

DATE: December 14, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01820

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 28, 2005, DOHA issued a statement of reasons (SOR) 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 May 9, 2006, after the hearing, Administrative Judge Barry M. Sax 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 erred in applying Guideline B Mitigating Conditions 1 [\(1\)](#) and 3 [\(2\)](#); whether there is sufficient evidence to sustain the Administrative Judge's favorable security clearance decision. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. The Administrative Judge made the following findings of fact:

Applicant is a 39-year-old employee of a defense contractor. The February 24, 2005 SOR contains two (2) allegations under Guideline B (Foreign Influence). Applicant admits both allegations. Both admissions are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence, I make the following additional FINDINGS OF FACT as to the status of each SOR allegation.

Guideline B (Foreign Influence)

1.a. - Applicant's wife is a citizen of the People's Republic of China (PRC), who resides with him in the U.S. They met via an internet chat room in about 2003.

1.b. - Applicant's (sic) traveled to the PRC twice in 2003, twice in 2004, and in 2005 to visit his wife (then his fiancée). [\(3\)](#)

B. Discussion

The Judge's findings of fact are not challenged on appeal.

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*.

Department Counsel argues that the Administrative Judge erred in favorably applying Guideline B Mitigating Conditions 1 and 3.⁽⁴⁾ The Board finds Department Counsel's argument to be persuasive.

In the conclusion section of his decision, the Administrative Judge found that: (1) Applicant's wife is a citizen of the PRC, residing in the U.S. with Applicant; (2) Applicant met his wife on an Internet chat room; (3) Applicant's wife stays mostly at home, caring for Applicant's child, does not yet know much about the U.S. and American life, and Applicant is her only real tie to this country; (4) Applicant's wife's parents, sisters, and brother-in-laws are citizens and residents of the PRC; (5) Applicant's wife speaks to her parents about every other month;⁽⁵⁾ (6) "[t]he PRC is officially recognized as one of the most active gatherers of defense and industrial information in the U.S., which means Applicant's burden of proof is even heavier than for someone with relatives in a friendly country"; (7) "Applicant's evidence about his wife and in-laws is somewhat limited by the relative short period of time they have known each other"; and (8) "[t]here is some evidence that [Applicant's] wife's parents are not agents of a foreign power, but there is no evidence one way or the other as to whether they are susceptible to pressure from the PRC government or intelligence agencies and might ask Applicant to act against U.S. security interests." Based on the forgoing, the Judge found security concerns were raised under Guideline B Disqualifying Conditions 1 and 2, but then concluded without explanation or analysis that those concerns could be mitigated under Guideline B Mitigating Conditions 1 and 3, because Applicant's immediate family members are not agents of a foreign power or in a position to be exploited by a foreign power in a way that count force Applicant to choose between loyalty to the persons involved and the U.S., and Applicant's contacts and ties with his wife's family in the PRC are casual and infrequent.

Given the record in this case, the Administrative Judge's favorable application of Guideline B Mitigating Conditions 1 and 3⁽⁶⁾ is not sustainable. The Judge's favorable clearance decision is arbitrary, capricious, and contrary to law, in that it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made, and offers an explanation for the decision that runs contrary to the record evidence. *See, e.g.*, ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998). The favorable facts recited by the Judge--such as Applicant's solid record of service and his circumspection in identifying himself on the internet--either do not readily suggest refutation, extenuation, or mitigation or have low probative value. *See, e.g.*, ISCR Case No. 04-00109 at 5 (App. Bd. July 13, 2006); ISCR Case No. 02-22461 at 12-13 (App. Bd. Oct. 27, 2005). None of the circumstances cited by the Judge would present a serious obstacle to the PRC from exercising control over Applicant's wife, either directly or through her family members in the PRC, in order to coerce, exploit, or pressure Applicant. *See, e.g.*, ISCR Case No. 04-03720 at 4 (App. Bd. June 14, 2006); ISCR Case No. 04-02181 at 5 (App. Bd. June 7, 2006); ISCR Case No. 03-10955 at 3 (App. Bd. May 30, 2006).

The error which has been identified by Department Counsel is harmful and no argument has been presented to affirm the case on other grounds.⁽⁷⁾

Order

The Administrative Judge's favorable security clearance is REVERSED.

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

Separate Opinion of Member David M. White

I agree with the opinion of my colleagues insofar as they hold that the Administrative Judge's conclusions favorably applying Guideline B (Foreign Influence) Mitigating Conditions (FIMC) 1 and 3 are arbitrary and capricious, and that this is harmful error. ⁽⁸⁾ I respectfully disagree with the decision to reverse the Judge's decision because correction of these properly identified errors neither mandates nor supports reversal, with the resultant final denial of a clearance to this Applicant. I would remand the case for a properly reasoned and articulated decision, based on consideration of all the relevant and material information.

The Directive gives the Appeal Board authority to take one of three actions in its written clearance decision addressing the material issues raised on appeal: to affirm the decision below; to remand the case specifying action to be taken to correct identified error; or to reverse the decision of the Administrative Judge if correction of identified error mandates such action. ⁽⁹⁾ The identified harmful errors that require correction in this case are the arbitrary and capricious conclusions applying FIMC1 and FIMC 3 to sufficiently mitigate the security concerns raised by the Government's evidence and warrant granting the clearance in question.

Even though this case does not turn on credibility determinations concerning disputed testimony in the fact-finding process, I am in no position after merely reading a cold record to reach my own "fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in [the Adjudicative Guidelines]." ⁽¹⁰⁾ Applicant is entitled to a hearing and to personally appear before the hearing Judge so that the decision maker will be able to assess him as a "whole person" in reaching a proper clearance decision. Both parties to this appeal are entitled to a reasoned articulation, by the Judge who heard the evidence, supporting a sustainable judgment.

Under appropriate circumstances, the Judge can "render a favorable decision in the absence of an[y] Adjudicative Guidelines mitigating condition." ⁽¹¹⁾ Thus even a finding by the Board that FIMC 1 and 3 are not applicable as a matter of law, as opposed to the more narrow legal holding that the decision inadequately explains why and how they do apply, would not compel denial of Applicant's clearance. Only a remand, not a reversal, can cure the arbitrary and capricious nature of the decision in this case because, as the majority correctly state, the Board is not permitted to substitute our judgment for that of the Administrative Judge.

Having found that the Judge's decision to grant Applicant a clearance is arbitrary and capricious, "in that it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made, and offers an explanation for the decision that runs contrary to the record evidence," the majority articulates no explanation whatsoever for deciding that Applicant must be denied a clearance in order to correct the Judge's deficient explanation. The Judge's issuance of an unsustainable decision in itself has no logical relevance to

whether granting Applicant a clearance is clearly in the interest of national security. The Judge's decision articulated no rational basis for denying Applicant a clearance, and neither does the majority opinion. This leaves Applicant, and the Government for that matter, with a final clearance decision that is not the "overall common sense determination based upon careful consideration of [applicable Guidelines], each of which is to be evaluated in the context of the whole person," as required by Directive ¶ E2.2.3. Rather, Applicant is denied a clearance without any explanation other than that the Judge wrote an insufficient explanation for finding in his favor. This not only is not mandated to correct the identified error, it does not correct the error at all.

Accordingly, I would set aside this decision and remand the case for a new decision by the Judge that sufficiently analyzes and articulates the relevant and material information, the pertinent criteria and adjudication policy, to reach supportable conclusions with respect to both Guideline B and the ultimate determination of whether granting a security clearance in this case is clearly consistent with the interests of national security.

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. 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").
2. Directive ¶ E2.A2.1.3.3 ("Contact and correspondence with foreign citizens are casual and infrequent").
3. The Administrative Judge made statements in the conclusion section of his decision which the Board construes as additional findings of fact.
4. In the conclusion section of his decision, the Administrative Judge engages in an extensive discussion of the circumstances relating to Applicant's wife's family members in the PRC (parents, sisters, and brothers-in-law). Based upon his findings with respect to those individuals, the Judge concludes that Applicant's wife's family members in the PRC are not in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to those individuals and the United States. The Judge also concludes that Applicant's contact and ties with his wife's family in the PRC are casual and infrequent. In his brief, Department Counsel disagrees with the Judge's favorable application of Mitigating Conditions 1 and 3 with respect to Applicant's wife's family members in the PRC, and offers an extensive argument as to why the Judge's conclusions in that regard are not supported by the record evidence. The Board notes that the SOR did not allege any security concerns relating to Applicant's wife's family members in the PRC. It only alleged security concerns relating to Applicant's wife. However, the circumstances relating to Applicant's wife's family members in the PRC are relevant in evaluating the extent to which Applicant's wife's circumstances present security concerns. *See, e.g.*, ISCR Case No. 01-18860 at 8 (App. Bd. Mar. 17, 2003); ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003).
5. At the hearing, Applicant stated that his wife "calls her mother and her sisters at least twice a month--well, since she's been here, yes, twice a month." Transcript at 33.
6. The Administrative Judge only concluded that Applicant's ties to his wife's family members in the PRC were casual and infrequent. The record establishes that Applicant's ties to his wife--the only PRC citizen of security concern referenced in the SOR--are not casual or infrequent, and that his wife's ties to her family members in the PRC are not casual or infrequent. Therefore, itigating Condition 3, standing alone, could not serve as a basis for mitigating the security concerns as set forth in the SOR.
7. The nonappealing party can argue in favor of affirming a ruling or decision based on any ground having support in

the record, including grounds ignored, overlooked, or rejected by the Judge. *See, e.g.*, ISCR Case No. 02-24267 at 7-8 (App. Bd. May 24, 2005). In this case, Applicant did not file a reply to the government's appeal brief, or a cross-appeal. Additionally, there has been no request for remand, nor argument as to how the Judge's errors could be corrected on remand. There is no presumption in favor of granting a security clearance. *See, e.g.*, ISCR Case No. 02-20365 at 4 (App. Bd. May 27, 2005).

8. Not only does the decision apply the wrong standard and incorrectly focus on Applicant's in-laws in China rather than security concerns raised by his PRC citizen wife alleged in SOR ¶ 1.a, but it is completely devoid of analysis supporting the favorable formal finding concerning his travels to the PRC alleged in ¶ 1.b.

9. Directive ¶¶ E3.1.33.1 through E3.1.33.3. Black's Law Dictionary defines "Reverse" as "To overthrow, vacate, set aside, make void, annul, repeal or revoke; as to reverse a judgement, sentence or decree, or to change to the contrary or to a former condition." The majority in this case follows routine Board practice in which the word "reverse" does not mean "vacate" or "set aside," as is inherent in a remand, but instead means entry of a final clearance decision opposite to that reached by the Hearing Office Administrative Judge. This interpretation is consistent with Directive ¶ E3.1.36.5 which makes a clearance decision "final" when the Appeal Board affirms or reverses an Administrative Judge's clearance decision. Such reversal is authorized by the Directive, "if correction of identified error mandates such action."

10. Directive ¶ 6.3 requires each clearance decision to meet this standard.

11. ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004). *See* ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004); ISCR Case No. 02-30864 at 4 (App. Bd. Oct. 26, 2005); ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004).