

KEYWORD: Guideline C; Guideline B

DIGEST: Applicant's challenges to the Judge's finding fail either because they relate to favorable conclusions, rely on new evidence, the findings are based on substantial evidence, the findings are based on reasonable inferences from the record, or the error is harmless. Adverse decision affirmed.

CASENO: 06-24013.a1

DATE: 03/04/2008

DATE: March 4, 2008

In Re:)	
)	
-----)	ISCR Case No. 06-24013
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 12, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On October 26, 2007, after considering the record, Administrative Judge Juan J. Rivera denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issue on appeal: whether the Judge’s adverse security clearance decision under Guideline B is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge’s adverse clearance decision should be reversed because there were multiple errors in the Judge’s findings. The Board does not find Applicant’s argument persuasive.

The Board’s review of a Judge’s findings 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 finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620, (1966).

Some of the errors asserted by Applicant relate to the Guideline C allegations which were resolved in her favor and, therefore, are not at issue on appeal. Other assertions of error are based on new evidence in the form of Applicant’s statements in her brief as to various details about her family which did not appear in the record below. The Board may not consider this new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.*, ISCR Case No. 06-00184 at 2 (App. Bd. Jul. 24, 2007).

With respect to the balance of the findings at issue, the Board concludes that they are based on substantial evidence, they constitute reasonable inferences that could be drawn from the record, or they involve harmless error in that it would not change the outcome of the case.² Applicant has not met her burden of demonstrating that the Judge’s material findings with respect to her circumstances of security concern do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge’s material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of disqualifying and

¹The Judge found in favor of Applicant under Guideline C. That favorable finding is not at issue on appeal.

²For example, Applicant argues that the Judge erred in finding that Applicant had two sisters, age 46 and 45, and that her mother died in 1990; when in fact her sisters were age 54 and 45, and her mother died in 1996.

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. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance decision. 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*. An applicant'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.

Applicant elected to have her case decided upon the written record—a circumstance which meant the Judge did not have an opportunity to question Applicant about her family ties and evaluate her credibility in the context of a hearing. Most of Applicant's submission in response to the government's File of Relevant Material (FORM) related to the Guideline C security concerns which were resolved in her favor. Applicant has not met her burden of demonstrating that the Judge erred in concluding that the Guideline B allegations had not been mitigated—given the limited record in this case. Although Applicant strongly disagrees with the Judge's decision, she has not established that it is arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors.³ The Judge found in favor of Applicant under Guideline C, but articulated a rational basis for not favorably applying any mitigating conditions or factors with respect to the Guideline B allegations. He reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Judge's decision exhibits a discerning weighing of a number of variables to reach a commonsense determination. Directive ¶ E2.2. In some instances, as noted earlier, this process led to favorable findings for Applicant. However, the Judge also articulated a reasonable concern that Applicant's circumstances created a conflict of interest that could potentially make her vulnerable to coercion, exploitation or pressure. That concern is based on close family ties in Taiwan, considered in the context of the overall political/security profile of that country *vis-a-vis* the United States. Applicant offers an alternative interpretation of the record evidence. However, that alternative interpretation of the record evidence is insufficient to render the Judge's interpretation arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 03-19101 at 2 (App. Bd. Oct. 13, 2006). The Judge has articulated a rational explanation for his unfavorable determination under the disqualifying and mitigating factors and the whole-person concept, and there is sufficient record evidence to support that determination—given the standard that required the Judge to err on the side of national security. *See, e.g.*, ISCR Case No. 06-04371 at 3 (App. Bd. Oct. 18, 2007).

³Decision at 6-8.

Order

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

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board