

DATE: July 13, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00109

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 1, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 30, 2005, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. The Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge's ultimate conclusion that Applicant sufficiently mitigated the foreign influence security concerns is arbitrary and capricious, in light of record evidence that the Russian Federal Security Service is aware of and has investigated Applicant's relationship with his Russian girlfriend. We reverse the Administrative Judge's decision to grant the clearance.

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

A. Facts

The relevant findings as found by the Administrative Judge are:

Applicant is a 55-year-old employee of a defense contractor working as security specialist installing equipment in U.S. embassies and consulates. He has held a security clearance for 18 years. He has never had a security violation or been criticized for any security lapse. He is a widower with two grown sons. He served two years in the army including service in Viet Nam. He was honorably discharged in 1970. Later he served in the National Guard with the rank of staff sergeant working on classified matters and holding a security clearance. He has a high school GED equivalency but has taken many courses in information technology to qualify for his present work.

While working in Russia for his employer in 2002 he met a 32-year-old Russian woman who works as an accountant. He reported the contact to the consulate and to his employer. He returned to conclude the project in May, 2003, saw her again, and they developed a romantic relationship. He went on to other assignments but corresponded with her and has returned to visit twice on vacation, in November 2003, and in 2004, for periods of more than a month each time. He

notified his employer of the later trips. He has sent money to her totaling \$6-7,000.00 since 2003, to help her and her 12 year-old daughter. They exchange e-mails almost daily. He considers marriage a possibility but has taken no steps to do so recognizing the difficulties of doing so.

He plans to visit her again. She has never traveled from Russia to be with him.

Applicant has met his friend's sister and daughter but not her parents. He has no contact with her employer organization which has nothing to do with defense work. Someone in her employer organization who knew of and objected to her friendship with Applicant reported that she was spying for the U.S. The matter was investigated by the Russian Federal Security Service (FSB) and dismissed. The person who reported her contact with Applicant has now been enjoined from further contact with her.

One allegation in the SOR (Par. 1.b.) concerns an alleged spouse-like relationship with a former landlady in the U.S. with whom he had a romantic relationship. The government has stated that this matter is no longer of concern. [\(1\)](#)

Applicant is highly regarded for his skills, dedication to his work, and good character. He travels extensively to embassies and consulates to perform work for his employer. His supervisors and customers are very complimentary of his abilities and work ethic. He takes great pride in his work, and contributions to national security, especially providing security for our foreign service personnel working abroad.

The Government has established by official documents of which the Administrative Judge has taken official notice that Russia has engaged in espionage seeking economic and technical data. These are matters of serious concern regarding national security and they were considered in the context of this case. Changes in Russia are occurring and improvements in our relations have been noted in recent U.S. Government policy statements noting new cooperative arrangements between the Russian Federal Security Service (FSB) and the U.S. Department of Homeland Security and the Federal Bureau of Investigation.

In considering Applicant's situation under the "whole person" concept, the Administrative Judge also found that Applicant is a native-born U.S. citizen, and has strong and deep ties to the U.S. over many years of service and work as a member of the armed forces and as an employee of a defense contractor. Applicant is an impressive person of skills and dedication to his work who has dealt effectively with security issues for over a quarter of a century.

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 finding 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.

On appeal, Department Counsel does not challenge these findings of fact. The issue presented on appeal involves the ultimate issue of whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Additional evidence will be cited in that discussion.

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*.

In this case, the Administrative Judge concluded that the government has established a *prima facie* case to deny Applicant a security clearance because a person to whom Applicant has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country (Directive ¶ E2.A2.1.2.1). In such situations, 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. The Judge reviewed the possible mitigating factors listed under Guideline B but concluded that only Foreign Influence Mitigating Condition 4⁽²⁾ applies, and that Foreign Influence Mitigating Condition 2⁽³⁾ partially applies. Significantly, the Judge concluded that Applicant's contacts with his girlfriend are not casual and infrequent, so Foreign Influence Mitigating Condition 3⁽⁴⁾ did not apply, and that she is possibly in a position to be exploited, so Foreign Influence Mitigating Condition 1⁽⁵⁾ did not apply.

The Administrative Judge then considered mitigation for Applicant under the "whole person" concept. Even if a Judge reasonably concludes that particular Adjudicative Guidelines disqualifying and mitigating conditions do not apply to the specific facts of a case, the Judge must still evaluate an applicant's security eligibility under the general factors of Directive § 6.3 and Adjudicative Process ¶ E2.2.1 (which refers to the whole person concept). Where an Adjudicative Guidelines disqualifying or mitigating condition is applicable, the Judge must consider that condition in light of the record evidence as a whole and any pertinent general factors, and decide what weight can reasonably be given to the disqualifying or mitigating condition. *See, e.g.*, ISCR Case No. 02-22461 at 11 (App. Bd. October 27, 2005). Additionally, any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security. Decision at 4 and Directive ¶ E2.2.2.

In his "whole person" analysis of Applicant, the Administrative Judge specifically considered such things as: (a) his position as a native-born U.S. citizen and other strong and deep ties to the U.S., (b) his many years of service and work as a service member and a trusted defense contractor employee, (c) his skill and dedication to his work, and (d) his effective handling of security issues for a quarter of a century including the reporting of his contacts with his girlfriend. After mentioning these, the Judge concluded that it is not likely that Applicant would take any action that would jeopardize national security.

Department Counsel does not challenge the Administrative Judge's conclusions as to Applicant's impeccable character, employment history, and loyalty to the United States; however, Department Counsel contends there is no nexus between these favorable facts and the reduction or elimination of the potential for pressure, coercion, exploitation, or duress. Department Counsel contends that the only conduct which supports mitigation of the security concerns attendant to Applicant's contacts with his girlfriend is his reporting of the relationship and of his vacations to Russia, to the American Consulate and his employer, but that such conduct is insufficient to mitigate the security concerns. The security concerns here include the fact that this relationship came to the attention of the FSB, and that during their investigation, the FSB reviewed his email correspondence with her. Given the history and nature of the relationship between Russia and the U.S., the Judge did not provide a rational explanation as to why Applicant's reporting of his relationship sufficiently mitigated these security concerns. The Administrative Judge's conclusion that Applicant mitigated security concerns was arbitrary and capricious especially considering the FSB's investigation of Applicant and his girlfriend, and Applicant's continuing contact with her, a foreign citizen to whom he is bound by bonds of affection and obligation.

The Board does not have to completely agree with Department Counsel's position to conclude that Applicant failed to mitigate security concerns under the whole person concept considering the record evidence. The Administrative Judge identified evidence that may be relevant in a whole person evaluation; however, he failed to offer a clear analysis or rationale of how that evidence, in its totality, overcomes significant security concerns considering, among other things, the potential for pressure, coercion, exploitation, or duress that the Judge identified as an important policy consideration. Decision at 3 and Directive ¶ E2.2.1.8.

The Administrative Judge's obligation to evaluate an applicant's security eligibility under the whole person concept complements the obligation to apply pertinent provisions of the Adjudicative Guidelines. Neither obligation diminishes the other. For example, the whole person analysis focuses on Applicant's conduct and situation, and even though Foreign Influence Mitigating Condition 1 asked whether the girlfriend was in a position where she could be exploited, the object of that question was whether she could be exploited by the foreign power in such a way that could force Applicant to choose between loyalty to her and the United States. The Judge had concluded that Mitigating Condition 1 could not apply because she could be exploited and that he could be forced to choose. Having reasonably concluded that the record evidence raised security concerns under Guideline B, the Judge failed to articulate a discernable, rational basis for why he concluded the favorable facts he recited showed refutation, extenuation, or mitigation of those security concerns. Most of the favorable facts recited by the Judge either do not readily suggest refutation, extenuation, or mitigation or have low probative value in that regard. *See, e.g.*, ISCR Case No. 02-22461 at 12-13 (App. Bd. October 27, 2005).

As Department Counsel points out, there is a particularly troubling security concern involved in Applicant's situation that is not specifically analyzed in the Administrative Judge's whole person evaluation. The FSB became aware of Applicant and his girlfriend, and while the FSB apparently found no security issue with the relationship (to this point), they are clearly aware of Applicant and his relationship with one of their citizens. In the process of investigating, the FSB read the email exchanges between Applicant and his girlfriend. Applicant and his girlfriend, to whom he is bound by bonds of affection and obligation (including financial obligation), continue to communicate by email. Applicant traveled to Russia in a vacation status for extended weekly periods during the two years preceding the hearing, and considering the continuing nature of the relationship, it cannot be assumed that he will not return to Russia to visit his girlfriend. In this regard, even if the FSB had acted (and will continue to act) properly in this case, Government Exhibit 4 (Consular Information Sheet) highlights the problems of foreigners visiting Russia and becoming victims of harassment, mistreatment and extortion by law enforcement and other officials.⁽⁶⁾ While no one questions the sincerity of Applicant's promise that he would do the right thing if pressured, the most probative evidence that the Judge considered was the fact that Applicant reported the contact with the girlfriend and his vacation travel. However, considering that and all other favorable evidence, the Judge did not articulate a rational basis for his conclusion that Applicant overcame the significant security concerns described in this paragraph especially considering the doubt must be resolved in favor of national security.

Order

The Administrative Judge's formal finding with respect to SOR paragraph 1.b is affirmed, but for the reasons stated above, the judgment of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Member, Appeal Board Administrative Judge

Signed Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge cited Hearing Transcript (HT) at 8 but HT at 50 appears to be a proper citation.
2. "The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required" (Directive ¶ E2.A2.1.3.4).
3. "Contacts with foreign citizens are the result of official United States Government business" (Directive ¶ E2.A2.1.3.2).
4. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive ¶ E2.A2.1.3.2).
5. "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 ¶ E.2.A2.1.3.1).
6. While not identified as an additional security concern, Applicant testified that his girlfriend "knows most of the military chiefs and the police chiefs, and everything in the region . . ." HT at 43.