

KEYWORD: Guideline B; Guideline E; Guideline J

DIGEST: There is merit in Department Counsel claim that the record is devoid of facts from which to infer that Applicant could not be subjected to coercion through his relatives. The Judge erroneously relied on 50 USC § 435. The Judge's favorable decision as to Guideline E is also not supported by the record evidence. Favorable decision reversed.

CASENO: 04-11664.a1

DATE: 04/06/2007

DATE: April 6, 2007

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In Re:	)	
	)	
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SSN: -----	)	
	)	
Applicant for Security Clearance	)	

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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 17, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), of Department of Defense Directive 5220.6

(Jan. 2, 1992, as amended)(Directive). Applicant requested a decision on the written record. On June 27, 2006, after considering the record, Administrative Judge Claude R. Heiny granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge erred in applying Foreign Influence Mitigating Condition (FIMC) 1;<sup>1</sup> whether the Judge erred in applying FIMC 3;<sup>2</sup> and whether the Judge's conclusion that Applicant had satisfactorily explained his failure to provide information about his foreign financial holdings and his prior criminal record was arbitrary, capricious, and contrary to law. We reverse the decision of the Judge.

### **Whether the Record Supports the Judge's Factual Findings**

#### **A. Facts**

The Judge made the following findings: Applicant is a 38 year-old-supply clerk for a defense contractor, with prior military service during which time he held a security clearance.

In October 1986, Applicant was charged and convicted for public intoxication. In December 1986, Applicant, who lived on a naval base as a military dependent, was stopped at a random gate search. The search yielded a small amount of a "controlled substance" which Applicant has denied actually belonged to him. In March 1987, Applicant was charged and convicted of Driving While Intoxicated (DWI) and charged with trespassing on government property. In December 1987 Applicant was convicted of possession of alcohol by a minor.

In filling out his security clearance questionnaire, Applicant answered "no" to Question 24. This question inquired whether Applicant had ever been charged or convicted of any offense relating to alcohol or drugs. Applicant stated that he believed that the question only required him to go back 10 years.

In 1993, while stationed with the U.S. Army in Korea, Applicant met a woman, a Korean national, whom he married in 1997. Applicant's wife has a brother, who is a truck driver in Korea. Applicant states that he has only met his brother-in-law once. In 2002 Applicant and his wife purchased a house in Korea. The house is in the wife's name only in order to avoid extensive paperwork. Applicant's spouse has about \$150,000 in Korean bank accounts. Applicant did not list the house on the security clearance application nor the bank accounts "because he did not believe he was required to do so."

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<sup>1</sup>A determination that the immediate family members...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 persons involved and the United States." Directive ¶ E2.A2.1.3.1.

<sup>2</sup>"Contact and correspondence with foreign citizens are causal and infrequent..." Directive ¶ E2.A2.1.3.1.

The Judge also found that the Republic of Korea is a stable democracy, the U.S.’s seventh largest trading partner and largest export market. The U.S. is a prime target of economic espionage, Korea being listed as among the top seven nations conducting such activities against the U.S.

## 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. Department Counsel does not challenge the Judge’s findings. Therefore, the findings are not an issue on appeal.

### **Whether the Record Supports the 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 choices 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. 581, 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.

#### A. Application of FIMC 1

The Judge concluded that Applicant’s wife and brother-in-law raise security concerns under Foreign Influence Disqualifying Condition (FIDC) 1.<sup>3</sup> As a consequence, the burden shifted to Applicant to establish that to grant him a security clearance is clearly in the national interest. See Directive ¶ E3.1.15. Because Applicant elected not to request a hearing, the Judge was limited to considering the evidence in the File of Relevant Material (FORM).

Department Counsel argues that the record is devoid of facts from which to infer that Applicant could not be subjected to coercion through his relatives. We find merit in Department Counsel’s argument. In the first place, the Judge’s conclusion that Applicant’s wife is not an agent of a foreign power is based upon the definition of that term contained in 50 U.S.C. § 435 *et seq.* The Board has previously held that this statutory definition is self limiting in nature and inadequate to address the security concerns arising under Guideline B. See ISCR Case No. 04-00540 at 4-6 (App.

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<sup>3</sup>“An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in, a foreign country.” Directive ¶ E2.A2.1.2.1.

Bd. Jan. 5, 2007). Therefore, to this extent at least, the Judge's conclusion is arbitrary, capricious, and contrary to law.

Additionally, the Judge does not discuss the extent to which Applicant's wife's house, located in Korea, and in which Applicant resides, and Korean bank accounts constitute a potential means of coercion. The Judge made only a conclusory observation that these matters are not of security significance but did not explain why. Decision at 6. In doing so the Judge failed to consider an important aspect of the case. *See* ISCR Case No. 01-26893 at 7 (App. Bd. Oct. 16, 2002). Again, we conclude that this is error.

#### B. Application of FIMC 3

Board precedent presumes that an applicant's family ties are neither casual nor infrequent. *See* ISCR Case No. 02-24267 at 7 (App. Bd. May 24, 2005). The Department Counsel does not challenge the Judge's findings that Applicant has only met him once. However, there is no evidence in the record to establish the extent of any communication between Applicant, or Applicant's wife, and the brother-in-law. While it is possible that neither have any contact with him, Applicant bears the burden of persuasion to establish this mitigating condition. We conclude that the evidence in the FORM is insufficient to do so and that the Judge's application of FIMC 3 is in error.

C. Judge's conclusion that Applicant provided a credible explanation for neglecting to provide information on security clearance form

We have examined the record evidence concerning Applicant's having failed to list his criminal past and his wife's Korean property holdings. As regards the latter, he stated that, since the relevant questions were directed explicitly to him, he did not believe that Applicant was required to list his wife's holdings. The FORM contains a character reference from a warrant officer who knows Applicant and who opines that Applicant "is a very literal person and if someone were to ask him questions about 'YOU' he is only going to give. . . information about himself." Item 3. We conclude that the Judge's credibility determination on this matter is supported by substantial evidence.

However, as to the former, we reach a different conclusion. Applicant states that, since he was only to list his residences for the previous 10 years, he believed that he was only required to list criminal activity within that period as well. However, question 24 is clear and unequivocal in its language—"Have you *ever* been charged with or convicted of any offense(s) related to alcohol or drugs?" (emphasis added). There is no evidence in the FORM to demonstrate why such a belief would be reasonable under the circumstances, especially to someone who by nature takes matters as literally as the character reference mentioned above suggests. Having elected not to have a hearing, Applicant denied himself the opportunity to provide a more detailed explanation as to his understanding of what information he was expected to provide and to submit himself to questioning by Department Counsel and by the Judge. We conclude that Applicant has not sustained his burden of persuasion under Guideline E and that the Judge's favorable decision as to that Guideline is arbitrary, capricious, and contrary to law. Given the lack of record evidence in this case, we conclude that there is no reason to remand the decision to the Judge.

**Order**

The Judge's decision granting Applicant a clearance 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