

KEYWORD: Guideline B; Guideline C

DIGEST: The Judge erred in not applying Guideline C, Disqualifying Condition 10(d) in light of Applicant's sworn statement that he sees his "loyalty to the U.S. and Iran as equal . . ." Favorable decision reversed.

CASENO: 06-25183.a1

DATE: 02/21/2008

DATE: February 21, 2008

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In Re:)	
)	
-----)	ISCR Case No. 06-25183
)	
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 March 12, 2007, 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). The SOR was subsequently amended on the motion of the government to add security concerns raised under Guideline C (Foreign Preference). Applicant requested a hearing. On September 6, 2007, Administrative Judge Richard A. Cefola granted Applicant’s request for a security clearance. Department Counsel submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable clearance decision under Guidelines C and B is arbitrary, capricious, and contrary to law. We reverse the Judge’s decision to grant the clearance.

Whether the Record Supports the Administrative Judge’s Factual Findings

A. Facts

The Administrative Judge made the following relevant findings:

Applicant is 54 years of age, obtained Master’s Degree and a Ph.D. from an American university, and is employed by a defense contractor. His brother and sister are citizens of and reside in Iran. Applicant’s brother is 61 years old and is a retired truck driver for a tobacco company. His sister is a 69-year-old housewife. Applicant has not visited Iran since 1999, as his parents are now both deceased. He has no intention of visiting Iran in the future.

Applicant is not subject to coercion *vis-a-vis* his Iranian siblings. He would report any such attempt at coercion to the appropriate U.S. authorities.

Applicant has lived in the U.S. for 32 years, and has been a U.S. citizen for nearly 18 years. He is married to a German national, who has applied for U.S. citizenship. Their five-year-old daughter is a native-born American. Applicant has renounced his Iranian citizenship and has surrendered his expired Iranian passport. His loyalty is only to the U.S.

Iran is a state that sponsors terrorism. The U.S. has not had diplomatic relations with Iran since 1980. It is a theocratic Islamic republic in which Shi’a Muslim clergy dominate the key power structures, and ultimate political authority is vested in a learned religious scholar. Iran’s dismal and worsening human rights record presents a further threat to the U.S., as a large number of Iranians emigrated to the U.S. in 1979, after the Islamic revolution. These immigrants often left behind family members in Iran. Iran’s security forces often target family members of political prisoners for harassment purposes.

B. Discussion

The Appeal Board’s review of the Judge’s findings of fact 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 Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

In this case, the appeal issue relates to the Judge's conclusions.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

A 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 general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the 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 and E3.1.33.3. We review matters of law *de novo*.

Department Counsel argues that the Judge erred in not applying Guideline C Disqualifying Condition 10(d), and that the error is harmful because the security concerns raised under the Condition are not otherwise mitigated. Department Counsel's argument in this regard has merit.

Security concerns are raised under Disqualifying Condition 10(d) when there is "any statement or action that shows allegiance to a country other than the United States . . ." In his signed, sworn statement to the government's investigator, Applicant stated: "I see my loyalty to the U.S. and Iran as equal . . ."¹ He also stated that a potential conflict between Iran and U.S. could possibly affect his personal feelings and that he would have to evaluate the situation on a case-by-case basis: "If the program to which I was assigned at any given time became too difficult for my conscience to bear, I would reserve the right to withdraw my participation."² While Applicant later contended that his sentiments toward Iran had changed because his parents were now deceased, his signed sworn statement had in fact been executed well after their deaths.³ Additionally, at the hearing Applicant expressed ambiguous sentiments and was unable to say whether he was willing to bear arms against Iran: "Well, this is a, you know, that's a very hypothetical situation, and I don't think I can address that, you know, because I don't think that this is something that is going to happen."⁴

In light of the foregoing evidence, it was error for the Judge not to apply Disqualifying Condition 10(d). The error is harmful because the security concerns raised under the condition are not otherwise mitigated. The only finding of fact that directly addressed the concern was the Judge's

¹Government Exhibit 2 at 3.

²*Id.*

³Applicant's signed, sworn statement was executed on September 11, 2000. Government Exhibit 2 at 8. Applicant's mother died in 1998 and his father died in early 2000. Applicant's Answer at 2.

⁴Transcript at 34.

conclusory statement: “His loyalty is only to the U.S.”⁵ The Judge did not apply any Mitigating Conditions relevant to the concern. Nor did he engage in any analysis under the whole-person factors, stating only that: “The totality of the Applicant’s conduct and circumstances, as set forth at length above, clearly warrants a favorable recommendation under the ‘whole person concept.’”⁶ Accordingly, with respect to the Guideline C allegations the Judge failed to consider an important aspect of the case and failed to articulate a satisfactory explanation for his conclusions. His favorable decision under that Guideline is not sustainable, in that it is arbitrary, capricious and contrary to law.

Because the Judge’s favorable security clearance decision under Guideline C must be reversed, the Board need not reach the issues raised by Department Counsel as to Guideline B.

Order

The Judge’s favorable security clearance decision is REVERSED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

⁵Decision at 3. The Judge’s other findings with respect to Guideline C addressed Applicant’s ties to the U.S., which were present prior to his making the statement, and the circumstances relating to his renunciation of Iranian citizenship and the surrender of his expired passport.

⁶Decision at 5.