

DATE: June 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15485

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

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

FOR APPLICANT

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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 19, 2004.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge's application of Guideline B Mitigating Conditions 1 and 3 was arbitrary, capricious and contrary to law; and (2) whether the Administrative Judge's conclusion that the government's concerns under Guideline C had been mitigated was arbitrary, capricious or contrary to law. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider

relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

Before addressing the main appeal issues, the Board will discuss a threshold issue raised by a portion of Department Counsel's brief, which sets forth proposed "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 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 to engage in *de novo* fact-finding on appeal. 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. [\(1\)](#)

1. Whether the Administrative Judge's application of Guideline B Mitigating Conditions 1 and 3 was arbitrary, capricious or contrary to law. The Administrative Judge found that Applicant has a mother, a sister, and a brother that are citizens of Israel and currently reside in that country. The Judge also found that Applicant's wife and children are dual citizens of the United States and Israel and currently live in the United States. The Judge found that "[t]o the best of Applicant's knowledge none of his family members are associates or agents of a foreign power or in a position to be exploited by a foreign power in a way that could force him to chose between loyalty to them and the US." The Judge then concluded that Guideline B Mitigating Conditions 1 [\(2\)](#)

and 3 [\(3\)](#)

applied and concluded that Applicant had successfully mitigated the government's concerns under Guideline B.

Department Counsel on appeal asserts that the Judge's conclusions are arbitrary, capricious and contrary to law. Department Counsel's assertion has merit. For the reasons that follow, the Board concludes the Administrative Judge failed to articulate a sustainable basis for her favorable conclusions under Guideline B (Foreign Influence).

Regarding the applicability of Guideline B Mitigating Condition 1, Department Counsel correctly notes that the record evidence concerning Applicant's mother and two siblings living in Israel raises security concerns under Guideline B, and that the burden of persuasion shifted to Applicant to present evidence sufficient to address those security concerns such that "it is clearly consistent with the national interest" to grant or continue access to classified information for Applicant. (4)

The Judge had to consider the totality of Applicant's conduct and circumstances and evaluate whether Applicant had presented sufficient evidence to extenuate or mitigate the security concerns raised by the presence of his mother and his siblings in Israel. However, the Administrative Judge acted in an arbitrary and capricious manner by inverting the burden of proof and holding that Guideline B Mitigating Condition 1 applied because there is no evidence that Applicant's mother, brother and sister, who are residents of and citizens of Israel, are agents of the Israeli government and could be pressured by them or be exploited by this foreign power (Decision at p. 8). Department Counsel did not have to disprove the applicability of Guideline B Mitigating Condition 1. Rather, Applicant had to present evidence to justify its application. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6. The Judge's application of Guideline B Mitigating Condition 1 was arbitrary and capricious because it was predicated on an improper shifting of the burden of persuasion.

Department Counsel contends that, for purposes of Guideline B, it is irrelevant whether the form of influence to which Applicant could be subjected is coercive or noncoercive (Brief at p. 10). This contention has merit. Nothing in Guideline B limits its scope or applicability to situations involving only coercive forms of influence. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p.6 n.14. 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. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 6 and n.13. 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.

In concluding that Guideline B Mitigating Condition 1 applied, the Administrative 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. The Judge concluded that "Applicant persuasively declared that if he were ever approached by anyone seeking information on his classified work, he would report such a contact or threat to a responsible security official." (Decision at p. 8). Although a favorable credibility determination means the Judge believes the witness, it does not relieve the Judge of the obligation to weigh the witness' 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 Applicant's ties with immediate family members in Israel and the dearth of evidence concerning whether these relatives were in a position to be exploited (the Judge's decision rests heavily on her principal finding that Applicant testified that none of his relatives or associates were agents of a foreign power or in a position to be exploited by a foreign power, *to the best of his knowledge* [emphasis added]), the Judge's conclusion that Guideline B Mitigating Condition 1 applied was not sustainable.

Moreover, by relying on Applicant's hypothetical statement as to what he would do if anyone approached him seeking access to classified information, the Administrative Judge engaged in arbitrary and capricious reasoning. The 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. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 4-5. In the context of the application of Guideline B Mitigating Condition 1, the proper focus is not on what an applicant would do if placed in a position where he or she is forced to choose between loyalties to family members and loyalty to the United States. The proper focus is on a determination as to whether the presence of an applicant's family members in a foreign country places applicant in a position where he or

she might have to choose between conflicting loyalties.

In applying Guideline B Mitigating Condition 1, the Administrative Judge based her conclusion that Applicant's mother and siblings are not in a position to be exploited because: (a) Applicant's mother is elderly; (b) Applicant's mother is not dependent on Applicant for support; (c) notwithstanding his concerns for his mother, Applicant made the security interests of the United States a higher priority when he took steps to cancel his Israeli passport and renounce his Israeli citizenship; (d) neither Applicant's sister nor brother work for the Israeli government; and (e) Applicant has had ties to the United States over a long period of time. None of these factors provide a sustainable basis for applying Guideline B Mitigating Condition 1.

The fact that Applicant's mother is elderly does not support the application of Guideline B Mitigating Condition 1 because there is no record evidence that provides the Administrative Judge with a rational basis for concluding that the age of Applicant's mother confers any protection upon her against targeting by the Israeli government. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at pp. 5-6. Similarly, neither the absence of evidence that Applicant supports his mother, nor the absence of evidence that Applicant's siblings work for the Israeli government, nor the evidence of Applicant's close ties with the United States and the affirmative steps he took to sever ties with Israel negate or diminish the dilemma Applicant would face if he were subjected to influence or pressure because of his ties with immediate family members living in Israel. Because none of these factors would relieve Applicant from the dilemma of being forced to choose between his family members and the United States, none of them provide a rational basis for the Judge to apply Guideline B Mitigating Condition 1.

In his appeal brief, Applicant cites numerous decisions of DOHA Hearing Office Administrative Judges to bolster his argument that in this case the Administrative Judge properly determined that his relatives were not in a position to be exploited by a foreign power. A decision by a Hearing Office Administrative Judge is not legally binding precedent on other Hearing Office Judges or the Board. Just as the decision of one trial-level judge is not legally binding precedent on a fellow trial-level judge, the decision of one Hearing Office Judge is not legally binding precedent on another Hearing Office Judge. Similarly, just as the decision of a trial-level tribunal is not legally binding precedent on an appellate tribunal, the decisions of Hearing Office Judges are not legally binding precedent on the Board. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5. The Board has no obligation to follow the Hearing Office decisions cited by Applicant, and no obligation to reconcile the Judge's decision below with the Hearing Office decisions cited by Applicant.

Department Counsel asserts on appeal that the Administrative Judge's conclusion that Guideline B Mitigating Condition 3 applied to mitigate the Guideline B security concerns is unsupported by the record evidence. Department Counsel's contention has merit.

As Department Counsel points out, there is a rebuttable presumption that an individual's relationship with his immediate family members is not casual and infrequent. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at 4. In this case, the Judge made no findings of fact that provide a basis for overcoming the presumption and that support her conclusion that Guideline B Mitigating Condition 3 applied. Given the absence of relevant findings of fact on the part of the Judge, there is no discernable basis for the application of Mitigating Condition 3 in this case. The Judge applied Mitigating Condition 3 without any explanation (Decision at p. 8). In addition, as Department Counsel suggests, there is significant record evidence that runs contrary to the Judge's application of Mitigating Condition 3. The Judge engaged in arbitrary and capricious reasoning when concluding that Guideline B Mitigating Condition 3 applied to mitigate the government's concerns in this case.

To summarize, Department Counsel has successfully demonstrated that the Administrative Judge failed to articulate a rational basis for her conclusion that Guideline B Mitigating Conditions 1 and 3 applied in this case.

2. Whether the Administrative Judge's conclusion that the government's concerns under Guideline C had been mitigated was arbitrary, capricious or contrary to law. Under Guideline C (Foreign Preference), the Administrative Judge found the following: (a) Applicant is an Israeli citizen by birth who served in the Israeli military but is no longer obligated for military service; (b) Applicant became a naturalized American citizen in 1986; (c) Applicant obtained a United States passport in 1987 and renewed it in 1997; (d) Applicant maintained an Israeli passport because, as an Israeli citizen, he

was required to use it to enter and leave Israel; (e) Applicant only used his Israeli passport for travel to Israel and otherwise used his U.S. passport; (f) Upon receipt of the "Money Memorandum" [\(5\)](#)

in November 2003, Applicant did not understand the correct procedures for surrendering his Israeli passport; (g) in May 2004, once he understood the requirement, he decided to surrender his passport and renounce his Israeli citizenship in order to maintain his security clearance; (h) Applicant surrendered his Israeli passport in June 2004; and (i) Applicant initiated steps to renounce his Israeli citizenship. Based on these findings, the Judge concluded: (i) once Applicant understood the U.S. security concerns over his retaining his foreign citizenship, he expressed his willingness to surrender his passport and began the steps to renounce his Israeli citizenship; (ii) Applicant's actions in surrendering the Israeli passport lend credence to his position that he does not prefer the interests of another country over the United States; (iii) Guideline C Mitigating Condition 4 [\(6\)](#)

applies since Applicant took steps to renounce his citizenship; and (iv) Applicant's overall conduct was not undertaken in such a way as to establish a preference for a foreign country over the United States.

On appeal, Department Counsel argues that the Administrative Judge's conclusion that the government's case under Guideline C was mitigated by Applicant's surrender of his Israeli passport and commencement of efforts to renounce his Israeli citizenship was not warranted given Applicant's conduct prior to the passport surrender and attempts at renunciation and the timing of the passport surrender and attempts at renunciation.

Department Counsel's argument regarding Guideline C is not persuasive. Department Counsel's argument is based in large part on its contention that Applicant did not relinquish his passport or attempt to renounce his citizenship until just prior to the hearing, even though he knew since a February 2001 security interview that his possession of an Israeli passport presented a security problem. Department Counsel's argument is based in part on a premise which is in conflict with the Judge's findings of fact. The Judge did not find that Applicant was on notice since February 2001 that his possession of an Israeli passport posed a potential security problem. Rather, the Judge found that Applicant became aware of the DoD policy on foreign passports in November 2003 and was unaware of how to comply until May 2004. Department Counsel does not challenge the Judge's findings of fact. Indeed, Department Counsel's brief specifically adopts the Judge's findings of fact. Therefore, to the extent Department Counsel's argument is based on the premise that Applicant knew in February 2001 that his Israeli passport and citizenship were a problem but he failed to act, the Board will not consider it. In any case, the Board has previously rejected arguments which impute 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).

Department Counsel discusses the applicability of Guideline C Mitigating Conditions 1 [\(7\)](#)

and 3 [\(8\)](#)

in its argument pertaining to the Administrative Judge's resolution of Guideline C. The Board need not review these discussions since the Judge did not apply those mitigating conditions in her decision.

All that remains of Department Counsel's Guideline C argument is a disagreement with the Administrative Judge's weighing of the evidence. [\(9\)](#)

A party's disagreement regarding the Judge's weighing of the evidence does not establish error on the part of the Judge. *See, e.g.*, ISCR Case No. 02-23336 (May 10, 2004) at p. 5. 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 warrants reversal, based on the Administrative Judge's unsustainable conclusions under Guideline B. Pursuant to the 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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. If a party believes the Administrative Judge's decision does not set forth pertinent findings of fact, then the party can consider whether to raise a claim that the Judge failed to comply with the requirements of the Directive, Additional Procedural Guidance, Item E3.1.25. If a party believes the Judge reached conclusions that do not rationally follow from, or are not adequately supported by, the Judge's findings of fact, then the party can consider whether to raise a claim that the Judge's conclusions are arbitrary or capricious.

2. "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.

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

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

5. On August 16, 2000, then-Assistant Secretary of Defense for Command, Control, Communications and Intelligence, Arthur L. Money, issued clarifying guidance (the ASDC3I Memorandum or the "Money Memo") stating that a person who possesses a foreign passport should be disqualified from holding a clearance "unless the applicant surrenders the foreign passport . . ."

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

7. "Dual citizenship is based solely on parent's citizenship or birth in a foreign country." Directive, Adjudicative Guidelines, Item E2.A3.1.3.1.

8. "Activity is sanctioned by the United States." Directive, Adjudicative Guidelines, Item E2.A3.1.3.3.

9. The Judge's conclusion that Applicant had mitigated the government's case under Guideline C was based in large part on her conclusion that Guideline C mitigating Condition 4 ("Individual has expressed a willingness to renounce dual

citizenship") applied. Department Counsel does not specifically challenge the Judge's application of Guideline C Mitigating Condition 4 on appeal.