

KEYWORD: Guideline B; Guideline E

DIGEST: Quasi-judicial adjudications must be made within the bounds of applicable law and policy. Security clearance decisions must be based on current DoD policy and standards. The Judge's limited analysis of the PRC is inadequate and did not present the full context of the strategic threat posed to the US by the PRC. Favorable decision reversed.

CASENO: 06-17838.a1

DATE: 01/28/2008

DATE: January 28, 2008

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In Re:	)	
	)	
-----	)	ISCR Case No. 06-17838
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Candace Le'i, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 16, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 11, 2007, after the hearing,

Administrative Judge Kathryn Moen Braeman granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.<sup>1</sup>

Department Counsel raised the following issues on appeal: whether the Judge's application of Foreign Influence Mitigating Conditions (FIMC) is unsupported by record evidence and arbitrary, capricious, and contrary to law; and whether the Judge's whole person analysis is unsupported by record evidence and arbitrary, capricious, and contrary to law. Finding error, we reverse.

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

### **A. Facts**

The Judge made the following pertinent findings of fact: Applicant was born in the People's Republic of China (PRC), becoming a U.S. citizen in December 2000. He works for a defense contractor. Applicant's mother was born in the PRC but is a U.S. citizen who has worked for a defense agency for many years. She is divorced from Applicant's father and is married to a U.S. citizen and former Army officer.

Applicant's father is a citizen and resident of the PRC. Applicant speaks with him twice a year, on his birthday and on holidays. Applicant's grandfather is also a citizen and resident of the PRC, with whom Applicant has visited in 2001, 2002, and 2003. Applicant speaks with his grandfather twice a year, on his birthday and on holidays..

Applicant's wife is a citizen of the PRC, but a legal resident of the U.S. by virtue of marriage. Applicant's parents-in-law are citizens and residents of the PRC. Applicant's wife speaks with them by telephone two or three times a week, although Applicant does not speak with them. Applicant's father-in-law is a partner in a large Chinese law firm. In 2004 and in 2005, Applicant's parents-in-law gave Applicant's wife gifts of \$10,000 each year. In 2006 they gave her \$6,000 and, at the time of the close of the record, Applicant and his wife were expecting a gift of \$50,000 for a down payment on a house.

The Judge found that the PRC does not consider Chinese-Americans to be more vulnerable to approach than any other group. The PRC is willing to exploit a targeted individual's feelings of obligation toward the PRC or toward family or friends who live there.

### **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 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

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<sup>1</sup>The Judge's favorable decision under Guideline E is not at issue in this appeal.

Judge's credibility determinations. Directive ¶ E3.1.32.1. Department Counsel has not expressly challenged the Judge's findings of fact, though she cites other record evidence in support of her arguments 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 the 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.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge explicitly applied two Guideline B mitigating conditions, FIMC 8(a)<sup>2</sup> and (f).<sup>3</sup> Department Counsel argues that the Judge's analysis under 8(a) is unsustainable in light of significant contrary record evidence. For example, although the Judge discussed the PRC's approach

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<sup>2</sup>Directive ¶ E2.8(a). ("[T]he nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.")

<sup>3</sup>Directive ¶ E2.8(f). ("[T]he value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.")

to intelligence collection, Department Counsel cited the PRC's suppression of human rights; its practice of arbitrary arrest and detention;<sup>4</sup> its long-standing rivalry with the U.S. over matters such as the status of Taiwan;<sup>5</sup> that the PRC targets the U.S. with active intelligence gathering activities, both legal and illegal;<sup>6</sup> and that it considers Americans of Chinese ancestry to be "prime intelligence targets."<sup>7</sup> Insofar as one of the criteria addressed in the mitigating condition and the concern paragraph is the nature of the foreign country, the evidence cited by Department Counsel is critical in evaluating whether Applicant has met his burden of persuasion.

The validity of Appeal Board precedent issued under an earlier edition of the Adjudicative Guidelines is an issue in this case. The Board has previously held ". . . a Judge cannot rely on language from an earlier version of the Directive to justify the Judge's decision and that an applicant's security eligibility must be adjudicated under current DoD policies and standards, not past ones. Similarly, the precedential value of Board decisions is affected to the extent those decisions involve the interpretation of a provision of the Directive that is later revised or changed. Statements made by the Board in earlier decisions that are predicated on then-existing language in the Directive cannot be simply assumed—by a Judge or a party—to be applicable in later cases after the pertinent provision(s) of the Directive have been revised or changed." See ISCR Case No. 02-17369 at 3-4 (App. Bd. May 23, 2006); and ISCR Case No. 02-24254 at 7-8 (App. Bd. Jun 29, 2004) (footnotes omitted). Of course, some precedent remains completely valid in the face of changes to the guidelines, because it is not dependent on the language of any specific guideline. Other precedent remains valid where the applicable language of the guideline is unchanged or the changes are not of sufficient magnitude to vitiate or overrule the substance of the precedent. However, Board decisions cannot be relied on or followed to the extent they involve precedent predicated on law or DoD policy that changed after the issuance of those decisions. Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them. See, e.g., *Croplife America v. Environmental Protection Agency*, 329 F.3d 876, 882 (D.C. Cir. 2003) (administrative law judges cannot ignore agency policy in making rulings); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989)(administrative law judge is subordinate to head of agency or department in matters of policy); *Mullen v. Bowen*, 800 F.2d 535, 540 n. 5 (6th Cir. 1986) (decisional independence does not relieve administrative law judge of the obligation to apply agency policy). See ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003)(security clearance decisions must be based on current DoD policy and standards). Accordingly, no Board decision should be construed or interpreted without regard to the law and DoD policy applicable at the time the Board decision was issued.

Here, Guideline B is at issue. Guideline B was subject to extensive revisions in the Revised Adjudicative Guidelines. However, those prior Board decisions which are consistent with the revised guidelines are still applicable. For example, the new guidelines specify in paragraphs 6 and

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<sup>4</sup>See Government Exhibit (GE) 1, Department of States Background Note, April 2006, at 7; GE 2, Department of State Report on Human Rights Practices, March 8, 2006, at 1.

<sup>5</sup>See GE 1 at 14-15.

<sup>6</sup>See, e.g., GE III, U.S. National Security and Military/Commercial Concerns with the People's Republic of China, January 1999, at 21-25.

<sup>7</sup>See GE IV, Intelligence Threat Handbook, June 2004, at 17.

8(a) that the country matters. It follows that prior Board precedent which states that when the foreign country is hostile to the United States, an applicant bears a “very heavy burden” to show that neither he nor his family members in that country are subject to influence by that country is still valid under the new guidelines. See, e.g., ISCR Case No. 01-26893 at 8 (App. Bd. Oct. 16, 2002). In light of the above, Department Counsel’s argument that the Judge’s limited analysis of the PRC is inadequate and that she has not presented the full context of the strategic threat posed to the U.S. by the PRC is persuasive.

Department Counsel also argues that the Judge erred in concluding that the nature of the relationship between Applicant and his foreign relatives does not pose an unreasonable security concern. Department Counsel contends that such family relationships as are found in this case are presumptively close and that there is nothing in the record to rebut that proposition.<sup>8</sup> Indeed, Applicant visited his father and grandfather on several occasions between 2001 and 2003 and maintains telephone contact with them at significant times of the year. Furthermore, Applicant’s Chinese wife speaks with her parents two or three times a week. In light of record evidence that the PRC monitors mail, telephone, and electronic communications,<sup>9</sup> the contacts between Applicant’s wife and her parents raise security concerns which the record as a whole does not resolve. Additionally, the Board notes that the apparent prominence of Applicant’s father-in-law<sup>10</sup> heightens the Government’s security concern, especially in light of Applicant’s receipt of gifts expected to exceed \$70,000. While the Judge notes that Applicant is well-off himself, and, therefore, not dependent on his father-in-law for support, she does not address the adverse security consequences gifts of that magnitude from overseas relatives. Furthermore, the Judge did not explicitly discuss FIMC 8(b).<sup>11</sup> However, she appears impliedly to have raised it in concluding that Applicant’s “deep ties to the U.S.” militate against his acting on behalf of the PRC. The Judge does not explain why Applicant’s ties to his foreign relatives, to include the receipt of a substantial amount of money from his father-in-law, are comparatively minimal, as this mitigating condition requires.

As mentioned above, the Judge also gave favorable application to FIMC 8(f), which addresses the mitigation of security concerns arising out of foreign interests. Applicant owns no property in the PRC, though he has, as stated above, received gifts from his father-in-law. The Judge concluded that these gifts “could not be used effectively to influence, manipulate or pressure” Applicant.<sup>12</sup> Given the totality of the record here, the Judge erred in giving FIMC 8(f) substantial weight. Given the record evidence, the Board concludes that the Judge’s favorable decision is not sustainable.

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<sup>8</sup>See ISCR Case No. 00-0484 at 4 (App. Bd. Fe. 1, 2002). See also Note 8 above.

<sup>9</sup>GE 2 at 1, 10.

<sup>10</sup>See the testimony of Applicant’s spouse: “[M]y dad is considered rich in China . . . he’s doing pretty good . . . he’s a partner in a big law firm, a private law firm.” Tr. at 50, 52.

<sup>11</sup>Directive ¶ E2.8(b). (“[T]here is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.”)

<sup>12</sup>Decision at 7.

**Order**

The Judge's favorable security clearance decision is REVERSED.

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