

KEYWORD: Guideline B

DIGEST: The precedential value of Board decisions is affected to the extent those decision involve interpretation of a provision of the Directive that is later revised or changed. Statements 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. Adverse decision remanded.

CASENO: 06-23454.a1

DATE: 11/14/2007

DATE: November 14, 2007

In Re:)	
)	
-----)	ISCR Case No. 06-23453
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B Norman, Esq., Chief Department Counsel, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 19, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline B (Foreign Influence)

of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 18, 2007, after considering the record, Administrative Judge Christopher Graham denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's application of the relevant mitigating conditions is arbitrary, capricious, and contrary to law; and whether the Judge's whole person analysis is arbitrary, capricious, and contrary to law. Finding error, we remand the decision to the Judge.

Whether the Record Supports the Judge's Factual Findings

A. The Judge made the following pertinent findings of fact:

Applicant immigrated to the U.S. as a child, becoming a U.S. citizen in 2000. Applicant's father is a citizen and resident of China (PRC). Applicant's mother is also a citizen of the PRC, living with Applicant's sister in the U.S. Applicant's parents-in-law are PRC citizens, living with Applicant and her husband in the U.S. About once a month, Applicant's mother-in-law telephones some of her relatives in the PRC.

The PRC has a poor human rights record. It engages in espionage against the U.S., attempting to identify ethnic Chinese who have access to sensitive information and sometimes succeeding in obtaining their cooperation in illegal technology or information transfers.

B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial record 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 Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant has not challenged the Administrative Judge's factual findings. Rather, Applicant claims error regarding the Judge's conclusions, more specifically, his approach to the various mitigating factors provided under Guideline B. Therefore, the Board will address the arguments raised on appeal by Applicant in the context of determining whether the record supports the Judge's ultimate conclusions.

Whether the Record Supports the Judge's Ultimate Conclusions

An Administrative 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 Appeal Board may reverse the Administrative 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. We review matters of law *de novo*.

An important preliminary matter in this case involves the version of DoD Directive 5220.6 that was in effect at the time the case went to hearing. As noted in a preceding paragraph, the SOR in this case issued on December 19, 2006. The current version of DoD Directive 5220.6, which contains the Revised Adjudicative Guidelines implemented for the Department of Defense by the Undersecretary of Defense for Intelligence on August 30, 2006, were made effective for any adjudication in which a Statement of Reasons issued on or after September 1, 2006. Thus, the current Adjudicative Guidelines apply to this case.

The Judge concluded that Applicant's PRC relatives could be a means through which Applicant could come to the attention of the PRC government and, therefore, could become a means through which Applicant could be pressured to compromise classified information. The Judge concluded that, given the record evidence, Applicant had not met her burden of persuasion that it is "clearly consistent with the interests of national security" for her to have a clearance. More specifically, the Judge stated that none of the mitigating conditions listed under paragraph 8 of the Adjudicative Guidelines (which comprise the mitigating conditions under Guideline B) applied to the case. The Judge went on to state: "Under the previous guidelines, the Appeal Board interpreted similar language to ¶ 8 (a)¹ (footnote added) as establishing an absolute standard; i.e., an applicant must affirmatively prove that there is *no possibility* that anyone might attempt to exploit or influence a foreign relative or acquaintance in the future." This statement was accompanied by a supporting footnote containing citations to Appeal Board cases decided under the version of DoD Directive 5220.6 that was in effect prior to September 1, 2006. Although the Judge discussed other factors in his conclusions, the statement comprises a significant portion of the Judge's analysis in this case on the issue of whether or not the mitigating conditions listed under paragraph 8 of the Revised Guidelines applied to Applicant's situation.

On appeal, Applicant makes a number of assertions regarding the Judge's conclusion that none of the Guideline B mitigating conditions applied. One such argument is particularly germane to the Board's resolution of this case. Applicant claims the Judge disregarded the possible application of Guideline B Mitigating Condition 8(b)² when deciding his case. Her argument has merit. While the Judge's decision states in its own terms that he considered Mitigating Condition 8(b), because he relied, in part, on language and cases emanating from Adjudicative Guidelines that are no longer in force, the Judge erred by effectively precluding consideration of Applicant's case under both current Mitigating Conditions 8(a) and 8(b). As the Board can determine an appropriate disposition of this case on this issue alone, it need not address other arguments raised by Applicant on appeal.

¹"[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 United States."

²"[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."

The validity of Appeal Board precedent issued under earlier editions 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.

Regarding Guideline B, the Revised Adjudicative Guidelines that took effect on September 1, 2006 brought with them significant changes in the language of both the disqualifying and the mitigating conditions. In this case, the Judge’s use of the word “similar” to describe the relationship between the language of the old Guideline B Mitigating Condition 1³ and the current Mitigating Condition 8(a) is clearly erroneous. While the basic concepts underlying the prior and the current mitigating conditions are related, a comparison of the language between the two reveals considerable differences. Not the least of these is the appearance of the qualifying term “unlikely” in the current version, whereas the earlier mitigating Condition 1 contained no such proviso. In the face of these differences, it was error for the Judge to assume that the viability of the Board’s prior interpretation of the language of the earlier Mitigating Condition 1 has continued, with unaltered effect, in the face of the new language of Mitigating Condition 8(a). Additionally, Mitigating Condition 8(b) under the current Guidelines, the application of which is of particular interest to Applicant on appeal, has no counterpart under the previous Guidelines, and it can act to provide mitigation in appropriate cases even when the provisions of Mitigating Condition 8(a) are not satisfied. By largely relying upon his perception of the Board’s interpretation of the language of prior Mitigating Condition 1,

³“A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(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.”

and his treatment of that interpretation as dispositive, the Judge effectively precluded proper consideration of the Applicant's case under current Mitigating Condition 8(b).

In addition to the matters discussed in the previous paragraph, the Judge's preoccupation with such terms as "immediate family members" and "agents of a foreign power" in other parts of his conclusions section leave little doubt that his analysis of the case was substantially rooted in a consideration of the language of prior Adjudicative Guidelines and his understanding of precedent developed thereunder, rather than the current Guidelines. While there are parts of his analysis of the case that do not suffer from this infirmity, the Board concludes that there is a strong possibility that the Judge's error precluded an adjudication under the current guidelines. Therefore, the case is remanded to the Judge for the issuing of a new decision in accordance with the matters discussed by the Board herein.

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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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