

DATE: January 5, 2006

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In Re:

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SSN:-----

Applicant for Security Clearance

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ISCR Case No. 04-00540

## PPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Eric H. Borgstrom, Esq, Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 24, 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 the case be decided on the written record. On March 31, 2006, after considering the record, Administrative Judge Shari Dam 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 issue on appeal: whether the Administrative Judge's decision is arbitrary, capricious, and contrary to law. [\(1\)](#) 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 was born in Taiwan in 1950. He received a Ph.D. in engineering from a U.S. university in 1980 and became a naturalized citizen in 1988. He works for a federal contractor and has held a security clearance since 1997.

Applicant married his wife in 1985. A native of Taiwan, Applicant's wife became a naturalized citizen in the same year. Both of their children were born in the United States. Applicant's mother-in-law is 92 years old, a citizen and resident of Taiwan who lives in an assisted living facility. The Judge found that Applicant has only seen his mother-in-law "a few times."

Applicant's parents are both deceased. He has five siblings, two of whom are also deceased. One of his siblings is a citizen and resident of the U.S., the other two being citizens and residents of Taiwan. One of the two Taiwanese residents, a sister, works as a clerk for the Taiwanese Justice Department. Applicant has spoken with her only two or three times over the past thirty years.

The other sibling, a brother, is a chicken farmer in Taiwan, but who has permanent resident alien status in the U.S.

Applicant traveled to Taiwan in 2002 to visit his parent's graves and again two years later to attend a high school reunion.

Applicant has previously worked on the development of a government program which his supervisor characterized as being of "national importance."

The Administrative Judge found that Taiwan is a stable democracy with an improved record in human rights. Taiwan has been identified as a collector of foreign economic information.

## 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 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

The Department Counsel does not challenge the judge's findings of fact. We have examined these findings in light of the record and conclude that they are supported by substantial evidence.

## 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*.

The Administrative Judge concluded that Applicant's case raises two Disqualifying Conditions: (1) "An 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;"<sup>(2)</sup> and (2) "Relatives, cohabitants, or associates who are connected with any foreign government."<sup>(3)</sup>

The Judge also concluded that two Mitigating Conditions apply: (1) "A determination that the immediate family member(s) . . . in question are not agents of a foreign power or in a position to be exploited by the foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States;"<sup>(4)</sup> and (2) "Contact and correspondence with foreign citizens are casual and infrequent."<sup>(5)</sup>

Concerning the first of these mitigating conditions, the Judge looked to 50 U.S.C. § 435 *et seq* for the meaning of the term "agent of a foreign power." This statute, which was included in the Intelligence Authorization Act for Fiscal Year 1995, requires the President to establish procedures governing access to classified information throughout the executive branch. It also sets forth conditions under which an investigating agency can request financial and other records of persons believed to be engaged in espionage. The Judge concluded that, based on the definition contained in this statute, Applicant's foreign relatives were not agents of a foreign power within the meaning of Mitigating Condition 1.

Although relatively lengthy and in detail complex, the statutory definition relied upon by the Administrative Judge

limits the meaning of "agent of a foreign power" to those who are either physically present in the United States or who are otherwise violating the criminal laws of the United States.<sup>(6)</sup> The Department Counsel asserts that the Administrative Judge erred by utilizing such a definition in Applicant's case. In addressing this issue, the Board must consider whether the statute mandates the Judge's use of that definition or whether, even if not, the Directive itself does so.

As stated above, the phrase "agent of a foreign power" appears in the Directive as a factor that would mitigate certain disqualifying conditions raised under Guideline B, specifically those arising out of an Applicant having relatives who are citizens of foreign countries or who are connected with foreign governments. In reviewing the statute at issue here, the only place in which one finds the phrase "agent of a foreign power" is in 50 U.S.C. § 436. The context of this section is limited. It authorizes investigating agencies to request financial information on current or past executive branch employees where "there are reasonable grounds to believe, based on credible information, that the person is, or may be, disclosing classified information in an unauthorized manner to a foreign power or agent of a foreign power" or where "circumstances indicate the person had the capability and opportunity to disclose classified information which is known to have been lost or compromised to a foreign power or an agent of a foreign power."<sup>(7)</sup>

This section is clearly intended to regulate and facilitate law enforcement in the apprehension of persons engaging in espionage. In that light, it is perfectly consistent for the statute to incorporate FISA's definition of "agent of a foreign power," since that definition is limited to criminal acts. A review of the legislative history of 50 U.S.C. § 435 *et seq* demonstrates that supporters of the legislation referred to "agent of a foreign power" exclusively in a law enforcement context. See, for example, Statement of Senator D'Amato, 140 Cong. Rec. 13842 (Sept. 30, 1994) (The Intelligence Authorization Act requires disclosure to the FBI when classified information has been disclosed to an agent of a foreign power. The statute permits "disclosure of consumer credit reports to the FBI in espionage investigations, but *only where* ' . . . there are specific and articulable facts giving reason to believe that the consumer whose report is sought . . . ' is a spy. . . ") (emphasis added) Therefore,

to the extent that the statute addresses the activities of law enforcement agencies investigating suspected acts of espionage, it is not surprising that Congress intended that it be consistent with FISA. The Board does not question the proposition that any regulatory guidance implementing the provisions of 50 U.S.C. § 436 would have to be consistent with that statute and the definitions that go along with it.

However, from that proposition it does not follow that Congress intended to forbid executive agencies from utilizing a broader definition of "agent of a foreign power" than is found in FISA in *all* matters relating to national security, even if such use in no way impairs the stated purposes of 50 U.S.C. § 436. Indeed it would be strange for Congress to intend that, in evaluating an applicant's initial suitability for access to classified information, that applicant's relatives would only be considered agents of a foreign country if they were actively engaged in criminal espionage as defined by the law of the United States. If Congress had intended such a result, it would most likely have said so explicitly. That it has not said so in the plain language of the statute is a powerful reason to believe that it did not intend the interpretation advanced by the Administrative Judge. "The preeminent canon of statutory interpretation is that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004), quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). To go beyond the plain language of the statute would compel the view that Congress intended that a foreign relative who was actively engaged in gathering intelligence on behalf of foreign country, but who was not within the criminal jurisdiction of the United States, be treated as though he were not an agent of that country in determining if the applicant might be susceptible to coercion or otherwise qualified for a security clearance.

Similarly, there is no reason to believe that the Department of Defense intended such an interpretation in promulgating the Directive.<sup>(8)</sup> In the first place, merely to show that a given relative is not an agent of a foreign power within the meaning of FISA does not begin to mitigate the broad concerns described in Guideline B. For example, security concerns raised by an applicant's relatives living in a foreign country or being connected with a foreign government would not logically be mitigated merely by showing that those relatives are not spying *in the United States*. Furthermore, to apply the FISA definition to the Directive would place even greater responsibility on applicants, who would bear the burden of establishing not merely that their relatives are not foreign government employees but that none of the criteria set forth in 18 U.S.C. § 1801 apply.

In summary, we conclude that Congress did not intend the opposite of what it said-"For purposes of this subchapter" and "As used in this subchapter." Nor can we conclude that it intended to limit the meaning which executive agencies might assign to the term "agent of a foreign power" in providing evaluative criteria for security clearance determinations. Neither do we have any basis to find that the Directive intended that limitation. Therefore, the Board adheres to its prior case law interpreting "agent of a foreign power."

In light of this, we conclude that the Administrative Judge erred in her analysis of Mitigating Condition 1. While Applicant's sister may well be a low level functionary of the Taiwanese government, consistent with Appeal Board case law we conclude that she is an agent of that government. We hold that the Administrative Judge abused her discretion in applying this Mitigating Condition.

The Administrative Judge also concluded that the security concerns regarding Applicant's mother-in-law and sister were mitigated by the casual and infrequent nature of his contact with them (Mitigating Condition 3). Leaving aside the question of Applicant's contact with his sister, the evidence contained in the file explains nothing about the reasons for his contact with his mother-in-law which would lead to the belief that they were casual in nature. We conclude that the information contained in the file of relevant material is insufficient to rebut the presumption that an applicant's contacts with immediate family members, to include immediate members of the spouse's family, are not casual in nature.<sup>(9)</sup> We hold that the Administrative Judge abused her discretion by applying Mitigating Condition 3.

Department Counsel argues that the Administrative Judge erred in her whole person analysis. Specifically, Department Counsel states that, of the whole person factors listed in the Directive,<sup>(10)</sup> only "[t]he potential for pressure, coercion, exploitation, or duress" is relevant to Applicant's case. Otherwise, Department Counsel asserts, "in Guideline B cases, the whole-person factors are generally less relevant and applicable because the security concerns are related to the relationship status between an applicant and his relatives in a foreign country and not conduct." Department Counsel then argues that this one factor is not sufficient to overcome the security concerns inherent in Applicant's family relationships.

The Board does not agree with Department Counsel that the factors listed in E2.2.1 are the only ones that may be considered in performing a whole person analysis in a Guideline B case. Other matters, such as evidence of an applicant's personal loyalties; the nature and extent of an applicant's family ties to the U.S. relative to his ties to a foreign country; his or her social ties within the U.S.; and many others raised by the facts of a given case can properly be factored in to a judge's evaluation of an applicant's worthiness of a security clearance. See, for example, ISCR Case No. 04-00631 (Ap. Bd. September 6, 2006); ISCR Case No. 03-02878 (App. Bd. June 7, 2006). The consideration for the Board on appeal is whether in a given case a judge's whole person analysis supports his or her final decision.

In this case the Administrative Judge did perform a whole person analysis, which took into account the U.S. residence of his wife, children, and sister and his compliance with security requirements that he report foreign travel. On the other hand, this analysis stated that "Applicant has a demonstrated track record of protecting our nation's secrets, having previously worked on classified projects for the United States without any adverse incidents." The record evidence shows that Applicant reported having been granted a Secret clearance in 1997. The evidence also establishes that Applicant was part of a team that designed a precision fiber optic gyroscope and that in doing so Applicant "handled some very sensitive company private information." This evidence insufficient to justify the Judge's broad opinion of Applicant's experience with classified information. We conclude that the Judge's whole person analysis is inadequate to support her final decision, especially in light of the errors described above.

This is not to say, however, that the record evidence will not support a favorable decision as matter of law, only that the Administrative Judge's analysis of the case is flawed. For that reason, we remand the case to the Administrative Judge for a new opinion, one which takes into account the errors which the Board has identified and one which includes a more detailed whole person analysis, an analysis which identifies in detail the factors which the Judge believes are pertinent to the case. Consistent with this opinion, the Judge's new decision may not rely explicitly or implicitly on Mitigating Conditions 1 or 3 of Guideline B.

#### IV. Order

The judgment of the Administrative Judge granting Applicant a clearance is REMANDED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. Additionally, in his reply to the Department Counsel's brief on appeal, Applicant stated that, despite assertions to the contrary by the Department Counsel, he never received a copy of the File of Relevant Material (FORM). Specifically, Applicant stated, "I am quite careful in this application process. I do not recall that I have received any material related to FORM. If this FORM has a material impact on this case, may I ask the counsel to give me a second chance to complete the FORM." A review of the case file reveals that Applicant acknowledged receipt of the File of Relevant Material on June 28, 2005. We conclude that his comment in the reply brief reflects a misunderstanding as to the meaning of the term FORM.

2. Directive ¶ E2A2.1.2.1.

3. Directive ¶ E2.A2.1.2.3.

4. Directive ¶ E2.A2.1.3.1.

5. Directive ¶ E2.A2.1.3.3.

6. 50 U.S.C. § 438 provides, "For purposes of this subchapter [50 U.S.C. § 435 *et seq*] . . . (6) the terms 'foreign power' and 'agent of a foreign power' have the same meanings as set forth in . . . the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801) [FISA]."

In its turn, FISA provides the following:

As used in this subchapter:

(a) "Foreign power" means-

(1) a foreign government or any component thereof whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means-

(1) any person other than a United States person, who-

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4);

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interest of the United States, when the circumstances of such person's presence in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(C) engages in international terrorism or activities in preparation therefor; or

(2) any person who-

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involved or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct or activities described in subparagraph (A), (B), or (C).

Both statutory provisions relied on by the Judge have self-limiting definitions ("For purposes of this subchapter" and "As used in this subchapter"). There is no basis to assume Congress intended a broader usage than that to which it explicitly limited the definitions.

7. 50 U.S.C. § 436(a)(2)(B)(i) and (iii).

8. Agent of a foreign power" is not defined in the Directive.

9. ISCR Case No. 02-28838 (App. Bd. June 12, 2006); ISCR Case No. 01-03120 (App. Bd. February 20, 2002).

10. Directive ¶ E2.2.1. These factors are (1) the "nature, extent, and seriousness of the conduct;" (2) the "circumstances surrounding the conduct, to include knowledgeable participation;" (3) the "frequency and recency of the conduct;" (4) the "individual's age and maturity at the time of the conduct;" (5) the "voluntariness of participation;" (6) the "presence of absence of rehabilitation and other pertinent behavioral changes;" (7) the "motivation for the conduct;" (8) the "potential for pressure, coercion, exploitation, or duress;" and (9) the "likelihood of continuation or recurrence."