

KEYWORD: Guideline F; Guideline E; Guideline B

DIGEST: Security concerns are not limited to influence exercised by foreign governments. The Judge's failure to make findings concerning the geopolitical situation in Afghanistan impairs his analysis both of Guideline B and the whole person. Adverse decision remanded.

CASENO: 04-02630.a1

DATE: 05/23/2007

DATE: May 23, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-02630
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 21, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct) and Guideline B (Foreign Influence) of Department of Defense Directive

5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 23, 2006, after the hearing, Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge erred in his application of Foreign Influence Mitigating Condition (FIMC) 1;¹ and whether the Judge's whole person analysis was arbitrary, capricious, and contrary to law.² Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant has two brothers who are citizens and residents of Afghanistan. Both are carpenters. They have no connection with the Afghan government.

Applicant has worked for the Afghan government, without pay, from March to July of 2004. He worked for the U.S. Army in Afghanistan from December 2004 until June 2005. The "Deputy Commanding General" of the U.S. Army in Afghanistan thinks most highly of Applicant, and other U.S. Army officers echo the general's comments.³

B. Discussion

The Appeal Board's review of the Judge's findings 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 findings 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.

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 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 ¶ E2.A2.1.3.1.

²Department Counsel does not challenge the Judge's favorable decision under Guidelines F and E. Therefore, they are not at issue in this case.

³Applicant Exhibit C includes an evaluation of Applicant's duty performance. Written on stationary bearing the letterhead of Combined Forces Command - Afghanistan, it states in part that Applicant is a "critical link" between the U.S. and the Afghan people. "Of special note, his mastery of five languages and cultural expertise has earned him the respect and trust of our Deputy Commanding General. [Applicant] is often called upon to translate and verify strategic-level documents for the Commander." Another document contained in this exhibit states that Applicant has assisted in "several joint planning groups to solve a myriad of problems surfacing in Afghanistan . . . [S]everal important [Afghan officials] will speak only through Applicant."

In his discussion of the first asserted error, Department Counsel noted that the Judge's findings include nothing about the nature of the Afghan government or the nature of threats posed by groups such as terrorists and para-military organizations operating within Afghanistan. Department Counsel notes that the Judge's failure to address the geopolitical conditions in Afghanistan render his decision arbitrary and capricious. Security concerns under Guideline B are not limited to influence exercised by foreign governments. Such concerns can arise from the operation of non-governmental groups, such as terrorist organizations, within a foreign country. *See* ISCR Case No. 03-22643 at 8 (App. Bd. June 24, 2005) ("The Board has rejected the contention that there is no rational connection between terrorism and threats to the security of classified U.S. information.") *See also* ISCR Case No. 02-29403 at 9 (App. Bd. Dec. 14, 2004).

In this case, the Judge's failure to make findings concerning the geopolitical situation within Afghanistan impairs his analysis, both of Guideline B and of the whole person. Therefore, we remand the case to the Judge for a new opinion, under Guideline B and the whole person. The new opinion should include a more detailed whole person analysis, which takes into account the dangers existing in Afghanistan insofar as they have a bearing on 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 Judge's decision granting 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

