KEYWORD: Guideline B

DIGEST: After the government presents evidence raising security concerns the burden shifts to the applicant to establish mitigation. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. Adverse decision affirmed.

CASENO: 07-04281.a2

DATE: 02/09/2009

DATE: February 9, 2009

In Re:	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Richard Murray, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 18, 2007, DOHA issued a statement of reasons 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 July 25, 2008, after the hearing, 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. On October 9, 2008, the Board remanded the case to the Judge for a new decision. On November 20, 2008, the Judge issued his remand decision, again denying Applicant a security clearance. Applicant submitted a timely appeal pursuant to the Directive.

Applicant raised the following issue on appeal: whether the Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. Specifically, Applicant contends that the Judge committed error in not clarifying contradictory language found in his initial decision and that the Judge's conclusion that Applicant may be vulnerable to foreign influence is arbitrary and capricious. Finding no error, we affirm the Judge's decision.

The Judge made the following relevant findings of fact: Applicant is a scientist at a U.S. university. He was born in India and educated there through the Ph.D. level. For several years, Applicant then was a member of the faculty at an institute. Applicant still has some contact with his colleagues there. Applicant came to the U.S. in the early 1980s for post-doctoral studies and remained here, except for trips to India. Applicant met and married his spouse when they were students in India. Both became U.S. citizens in the mid-1990s.

Applicant and his wife have relatives in India. Applicant maintains close contact with his mother, speaking to her at least twice per month. He speaks to his sisters once or twice a month. Applicant's wife speaks to her parents once a week and to her brothers three times a year. Applicant's brother-in-law is a faculty member at an Indian research institute.

Applicant bought real property in India in the early 2000s, which is worth about $80,000. Applicant's father willed him property including the family home, which Applicant's mother occupies. The record does not indicate the value of the property, and Applicant has not decided whether to accept any of it. He also has a bank account in India in the amount of $6,000, in case his mother should need his assistance.

India has trading and investment ties with the U.S. and has a generally positive record on human rights. However, India is known as one of the most active collectors of sensitive U.S. economic, industrial, and proprietary information and is a strong ally of Iran. The U.S. has sanctioned Indian scientists and companies for transferring sensitive weapons-related equipment/technology to Iran. Furthermore, there have been numerous cases of the illegal export or attempted export of restricted, dual-use technology to India.

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 Judge discussed the possible application of the relevant disqualifying and mitigating conditions and concluded that Applicant had not met that burden in this case. Applicant disagrees with the Judge's conclusions in that regard. However, the presence of some mitigating evidence does not alone

compel the Judge to make a favorable security 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, or *vice versa. See, e.g.,* ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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. *See, e.g.,* 06-06-17409 at 3 (App. Bd. Oct 12, 2007).

As discussed in the previous paragraph, the Judge looked at both the favorable and unfavorable record evidence and reasonably explained why Applicant's evidence of mitigation did not overcome the government's security concerns. In his whole-person analysis, the Judge also provided clarification of some statements he made regarding mitigation in his earlier decision. 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. 02-28041 at 4 (App. Bd. Jun. 29, 2005).

In his appeal, Applicant cited decisions by other Hearing Office Judges which he believes support his argument that the Judge in this case erred in denying him a security clearance. The Board gives due consideration to those decisions. However, they are not binding legal precedent for other Judges in other cases, and they are not binding on the Board. *See, e.g.,* ISCR Case No. 02-27081 at 7 (App. Bd. Nov. 10, 2004).

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). Given the record that was before him, the Judge's ultimate unfavorable decision under Guideline B is sustainable.

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Jean E Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

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