

KEYWORD: Guideline B; Guideline C

DIGEST: The Board concludes that both parties misread the Judge's decision as finding against Applicant under Guideline C and in favor of Applicant under Guideline B, due in part to the discrepancy between the conclusions in the text of the Judge's decision and the Formal Findings and in part to the fact that the Judge relied in her Guideline B analysis on Applicant's negative responses to a hypothetical question that had been alleged under Guideline C. To be fair to the parties, we remand the case to the Judge for the issuance of a new decision which should address all the relevant circumstances relating to the Guideline B. Adverse decision remanded.

CASENO: 06-07293.a1

DATE: 04/16/2008

DATE: April 16, 2008

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In Re:)	
)	
-----)	ISCR Case No. 06-07293
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 12, 2007, 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) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 27, 2007, after the hearing, Administrative Judge Darlene Lokey Anderson denied Applicant’s request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30. There was no cross-appeal. For the reasons set forth below, the Board remands the case to the Judge for the issuance of a new decision.

In the Formal Findings section of her decision, the Judge found in favor of Applicant under Guideline B and SOR paragraphs 1(a) and 1(b), and against Applicant under Guideline C and SOR paragraphs 2(a) through 2(f).¹ However, a close reading of the text of the Judge’s decision indicates just the opposite—that she actually found in favor of Applicant under Guideline C and against Applicant under Guideline B. In the Conclusions section of her decision, the Judge listed the applicable Guideline C Disqualifying Conditions. She then discussed the security implications of Applicant’s dual citizenship with Israel, his possession and use of an Israeli passport to visit his family members in Israel, and his subsequent renunciation of his Israeli citizenship and the surrender of his Israeli passport. Afterwards the Judge stated: “Under the circumstances of this case, I find for the Applicant under Guideline C (Foreign Preference).”² The Judge then listed the applicable Guideline B Disqualifying Conditions and discussed why Applicant’s connection to his two family members in Israel created a potential conflict of interest between his obligation to protect sensitive information or technology and his desire to help those individuals or their country. Following that analysis, the Judge then stated: “Accordingly, Guideline B, Foreign Influence is found against Applicant.”³

As a threshold matter, the Board concludes that both parties misread the Judge’s decision as finding against Applicant under Guideline C and in favor of Applicant under Guideline B. This was apparently due in part to the discrepancy between the conclusions in the text of the Judge’s decision and the Formal Findings. It was also apparently due in part to the fact that the Judge relied extensively on Applicant’s negative responses to a hypothetical question⁴ as to his willing to bear

¹Decision at 9.

²*Id* at 7-8.

³*Id* at 8.

⁴As a general rule, an applicant’s stated intention of what he might do in the future under a hypothetical set of circumstances is entitled to limited weight unless there is record evidence that the applicant has acted in a similar manner in the past under comparable circumstances. *See, e.g.*, ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 9, 2007). The likelihood or not of the hypothetical ever occurring may further affect the weight to be assigned.

arms for the U.S. against Israel⁵ in her analysis of the security concerns presented by Applicant's foreign family ties under Guideline B.⁶ Applicant's responses in that regard had actually been asserted as factual allegations under Guideline C.

The Board recognizes the presence of some ambiguity in this matter. Therefore, in order to be fair to the parties, the most expeditious resolution is to remand the case to the Judge for the issuance of a new decision. In her new decision, the Judge's analysis should address all the relevant circumstances relating to the Guideline B allegations,⁷ including the current significance of Applicant's foreign family ties, Applicant's ties to the U.S., the circumstances under which Applicant has previously held a security clearance, the evidence as to Applicant's character, and the identity of the country in accordance with Directive.⁸

Order

The Judge's adverse security clearance decision is REMANDED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: William S. Fields

⁵In his brief, Applicant's counsel asserts that DOHA engages in the discriminatory practice of only questioning applicants with family members in Israel as to whether they would bear arms for the U.S. against that country. Applicant's assertion in that regard without merit. Applicants with family members in other countries are also asked that question. *See, e.g.*, ISCR Case No. 02-02172 (A. J. May 16, 2003) (South Korea); ISCR Case No. 01-02204 (A. J. Sep. 4, 2001) (Switzerland); ISCR Case No. 03-21111 (A. J. Bd. Jun. 7, 2006) (Afghanistan); ISCR Case No. 01-10189 (A. J. Dec. 31, 2001) (United Kingdom); ISCR Case No. 00-0127 (A. J. Nov. 7, 2000) (Ireland); ISCR Case No. 03-04132 (A. J. Mar. 29, 2004) (People's Republic of China); ISCR Case No. 02-01987 (A. J. Nov. 12, 2003) (Cuba); ISCR Case No. 01-26993 (A. J. Aug. 6, 2003) (Iran); ISCR Case No. 01-16419 (A. J. Oct. 10, 2002) (Egypt); ISCR Case No. 03-26412 (A. J. Feb. 22, 2006).

⁶This was evidence which the Judge could properly consider along with the other evidence of record in reaching her decision.

⁷As noted above, the Board concluded that Guideline C had been resolved in favor of Applicant. Therefore, that Guideline is no longer at issue.

⁸In conducting her analysis, the Judge should be cognizant of the Board's decision in ISCR Case No. 03-21434 at 3-5 (App. Bd. Feb. 20, 2007).

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____
James E. Moody
Administrative Judge
Member, Appeal Board