

KEYWORD: Guideline B

DIGEST: The Adjudicative Desk Reference by its own terms cannot serve as the basis for a denial of access to classified information. The Judge is required to rely implement the Adjudicative Guidelines from the Directive, not the Adjudicative Desk Reference. Adverse decision affirmed.

CASENO: 09-07066.a1

DATE: 07/26/2011

DATE: July 26, 2011

In Re:)
)
)
 -----) ISCR Case No. 09-07066
)
)
)
 Applicant for Security Clearance)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Christopher Graham, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 16, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security 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 November 30, 2010, Department Counsel moved to amend the SOR. This motion was granted, and Applicant was afforded an opportunity to respond to the amended SOR. On April 29, 2011, Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 31 years old and has been married since 2006. Applicant and his sister were born, raised and educated in the United States. Applicant's father was born in Pakistan, and he is a Pakistani citizen with permanent residency status in the United States. His mother was born in India, and she is now a naturalized U.S. citizen. Both parents live with Applicant in his home. Applicant's father has worked at the embassy of a Middle Eastern country (Country X) since he entered the U.S. in 1978. His father has an important position at the embassy. He has no diplomatic or government-related duties. Applicant's father and the family have visited the embassy for festivals and special occasions. Applicant's maternal grandfather worked for the Pakistani Ministry of Foreign Affairs and performed duties in a high level position. Applicant's mother has a sister and a stepsister who are residents and citizens of Pakistan. She has contact with them approximately six times a year, usually during religious holidays or special occasions. Applicant has a paternal aunt living in Pakistan, and he maintains contact with her only through his father.

Applicant's wife was born in Pakistan, but she is now a naturalized U.S. citizen. Her parents were both born in Pakistan, but they are now naturalized U.S. citizens living in the U.S. They travel to Pakistan every two years. Applicant's wife's aunt works in Pakistan as a teacher. She traveled to the United States to attend Applicant's wedding. Applicant's wife has not traveled to Pakistan since around 2000-2001. Most of the contacts with family members living in Pakistan are maintained by Applicant's father and Applicant's wife's relatives, and Applicant has limited contact with them. Applicant last visited Pakistan in 1995-1996. He loves the United States and considers himself to be a loyal, hardworking American. Applicant noted that he has numerous family members living in the United States who have been granted access to classified information.

Pakistan is a parliamentary federal republic which, nonetheless, has a poor human rights record. Arbitrary arrests, governmental and police corruption is widespread, and the Pakistani government maintains several domestic intelligence agencies to monitor politicians, suspected terrorists, the media, and suspected foreign intelligence agents. The leader of the Taliban operates openly in Pakistan, as do extremists from the Pakistani Taliban and Al Qaida. In early 2009, the FATA in Pakistan continued to provide vital sanctuary to Al Qaida and a number of foreign and Pakistani-based extremist groups. Al Qaida exploits the permissive operating environment to

support the Afghan insurgency, while also planning attacks against the United States and Western interests in Pakistan and worldwide. The U.S. State Department warns U.S. citizens of the risks of traveling to Pakistan in light of terrorist activity. Country X is an important partner in the ongoing U.S.-led campaign against international terrorism. Country X engages in human rights abuses which include limits on freedoms of speech, press, religion, and movement for certain groups. There is also government corruption, trafficking in persons, and violence against women.

The Judge reached the following conclusions: Applicant, by himself or through his wife and his parents, has frequent contacts (at least twice a month) and a close relationship of affection and/or obligation with his aunt, his wife's aunt, and other extended family members who are residents and citizens of Pakistan. These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Pakistani agents, criminals, or terrorists operating in Pakistan may exploit the opportunity to obtain information about the United States. Moreover, Applicant's parents live with him in his house, and his father is a citizen of Pakistan. For the past 33 years Applicant's father has been employed by another Middle Eastern country in an important trust position. Applicant's connection to his father in the United States and other family members in Pakistan creates a potential conflict of interest because his relationships are sufficiently close to raise a security concern about his desire to help them by providing sensitive or classified information. Considering the totality of the facts and circumstances in Applicant's case, none of the mitigating conditions apply. Applicant's relationship with the United States and his status as a loyal and productive member of American society must be weighed against the potential conflict of interest created by his relationship with his father and other family members living in Pakistan. Of note is the United States' recent relationship with Pakistan, especially Pakistan's systematic human rights violations, and the ever present danger from terrorists and those who seek to damage U.S. interests. Applicant's father's long-term working relationship with another foreign country is a security concern.

Applicant asserts that his contacts with his extended family in Pakistan are attenuated and the record does not support a conclusion that these relationships pose a security concern. He argues that the facts of the case support mitigation of the Government's concerns. Applicant points out that he has held a security clearance since 2007 and, since neither his circumstances nor the Adjudicative Guidelines have changed since then, the unfavorable resolution of his case must be the product of a policy change by adjudicators. Applicant's assertions do not establish error on the part of the Judge.

Applicant's arguments rely heavily on references to the Adjudicative Desk Reference (ADR). The Judge was required to decide the case by using the Adjudicative Guidelines, not the ADR. The ADR itself states that it cannot serve as the basis for denial or suspension of access. *See, e.g., ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008).* Thus, the Judge's failure to consider the individual indicators listed therein does not establish error on the part of the Judge.

Applicant argues that he has held a security clearance since 2007 and nothing of security significance has taken place since then. The Government is not estopped from protecting classified information because of earlier, favorable adjudications.. *See ISCR Case No. 08-05344 at 2-3 (App.*

Bd. Feb. 3, 2010). Moreover, the Board is in the position of reviewing only the instant case, not any prior adjudication of Applicant's security clearance eligibility. The Board notes that federal agencies are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *See, e.g.*, ISCR Case No. 06-06496 at 3 (App. Bd. Jun. 25, 2009). Applicant has not established error or irregularity on this point.

As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant's arguments are essentially nothing more than an alternate view of the record evidence.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He discussed the applicability of the mitigating factors listed under Guideline B and indicated in some detail why the mitigating conditions did not apply. This conclusion was reasonable given the Judge's findings about the nature of the governments and the recent histories of Pakistan and Country X, and the nature of Applicant's contacts with his foreign relatives, including a father who has held a trusted position with a foreign government for many years.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'an

Michael Y. Ra'an
Administrative Judge

Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board