argument is based in part on a premise which is in conflict with the Judge's findings of fact. Department Counsel's argument assumes that Applicant learned in an April 2003 DSS interview that his Israeli passport presented a security problem. The Judge specifically found "Neither the Corporate #1 security advisor in 2001 nor the DSS agent in 2003 advised Applicant that he must take steps to surrender his Israeli passport as a condition to getting his security clearance." Department Counsel's brief does not challenge the Judge's findings of fact. Indeed, Department Counsel's brief specifically adopts the Judge's findings of fact. To the extent Department Counsel's argument is based on the mistaken premise that Applicant knew his Israeli passport and citizenship were a problem but failed to act, the Board need not review it. In any case, the Board has previously rejected arguments which imputed a time element to the requirements of the ASDC3I Memorandum of August 16, 2000. *See*, ISCR Case No.01-20908 (November 26, 2003) at p. 5 (The ASDC3I memorandum is silent on when an applicant must surrender a foreign passport in order to have the surrender considered to be mitigating). To the extent Department Counsel challenges the application of Guideline C (Foreign Preference) Mitigating Conditions 1 and 3, the Board need not review the argument, because the Judge did not apply those mitigating conditions. All that remains of this portion of Department Counsel's argument amounts to a disagreement regarding the Judge's weighing of the evidence with regard to Guideline C. A party's disagreement with the Judge's weighing of the evidence does not show error on the part of the Judge. *See, e.g.*, ISCR Case No. 02-29373, at p. 4. The Board need not agree with the

Judge's conclusions to decide that Department Counsel has not demonstrated error in the Judge's analysis of Guideline C.

Conclusion

Department Counsel has demonstrated harmful error that warrant reversal in the Administrative Judge's conclusions under Guideline B. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3., the Board reverses the Administrative Judge's favorable security clearance decision.

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

Concurring opinion of Chairman Emilio Jaksetic:

I concur with the majority's conclusion that the Administrative Judge's favorable security clearance decision should be reversed. However, I write separately because I reach that conclusion for somewhat different reasons.

This is not the first appeal where I have been faced with the difficulty of deciding how to reconcile the difference between (a) the issues that have been raised on appeal, and (b) the arguments made by the parties. The difference between issues and arguments is not always easy to articulate or describe. However, it is a difference that warrants further consideration because it can affect significantly how the Board decides an appeal.

Under the Directive, an appeal is not a second hearing, and the Board does not retry a security clearance case. Rather, the Board reviews an Administrative Judge's security clearance decision that has been appealed, and addresses the material issues raised by the parties[(3)] within the review standards set forth in the Directive.[(4)]

Ideally, the appeal brief submitted by the appealing party will raise identifiable claims of error and support those claims of error with cogent arguments. However, not all appeal briefs satisfy that ideal. If an appeal brief fails to raise any identifiable claims of error, the Board can dispose of the appeal for lack of specificity.[(5)] If an appeal brief makes what appear to be claims of error, but such claims are difficult to discern or understand, the Board must decide whether the appeal brief can be fairly construed or interpreted as sufficient to raise claims of error that warrant consideration.[(6)] If the nonappealing party challenges the appealing party's statement of the issues or seeks to frame them differently,[(7)] the Board will have to decide what framing of the issues would be most appropriate for deciding the particular appeal.[(8)]

This case presents the problem of how the Board should decide the merits of identifiable claims of error supported by some arguments that are not particularly helpful in addressing the material issues raised on appeal.

If an appeal argument is deemed to be synonymous with an appeal issue, then a conclusion that an appeal argument is unpersuasive would seem to warrant the further conclusion that the appeal issue lacks merit. However, if an appeal argument is not deemed to be synonymous with an appeal issue, then a conclusion that a particular appeal argument is unpersuasive does not necessarily lead to the further conclusion that the appeal issue lacks merit.[(9)] To illustrate the

distinction between an argument and an issue and how that distinction can be relevant to decision-making, it would be useful to consider some of the tasks that an Administrative Judge must perform at the hearing level.

An Administrative Judge must issue a written decision that makes pertinent findings of fact, reaches conclusions, applies pertinent provisions of the Directive, and indicates the Judge's conclusion as to whether it is clearly consistent with the national interest to grant or continue a security clearance for a given applicant.[(10)] When doing so, a Judge must: (i) make pertinent findings of fact that satisfy the substantial evidence test[(11)]; (ii) reach conclusions that are not arbitrary or capricious[(12)]; (iii) apply pertinent provisions of the Directive, applicable DoD policy, and other applicable federal law[(13)]; and (iv) make a security clearance decision that applies the "clearly consistent with the national interest" standard.[(14)]

In carrying out these important responsibilities, an Administrative Judge should fairly consider the arguments made by the parties and decide whether those arguments are helpful or otherwise persuasive to the Judge in making findings of fact, reaching conclusions, and making legal rulings. But, the Judge is not bound by, or limited to, the arguments made by the parties. Subject to review on appeal, the Judge can make findings of fact, reach conclusions, and make legal rulings that are not bound by, or limited to, the arguments made by the parties. When making findings of fact, reaching conclusions, or making legal rulings, the Judge is not limited to considering only those arguments made by the parties. Rather, the Judge is free to use his or her professional judgment and powers of reasoning to weigh the record evidence and make findings of fact, draw conclusions, and make legal rulings pertinent to the issues framed by the SOR allegations and collateral issues raised during the proceedings.[(15)] The parties can make arguments about how the Judge should weigh the record evidence, what inferences or conclusions that the Judge should reach in light of the record evidence, and what provisions of the Directive or other law the Judge should apply in the case. But, the Judge is not bound by, or limited to, the arguments made by the parties.

If the Judge makes findings of fact that are different from those urged upon the Judge by the parties, the Judge's findings of fact are not erroneous merely because the Judge did not find persuasive the arguments that the parties made about the record evidence. Similarly, if the Judge makes findings of fact that neither party happened to argue the Judge should make, the Judge's findings of fact are not erroneous merely because neither party asked the Judge to make those particular findings of fact. Subject to review under the appeal provisions of the Directive, the Judge is free to make pertinent findings of fact even if those findings go beyond, or are not consistent with, the arguments made by either party concerning the record evidence.

If the Administrative Judge reaches conclusions that are different from those urged upon the Judge by the parties, the Judge's conclusions are not erroneous merely because the Judge reached conclusions different from those urged upon the Judge by either party. Similarly, if the Judge reaches conclusions that neither party happened to argue the Judge should reach, the Judge's conclusions are not erroneous merely because neither party asked the Judge to reach those particular conclusions. Subject to review under the appeal provisions of the Directive, the Judge is free to reach relevant conclusions even if those conclusions go beyond, or are not otherwise consistent with, the arguments made by either party.

If the Administrative Judge makes a legal ruling that is different from those urged upon the Judge by the parties, the Judge's legal ruling is not erroneous merely because the Judge reached a legal conclusion different from that urged upon the Judge by either party. Similarly, if the Judge makes a legal ruling based on a provision of law or the application of a legal principle that neither party cited or argued should be applied, the Judge's legal ruling is not erroneous merely because the parties did not cite or argue in favor of applying that provision of law or legal principle. For example, an Administrative Judge is not precluded from applying pertinent provisions of the Directive merely because neither party specifically asked the Judge to do so. Indeed, if a Judge were to fail to apply a pertinent provision of the Directive merely because neither party specifically asked the Judge to do so, the Judge's failure would be subject to challenge on appeal. The Judge's obligation to apply pertinent provisions of the Directive does not turn on whether a party asks or fails to ask the Judge to apply those provisions.[(16)]

Stated otherwise, the Administrative Judge is not bound to make only those findings of fact, reach only those conclusions, or apply only those provisions of federal law or DoD policy that are urged upon the Judge in the arguments

made by the parties. The Judge is not a mere passive automaton that can only utter the lines provided to the Judge by the parties.[(17)] To the contrary, independent of the arguments the parties make, the Judge must make pertinent findings of fact, reach reasonable conclusions, and apply pertinent provisions of federal law or DoD policy. The arguments made by the parties are tools to assist the Judge in his or her decision-making, not chains or shackles that constrain the Judge's execution of his or her responsibilities within the parameters set by Executive Order 10865, the Directive, and applicable federal law.

Similar reasoning can be applied to the appeal process. The arguments made by the parties on appeal are tools they use in an effort to persuade the Board to address and resolve appeal issues facing the Board in a manner favorable to them.[(18)] However, if the Board decides the arguments made by the parties are not persuasive, or are otherwise ineffective tools, to address and resolve the issues raised by the parties on appeal, then the Board is not relieved of its obligation to address the appeal issues in a fair and impartial manner under the standards of review set by the Directive. The arguments offered by the parties are tools the Board can use or not use, depending on whether the arguments are good ones or are otherwise persuasive. Accordingly, if the parties have raised an identifiable issue on appeal, then the Board should address that issue to the best of the Board's ability within the constraints of Executive Order 10865, the Directive, and applicable federal law. In addressing the material issues raised by the parties on appeal, the Board can consider the arguments made by the parties and decide whether they are persuasive or are otherwise helpful to the Board in deciding the appeal issues. However, the arguments made by the parties are tools to assist the Board in its decision-making, not chains or shackles that constrain the Board's exercise of its appellate responsibilities within the parameters set by Executive Order 10865, the Directive, and applicable federal law.

In view of the foregoing, I will consider the arguments made by the parties on appeal, but do not consider myself bound by, or limited to, those arguments when addressing the material issues raised on appeal under the review standards set by the Directive.

I concur with my colleagues' discussion concerning Department Counsel's proposed "additions" to the Administrative Judge's findings of fact. If an appealing party wants to claim the Administrative Judge failed to make pertinent findings of fact as required by Directive, Additional Procedural Guidance, Item E3.1.25, then the appealing party can do so. But, the appealing party cannot presume to supply, on appeal, "findings of fact" that the Judge did not make.

However, Department Counsel's choice to not challenge the sufficiency of the Administrative Judge's findings of fact does not preclude Department Counsel from challenging the conclusions that Judge reached in this case. A Judge's decision may be arbitrary and capricious even though the Judge's specific findings of fact are supported by sufficient record evidence.[(19)] The arbitrary and capricious standard set forth in the Scope of Review section of Board decisions -- which is based on language from a Supreme Court decision on the arbitrary and capricious standard in federal administrative law -- has elements that can support a challenge to a Judge's conclusions that does not depend on a predicate challenge being made to the Judge's findings of fact:

"In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: [a] it does not examine relevant evidence; [b] it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; [c] it does not consider relevant factors; [d] it reflects a clear error of judgment; [e] it fails to consider an important aspect of the case; [f] it offers an explanation for the decision that runs contrary to the record evidence; or [g] it is so implausible that it cannot be ascribed to a mere difference of opinion." (The letters in brackets are not in the original.)

If a Judge fails to make pertinent findings of fact about a case, then the Judge's failure to do so could count against sustaining the Judge's conclusions -- when they are challenged on appeal -- if there is no discernable basis for how the Judge reached those conclusions. If a Judge fails to make findings of fact sufficient to warrant the Judge's conclusions (favorable or unfavorable), then it is possible that the Board may well conclude the Judge's decision [a] "does not examine relevant evidence," [c] "does not consider relevant factors," [e] "fails to consider an important aspect of the case," or [f] "offers an explanation for the decision that runs contrary to the record evidence."[(20)] Similarly, if there is not a rational connection between the Judge's unchallenged findings and the Judge's conclusions, then the Board may well decide the Judge [b] "fail[ed] to articulate a satisfactory explanation" for the Judge's conclusions.[(21)]

With respect to Guideline B (Foreign Influence), Department Counsel contends the Administrative Judge erred by applying Foreign Influence Mitigating Condition 1[(22)] and Foreign Influence Mitigating Condition 3,[(23)] and by concluding that Applicant successfully mitigated the security concerns raised under Guideline B. In response, Applicant contends the Judge properly applied those two mitigating conditions, and had a rational basis for concluding Applicant had mitigated the security concerns raised under Guideline B. Accordingly, the issues before the Board are the following: (a) was it arbitrary or capricious for the Judge to conclude that Foreign Influence Mitigating Condition 1 was applicable; (b) was it arbitrary or capricious for the Judge to conclude that Foreign Influence Mitigating Condition 3 was applicable; and (c) was it arbitrary or capricious for the Judge to conclude that Applicant met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15 to submit evidence of refutation, extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision.

Department Counsel persuasively argues the record evidence establishes a *prima facie* case under Guideline B that shifted the burden of persuasion to Applicant. However, the Administrative Judge acted in an arbitrary and capricious manner by inverting the burden of proof and holding that Foreign Influence itigating Condition 1 applied because there is no evidence that Applicant's wife or parents are in a position to be exploited (Decision at pp. 8 and 9). Department Counsel did not have to disprove the applicability of Foreign Influence Mitigating Condition 1. Rather, Applicant had to present evidence to justify its application.[(24)] The Judge's application of Foreign Influence Mitigating Condition 1 was arbitrary and capricious because it was predicated on an improper shifting of the burden of persuasion.

In arguing in support of the Administrative Judge's application of Foreign Influence Mitigating Condition 1, Applicant relies heavily on the Administrative Judge's credibility determinations and "Applicant's unchallenged and unrebutted testimony" (Reply Brief at pp. 6-9). I concur with my colleagues' reasoning as to why this argument is not persuasive. Moreover, the Judge's favorable credibility determination does not cure her impermissible shifting of the burden of persuasion.

Department Counsel contends that, for purposes of Guideline B (Foreign Influence), it is irrelevant whether the form of influence to which Applicant could be subjected is coercive or noncoercive (Brief at pp. 11-12, 13). Applicant's reply brief argues that the record evidence shows he has not been subjected to coercive pressure in the past (Reply Brief at pp. 6-8). For the reasons that follow, I conclude Department Counsel's contention has merit, and Applicant's position has limited persuasive force.

Nothing in Guideline B (Foreign Influence) limits its scope or applicability to situations involving only coercive forms of influence.[(25)] Furthermore, the absence of evidence that an applicant is vulnerable to coercion or blackmail does not preclude consideration of conduct or circumstances that raise security concerns independent of any vulnerability to coercion or blackmail.[(26)] In this case, the Administrative Judge is implicitly holding that only evidence of coercive means of influence raises security concerns under Guideline B and that the absence of such evidence leads to the conclusion that there are no security concerns under Guideline B. By focusing only on the question of coercive forms of influence, the Judge engaged in arbitrary and capricious reasoning. Applicant's argument has limited persuasive force because: (i) it is predicated on the erroneous assumption that only evidence of coercive influence (actual or attempted) raises security concerns under Guideline B; and (ii) it seems to assume that Department Counsel has the obligation to present evidence that Applicant has been specifically targeted by a foreign government.[(27)]

Department Counsel contends the Administrative Judge's application of Foreign Influence Mitigating Condition 3 is not supported by the record evidence in this case (Brief at pp. 14-16). Applicant contends the Judge's application of that mitigating condition is sustainable because the Judge applied it to some of Applicant's contacts, not all them, and the Judge's choice to do so is supported by the record evidence (Reply Brief at pp. 9-10). I concur with my colleagues' discussion and resolution of this issue.

Applicant's contention that the Administrative Judge's favorable conclusions under Guideline B are sustainable under the whole person concept is not persuasive. Given the record evidence in this case, the burden of persuasion shifted to Applicant.[(28)] The errors committed by the Judge (including inverting the burden of proof) lead me to conclude the Judge's favorable conclusions under Guideline B are based on an arbitrary and capricious analysis that is not sustainable by reference to the whole person concept.

With respect to Guideline C (Foreign Preference), Department Counsel contends the Administrative Judge erred by concluding the security concerns under Guideline C were mitigated. In support of this claim of error, Department Counsel argues: (a) Foreign Preference Mitigating Condition 1 does not apply (Brief at pp. 16-17); (b) Applicant's ignorance of the security consequences of possessing and using an Israeli passport does not mitigate his conduct (Brief at pp. 17-18); (c) Foreign Preference Mitigating Condition 3 does not apply (Brief at pp. 18-19); and (d) there is no evidence that Applicant's application for renunciation of Israeli citizenship has been approved (Brief at p. 19).

As my colleagues correctly note, the Administrative Judge did not apply Foreign Preference Mitigating Condition 1 or Foreign Preference Mitigating Condition 3. Accordingly, Department Counsel's arguments about those two mitigating conditions are irrelevant and fail to demonstrate any error by the Judge.

Since I do not read the Administrative Judge's decision as relying on Applicant's ignorance to mitigate the security concerns under Guideline C, Department Counsel's second argument is irrelevant and fails to demonstrate any error by the Judge.

Department Counsel's fourth argument is unpersuasive. Given the wording of Foreign Preference Mitigating Condition 4,[(29)] the absence of evidence that Applicant's application for renunciation of Israeli citizenship has been approved did not preclude the Administrative Judge from applying that mitigating condition.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. "Contact and correspondence with foreign citizens are casual and infrequent."

3. Directive, Additional Procedural Guidance, Item E3.1.32 ("The Appeal Board shall address the material issues raised by the parties to determine whether harmful error occurred.")

4. Directive, Additional Procedural Guidance, Item E3.1.32.1 (when a party challenges an Administrative Judge's findings of fact); Item E3.1.32.2 (when a party claims Administrative Judge did not adhere to procedures required by the Executive Order 10865 or the Directive); Item E3.1.32.3 (when a party challenges an Administrative Judge's rulings or conclusions).

5. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (explaining why appealing party must raises claims of error with specificity).

6. This often occurs with appeal briefs submitted by *pro se* applicants, but also can occur with appeal briefs submitted by attorneys.

7. The nonappealing party is not constrained by the appealing party's statement of the issues, and may argue for an alternate framing of the issues on appeal. *See, e.g.,* Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument, 2nd edition* (National Institute for Trial Advocacy, 2003) at p. 129; Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (Oxford University Press, 1999) at p. 339; Laurel C. Oates, Anne Enquist, and Kelly Kunsch, *The Legal Writing Handbook: Analysis, Research, and Writing, 3rd edition* (Aspen Law & Business, 2002) at p. 327; Helene S. Shapo, Marilyn R. Walter, and Elizabeth Fajans, *Writing and Analysis in*

the Law, Revised 4th edition (Foundation Press, 2003) at pp. 437-438.

8. *See, e.g.*, Ruggero J. Aldisert, *Opinion Writing* (West Publishing, 1990) at p. 86; Joyce J. George, *Judicial Opinion Writing Handbook, 4th edition* (William S. Hein & Co., 2000) at p. 95.

9. Distinguishing between appeal issues and arguments made in support of appeal issues is not a novel concept. *See, e.g.*, Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument, 2nd edition* (National Institute for Trial Advocacy, 2003) at p. 221 ("It is the discussion of issues that formally constitutes your argument."); Helene S. Shapo, Marilyn R. Walter, and Elizabeth Fajans, *Writing and Analysis in the Law, Revised 4th edition* (Foundation Press, 2003) at p. 360 ("Once you have decided which issues to appeal and the standard of review that applies, you must decide which arguments to raise in support of your claims."). *See also* Federal Rules of Appellate Procedure, Rule 28 (identifying the statement of the issues presented for review portion of a brief as separate from the summary of the argument and argument portions of the brief).

10. *See* Directive, Additional Procedural Guidance, Item E3.1.25.

11. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

12. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3.

13. *See, e.g.*, Directive, Section 5.2.13 (Administrative Judges and the Board shall "have the requisite independence to render fair and impartial decisions *consistent with DoD policy*")(italics added); Section 6.3 (security clearance decisions must be "based upon consideration of . . . the pertinent criteria and adjudication policy in enclosure 2 [of the Directive]"); Additional Procedural Guidance, Item E3.1.25 (Administrative Judge's decision must set forth pertinent policies); Additional Procedural Guidance, Item E3.1.32.2 (when relevant to a material appeal issue, the Board will determine whether Administrative Judge adhered to procedures required by Executive Order 10865 and the Directive) and Item E3.1.32.3 (when relevant to a material appeal issue, the Board will determine whether the Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law).

14. *See* Directive, Section 4.2; and Additional Procedural Guidance, Item E3.1.25.

15. For example, rule on: (a) requests for continuance; (b) objections to the admissibility of proposed exhibits; or (c) other matters associated with conducting the proceedings.

16. A party can waive (or, in some situations, forfeit) its own rights and privileges that would be otherwise available under applicable law. However, an Administrative Judge's obligation to apply pertinent federal law and DoD policy is not a matter that a party can waive or forfeit. A party cannot waive or forfeit something that does not belong to the party.

17. At early common law, a party could lose a case for merely failing to use the correct wording in a pleading, or failing to correctly parse a technical distinction. *See, e.g.*, David Mellinkoff, *The Language of the Law* (Little, Brown and Co., 1963) at pp. 113-114, 174-175. Modern legal practice has not been so rigid or draconian as to require that a party risk dismissal of a case merely because the party failed to utter or write the precise legal formula or exact wording pertinent to the case.

18. *See, e.g.*, Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument, 2nd edition* (National Institute for Trial Advocacy, 2003) at p. 21 ("Reasons in a brief have no life of their own. They are tools of education and persuasion only.").

19. *See, e.g.*, ISCR Case No. 99-0019 (November 22, 1999) at p. 3; ISCR Case No. 97-0435 (July 14, 1998) at p. 3; ISCR Case No. 95-0600 (May 16, 1996) at p. 4.

20. *See, e.g.*, ISCR Case No. 03-02486 (August 31, 2004) at pp. 6-7 (explaining why party need not challenge or rebut the presumption that the Judge considered all the record evidence to raise other challenges to the Judge's findings and conclusions) and pp. 8-9 (holding party had persuasively shown that there is significant record evidence that runs

contrary to the Judge's conclusions); ISCR Case No. 02-19479 (June 22, 2004) at p. 6 (Judge's decision cannot simply be silent about what, as a matter of common sense, appears to be a relevant factor that could be an important aspect of the case); ISCR Case No. 02-02195 (April 9, 2004) at p. 4 (Judge's failure to mention or discuss significant evidence that runs contrary to the Judge's findings and conclusions can be indicative of a failure to consider it at all, or arbitrary or capricious reasoning by the Judge); ISCR Case No. 02-00318 (February 25, 2004) at pp. 7-8 (same).

21. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 5-6.

22. "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).

23. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).

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

25. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p. 6 n.14.

26. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 6 and n.13.

27. *Compare* ISCR Case No. 02-14995 (July 26, 2004) at pp. 4-5 ("[T]he federal government is not required to wait until it has proof that an applicant has been specifically targeted by a foreign government before it can decide whether the applicant's conduct and circumstances pose a security risk.").

28. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

29. "Individual has expressed a willingness to renounce dual citizenship" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.4).