

DATE: November 22, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17071

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq, Department Counsel

FOR APPLICANT

Ellen J. Wang, Esq.

On December 20, 2004, DOHA issued a Statement of Reasons (SOR) advising Applicant that it could not conclude he was eligible for a security clearance because of security concerns raised under Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline M (Misuse of Information Technology Systems) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 22, 2006, after the hearing, Administrative Judge Martin H. Mogul granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge's conclusion that Foreign Influence Mitigating Condition (FI MC) 1 applies is unsupported by the record evidence and is arbitrary, capricious, and contrary to law; and whether the Administrative Judge's application of Personal Conduct Mitigating Condition (PC MC) 2 and Misuse of Information Systems Mitigating Conditions (MI MC) 1 and 4 are unsupported by the record evidence and are arbitrary, capricious, and contrary to law. We remand the case to the Administrative Judge.

II. Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge found that Applicant is a 60 year old software engineer employed by a defense contractor. Applicant was born in the People's Republic of China (PRC) but moved to Taiwan as a child. Applicant moved to the United States in 1968 to pursue a Ph.D. in mathematics at a U.S. university. He became a naturalized citizen of the United States in 1977.

The Administrative Judge found that Applicant has several family members living in Taiwan, including his father, an 89 year-old retiree from a government-controlled company. Applicant's brother is a retired Colonel in the Air Force of Taiwan, who is currently works for a private company building golf courses. Applicant has two sisters, one a retired school teacher and the other a retired banker. Applicant's father-in-law lives in the PRC and Applicant visited him in 2001.

Applicant e-mails family photographs to his brother four or five times a year and calls his father twice a year. He has

traveled to Taiwan on several occasions, including to attend his mother's funeral. He has no financial interests in Taiwan and has a substantial net worth in the United States.

On April 5, 2001, and from May 1 to May 9, 2001, Applicant accessed sexually explicit web sites from his computer at work. The computer was owned by his employer. Additionally, Applicant downloaded sexually explicit photographs onto the same computer. All this was in violation of company policy. The company investigated Applicant's conduct and terminated his employment for cause, although Applicant testified that he elected to retire in lieu of being terminated. Applicant also stated that he was unaware of the company policy at the time he accessed the web sites but was aware that his activity was wrong. The Administrative Judge found nothing to contradict Applicant's claim that he had stopped accessing such web sites before being confronted by his employer.

B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1]

We have examined the Administrative Judge's findings of fact, comparing them with the evidence contained in the file. We conclude that they are supported by substantial evidence but also note the following omissions: The Administrative Judge did not make any finding concerning the PRC's "well documented abuses of human rights in violation of internationally recognized norms," including "intolerance of dissent" and inadequate "legal safeguards for basic freedoms."⁽¹⁾ Neither did the Administrative Judge make a finding concerning the Taiwanese government's efforts at industrial espionage.⁽²⁾ Such findings are crucial in evaluating the application of FI MC 1, given Applicant's relatives in both the PRC and in Taiwan.

III. Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Guideline B, Foreign Influence, addresses possible security risks posed by individuals who, among other things, have family members residing in foreign countries, thereby posing a danger of coercion. In the case under consideration, substantial evidence supports the Administrative Judge's conclusion that Applicant has family members who are citizens of, and reside in, foreign countries, specifically Taiwan and the PRC, which raises security concerns under FI Disqualifying Condition (DC) 1.⁽³⁾

Regarding the application of FI MC 1,⁽⁴⁾ we first look to Applicant's relatives in Taiwan. While the evidence shows that Applicant's father and siblings have received pensions from the Taiwanese government, the evidence supplied by the Applicant establishes that none of them are currently agents of that government. We see nothing in the record to suggest, or to raise the concern, that their receipt of pensions renders them agents within the meaning of the law. Admittedly Applicant's brother is a retired military officer, but his current employment is with a private company rather than with the government. We find no basis to conclude that he is currently an agent of the Taiwanese government.

On the other hand, the failure of the Administrative Judge to address the record evidence regarding industrial espionage impairs his analysis, both of the susceptibility of Applicant's Taiwanese relatives to exploitation as well as of the whole person. We conclude that a thorough analysis of Applicant's case would require formal consideration of this matter.

We reach a similar conclusion regarding Applicant's father-in-law. The absence of factual findings as to the PRC's on human rights record impairs the Administrative Judge's favorable decision. A reasonable person, in evaluating whether even an elderly person such as the father-in-law might be a means through which Applicant could be subjected to coercion, would take into account that human rights record and would give it serious weight in deciding this issue. However, the Administrative Judge did not do so. In our opinion, the mere fact that Applicant's contact with his father-in-law is limited does not compensate for this omission. We conclude that, had the Administrative Judge taken the omitted matters into account, there is a "significant chance" that the decision would have been different. See ISCR Case No. 00-0244 at 4-5 (App. Bd. January 29, 2001). Therefore, we conclude that the Administrative Judge's decision as regards FI MC 1 is arbitrary and capricious. We conclude that the case should be remanded to the Administrative Judge for further analysis consistent with this opinion.

Concerning the Administrative Judge's analysis of Guidelines E and M, we conclude that the Administrative Judge's factual findings constitute substantial evidence that PC DC 5 ⁽⁵⁾ applies, as do MI DC 1 ⁽⁶⁾ and 4 ⁽⁷⁾ Improperly accessing pornography through a company-owned computer system, under the facts of this case, constitutes a pattern of rule violations that raises questions about Applicant's judgment and reliability as well as his ability to protect classified computer systems.

Concerning the Administrative Judge's analysis of PC MC 2 and MI MC 1 and 4, ⁽⁸⁾ the record supports the conclusion that Applicant's misconduct was somewhat more extensive than a reading of the Administrative Judge's findings would suggest. Furthermore, at the time of the misconduct, Applicant was of a mature age, well educated, and with a record of lengthy service to his employer at the time. This causes reason to doubt his claim that he did not know that accessing such web sites violated company policy. Even if he were not explicitly aware of policy guidance issued by his employer, one would think that common sense would lead a reasonable person to that understanding.

On the other hand, the record contains evidence favorable to Applicant as regards Guidelines E and M and this evidence provide support for the Administrative Judge's conclusion that Applicant's misconduct was mitigated. First, the Judge concluded that Applicant's conduct was not recent, and that conclusion is sustainable given the record evidence. Second, there is nothing in the record to imply that misconduct of this sort occurred other than during the brief period of a week and a half cited by Applicant's employer's investigative report and mentioned by the Judge. Additionally, there is no record evidence indicating that the adult sites in question were inherently illegal, such as child pornography, etc., or that Applicant's conduct involved dishonesty beyond the fact that it contravened company rules. The record indicates that Applicant's family and current employer are aware of this misconduct, which lessens the likelihood that it could render him vulnerable to coercion. Finally, the record shows that Applicant has held a secret clearance for years, including during the time of this misconduct, and the record provides no reason to suspect that Applicant has violated the trust imposed by this clearance.

The Board does not review decisions of Administrative Judges according to a standard of perfection, and there is no requirement that an administrative judge discuss each and every piece of evidence when analyzing a record and making a decision. While the Judge did not include all of the favorable facts cited above in his analysis, they, along with the matters specifically discussed by the Judge provide a reasonable basis for the Judge's ultimate conclusions under Guidelines E and M. Any error made by the Judge in understating the precise extent of Applicant's misconduct is harmless in the context of the record as a whole. The Board does not have to agree with the Judge's resolution of the issues under Guidelines E and M to conclude that it is not arbitrary, capricious, or contrary to law.

IV. Order

In light of our finding of error in the Administrative Judge's decision concerning Guideline B, his judgment granting Applicant a clearance is REMANDED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. Government Exhibit 6, *United States Department of State Background Note: China*, at 9.

2. Government Exhibit 8, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage*, at 15.

3. "Conditions that could raise a security concern and may be disqualifying include . . . [a]n immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country." Directive ¶¶ E2.A2.1.2 and E2.A2.1.2.1.

4. "A determination that the immediate family member(s) . . . 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. "A pattern of . . . rule violations, including violation of any written or recorded agreement made between the individual and the agency." Directive ¶ E2.A5.1.2.5.

6. "Illegal or unauthorized entry into any information technology system . . ." Directive ¶ E2.A13.1.2.1.

7. "Introduction of hardware, software or media into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations." Directive ¶ D2.A13.1.2.4.

8. All of these mitigating conditions address the same considerations, that the misconduct in question was not recent and that it was isolated in nature. See Directive ¶¶ E2.A5.1.3.2 and E2.A13.1.3.1 and 4.