

DATE: May 3, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24428

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

John P. Janecek, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 19, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline L (Outside Activities), Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 13, 2005, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 issue on appeal: whether the Administrative Judge's adverse security clearance decision under Guideline B is arbitrary, capricious and contrary to law. [\(1\)](#)

Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude, as a matter of law, that he had rebutted, mitigated or extenuated the security concerns raised by the Guideline B (Foreign Influence) allegations. Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge: (a) erred in not applying Guideline B Mitigating Conditions 1 [\(2\)](#) and 5, [\(3\)](#) (b) made an unfavorable decision that is unsupported by the record as a whole, and (c) relied on some facts that were not alleged in the SOR.

The Administrative Judge made unchallenged sustainable findings that: (1) Applicant's mother, four sisters, parents-in-law, a brother-in-law and a sister-in-law, are citizens of India, residing in India, (2) Applicant maintains once weekly to twice monthly telephone contact with his mother, and four or five times yearly telephonic contact with his sisters, (3) Applicant is a director and shareholder of an independent Indian company, (4) Applicant traveled to India about once or twice a year from 1995 to at least 2003, (5) Applicant owns a condominium in India valued at approximately \$25,000 USD that he allows an Indian company to use as a guesthouse, (6) Applicant owns a condominium in India valued at approximately \$12,000 USD that he purchased for his mother to live in, (7) Applicant owns land in India valued at approximately \$10,000 USD, (8) Applicant has an account in an Indian bank with a balance of approximately \$10,000 USD, (9) Applicant has an interest bearing account in India with a balance of approximately \$8,000, and the monthly interest earned on the account is sent to his mother in India, (10) Applicant is an officer and director, with a shareholder interest, in a U.S. parent business entity that owns an Indian subsidiary operating in India, in which Applicant is also a director, and (11) as of 2000, India is an active collector of U.S. economic intelligence. Given those findings, the

Administrative Judge concluded that Applicant's ties with those immediate family members raised security concerns under Guideline B and that Disqualifying Conditions 1 and 2 applied. That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he 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.

Applicant argues that the Administrative Judge gave insufficient weight to evidence that: (a) Applicant's relatives in India are ordinary people who are not agents of the Indian government, (b) his financial interests in India are minimal compared to his substantial U.S. financial interests, (c) he has excellent character, professional and employment references, and (d) India is a democracy with interests not inimical to the U.S. Applicant also argues that the Judge relied on some facts not alleged in the SOR and that there are many Hearing Office decisions in which an applicant with ostensibly more significant ties to India were granted clearances. The Board does not find Applicant's arguments persuasive.

The Board does not review an Administrative Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 02-29608 at 3 (App. Bd. Dec. 17, 2003). It reviews a decision as a whole, rather than focusing on isolated sentences or passages in it, to discern what the Judge meant. *See, e.g.*, ISCR Case No. 01-02452 at 8 (App. Bd. Nov. 21, 2002). There is a rebuttable presumption that the Judge considered all the record evidence unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 03-03974 at 6 (App. Bd. Apr. 20, 2006). Applicant's ability to cite to record evidence that he contends should have been given greater weight is alone insufficient to overcome that rebuttable presumption. Merely because an Judge does not give greater weight to record evidence cited by the appealing party, it does not follow that the Judge simply ignored that evidence. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 02-29608 at 4 (App. Bd. Dec. 17, 2003). A Judge must resolve close cases in the favor of national security, rather than in the favor of the Applicant. Directive ¶ E2.2.2.

The application of Adjudicative Guidelines 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, the application of a disqualifying or mitigating condition 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). As the trier of fact, the Administrative Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Lastly, the decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases, and such cases are not legally binding precedent on the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

Applicant is entitled to receive an SOR that places him on reasonable notice of the allegations being made against him. However, an SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every possible fact that may be relevant at the hearing. *See, e.g.*, ISCR Case No. 00-0633 at 4 (App. Bd. Oct. 24, 2003). Nor does an SOR have to indicate what arguments Department Counsel might make at the hearing. Considering the record as a whole, the Board concludes that the SOR issued to Applicant placed him on adequate notice of the allegations being made against him. Furthermore, a review of the hearing transcript does not leave the Board with the impression that the SOR prejudiced in any identifiable way Applicant's ability to prepare for the hearing, his ability to participate in the hearing, his ability to raise objections or make arguments on his behalf, or his ability to present evidence for the Judge to consider in his case. Given the SOR allegations against Applicant and the manner in which the hearing was conducted, Applicant was on adequate notice that his shareholder interest and/or control, directly or indirectly, of business entities conducting business in India, was in issue.

Applicant had the burden of demonstrating that his family members in India were not in positions where they are likely to be exploited by a foreign power. Applicant's arguments do not demonstrate that it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had not met his burden of establishing that his relatives were not in a position to be exploited by a foreign power in a way that could force him to choose between

loyalty to those relatives and the United States. The Board does not review a case *de novo*.

The absence of evidence that Applicant's family members in India are currently employees or agents of the Indian government is not dispositive. Having relatives, cohabitants or associates who are connected with a foreign government is a disqualifying condition under Guideline B.⁽⁴⁾ However, the absence of such a connection with a foreign government does not mean that there is no security concern under Guideline B. *See, e.g.*, ISCR Case No. 02-29665 at 5 (App. Bd. Nov. 10, 2004). A reading of Guideline B in its entirety shows that security concerns can be raised by a variety of foreign connections, not just having family members with foreign government connections. Additionally, the absence of a particular disqualifying condition does not compel a favorable security clearance decision. *See, e.g.* ISCR Case No. 02-08052 at 3 (App. Bd. Jun. 23, 2003). The Board has warned "against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." *See* ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002). In her decision, the Judge articulated a rational basis for her conclusion that Applicant's circumstances increased Applicant's vulnerability to foreign influence. Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had not met his burden of producing sufficient evidence to warrant the application of Mitigating Conditions 1 or to conclude that Applicant had not mitigated the security concerns raised under Guideline B.

Whether an applicant's financial interest in a foreign country is "substantial" for purposes of applying Guideline B Disqualifying Condition 8, or "minimal" for purposes of applying Guideline B Mitigating Condition 5, does not turn simply on consideration of the dollar amount of that financial interest. The Administrative Judge is not required to engage in a piecemeal analysis of an applicant's financial ties separate from the other security concerns presented in the case. In assessing the significance of the foreign financial interest involved, a Judge must not only consider its value in comparison to the applicant's financial interests in the United States, but also other record evidence concerning the facts and circumstances of the applicant's foreign financial interest and foreign family and other ties. *See, e.g.*, ISCR Case No. 01-18860 at 4 (Mar. 17, 2003). Considering Applicant's foreign financial ties in conjunction with his foreign family ties and the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had not met his burden of producing sufficient evidence to warrant the application of Mitigating Conditions 5, or to conclude that Applicant had not mitigated the security concerns raised under Guideline B. Moreover, given the Judge's other findings, a favorable application of Mitigating Condition 5 by itself, would not have compelled the Judge to mitigate the security concerns considering Applicant's foreign family ties.

Finally, the Administrative Judge's decision shows that she 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 noted earlier, this process led to favorable formal findings for Applicant. However, the Judge also articulated a reasonable concern that Applicant's circumstances 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 India, considered in the context of the fact that India is an active collector of U.S. economic intelligence. The Board need not agree with the Judge's decision to conclude that it is sustainable.

Order

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 Administrative Judge found in Applicant's favor with respect to Guidelines L and C. Those favorable finding are not at issue on appeal.
2. Directive ¶ E2.A2.1.3.1. ("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.")
3. Directive ¶ E2.A2.1.3.5. ("Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.")
4. Directive ¶ E2.A2.1.2.3. ("Relatives, cohabitants, or associates who are connected with any foreign government").