

KEYWORD: Guideline B; Guideline C

DIGEST: Department Counsel is persuasive that the Judge erred to the extent that his findings of fact do not discuss the terrorist groups which operate in Jordan. The Judge's new whole person discussion requires more analysis. Favorable decision remanded.

CASENO: 04-11414.a1

DATE: 03/05/2007

DATE: March 5, 2007

In Re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 04-11414
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein Esq, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 4, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), and Guideline C (Foreign Preference), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 16, 2006, after considering the

record, Administrative Judge Christopher Graham granted Applicant's request for a security clearance. Department Counsel submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge's whole person analysis under Guideline B is unsupported by record evidence and 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 Judge found that Applicant was born in Jordan but immigrated to the U.S. when he was 18 years old, eventually earning a degree in electrical engineering. He became a citizen of the U.S. in 1985. Applicant's wife is a native-born American. They have four children and possess no financial interests outside the U.S. Applicant and his family have traveled to Jordan three times, in 1991, 1999, and 2002. The first two were to visit relatives, the last was a stopover visit on the way to a religious pilgrimage in Saudi Arabia.

Applicant has held a Jordanian passport, as have all other members of his immediate family except his youngest child. Applicant's passport expired in 2004. He has expressed a willingness to renounce his Jordanian citizenship, although Jordan requires the payment of a \$2000 fee per passport, which would total \$10,000, more than Applicant can afford to pay.

Applicant's parents and eight of his nine siblings are citizens and residents of Jordan. The ninth sibling is a Jordanian citizen residing in the U.S. The Judge found that none of Applicant's relatives are employed by the government of Jordan. The Judge found that Applicant speaks with his mother once a month but that his contact with his siblings has occurred only during his visits to Jordan.

The Judge found that Jordan is a constitutional monarchy with excellent relations with the United States. He found that Jordan protects the rights of all its citizens.

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 finding, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

¹Department Counsel does not appeal the Administrative Judge's favorable findings under Guideline C.

Except as noted below, the Department Counsel has not expressly challenged the Judge's findings of fact, although she provides a detailed description of facts drawn from the record, upon which she states that her appeal brief relies. The Board may consider whether a Judge's factual findings are based upon substantial evidence, presuming that issue is raised by the appealing party. Failing that, we are bound by the findings as set forth in the decision, insofar as we have no *de novo* fact finding power of our own. See ISCR Case No. 03-11765, p. 3 (App. Bd. April 11, 2005).

We note that in her discussion of the Judge's whole person analysis, Department Counsel criticizes the Judge for not considering the fact that terrorist groups operate within Jordan. We interpret this as a challenge to the sufficiency of the Judge's findings. We agree with the Department Counsel that the presence of terrorist groups in Jordan is a factor which the Judge should have weighed in his analysis, and accordingly we conclude that his facts are in error to the extent that he made no finding on that matter. Otherwise we conclude that the Judge's findings are based upon 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 Judge concluded that Applicant's case raises Foreign Influence Disqualifying Condition (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."² Furthermore, the Judge considered two Foreign Influence Mitigating Conditions (FIMC): (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;"³ and (2) "Contact and correspondence with foreign

²Directive ¶ E2A2.1.2.1.

³Directive ¶ E2.A2.1.3.1.

citizens are casual and infrequent.”⁴ The Judge concluded that neither of these MC s apply.⁵ He based his favorable decision on his whole person analysis.

Department Counsel argues that the whole person analysis is flawed. Specifically, Department Counsel states that, of the whole person factors listed in the Directive,⁶ only “[t]he potential for pressure, coercion, exploitation, or duress” is relevant to Applicant’s case. Department Counsel then argues that this one factor is not sufficient to overcome the security concerns inherent in Applicant’s family relationships. Furthermore, Department Counsel takes the Administrative Judge to task for not considering the extent to which Applicant’s family, rather than simply Applicant himself, would be subject to pressure, coercion, etc.

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, e.g.*, ISCR Case No. 04-00631 at 4-5 (App. Bd. Sept. 6, 2006); ISCR Case No. 03-02878 at 3 (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.

The Judge did perform a whole person analysis, but one in which he focused almost solely upon ¶ E2.2.1.8. For reasons stated above, we conclude that the analysis is too narrowly focused. Additionally, it is unreasonably conclusory. For example, the Judge states that “it is helpful to consider Applicant’s relatives’ vulnerability to exploitation by foreign powers in Jordan.” He goes on to say that the numerous relatives living in Jordan are indeed vulnerable to exploitation but that Applicant, due to his maturity, successful employment, and loyalty to the U.S., is sufficiently immune to exploitation as not to constitute a security risk. The decision does not really explain why it is so.⁷

⁴Directive ¶ E2.A2.1.3.3.

⁵In analyzing MC1, the Judge made several problematic statements regarding law and Appeal Board precedent. He based his analysis in part upon the view that the term “agent of a foreign power” must be interpreted consistent with 50 U.S.C. § 435 et seq. We have addressed the propriety of this approach in ISCR Case No. 04-00540 at 5-6 (App. Bd. January 5, 2007). Another example is “[T]he Appeal Board prohibits any consideration of evidence that is not dispositive of the issue.” This Board places no such limitation on the admission or consideration of evidence, the Directive requiring that “[e]ach clearance decision must be a . . . common sense determination based on consideration of all relevant and material information.” ¶ 6.3. *Compare* ISCR Case No. 04-11571 at 2-3 (App. Bd. Feb 8, 2007).

⁶Directive ¶ 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.”

⁷The Department Counsel supplied no exhibits about Jordan, the only such documents in the file having come from Applicant. Most of these are from the web site of the Jordanian Embassy, and are filled with laudatory comments about the country. The only exhibit which bears the imprimatur of the U.S. is a State Department consular information sheet. It is in this exhibit that information about terrorist groups operating in Jordan is to be found.

We remand the case to the 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 takes into account record evidence about dangers existing in Jordan insofar as they have a bearing upon the potential for coercion. Also, as appropriate, it should detail and explain Applicant's pertinent qualities, characteristics, and circumstances which are the basis for the Judge's ultimate decision.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, 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