

KEYWORD: Guideline B; Guideline E

DIGEST: The Judge’s material findings of security concern are supported by substantial evidence. Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. An applicant with family members in a hostile country has a “very heavy burden” to show that they are not a means through which the applicant could be subjected to coercion. Adverse decision affirmed.

CASE NO: 12-12172.a1

DATE: 01/09/2014

DATE: January 9, 2014

In Re:)	
)	
-----)	ISCR Case No. 12-12172
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Corey Williams, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 6, 2013, DoD 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 decision on the written record. On July 31, 2013, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Shari Dam denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings of fact contained errors and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant was born in Eritrea but moved to Sudan as a young man. From there he came to the U.S., as subsequently did his wife and children. Applicant became a U.S. citizen in the late 1990s. One of Applicant's siblings is a citizen and resident of Sudan. Applicant calls this sibling once a year. He has other siblings who are citizens and residents of Eritrea and with whom he communicates more frequently, one of them on a monthly basis. Applicant's wife owns property in Egypt, which she purchased as a retirement home.¹

The Judge took official notice of documents submitted by the Government. These documents assert, *inter alia*, that Sudan is a country with a significant history of state-sponsored terrorism and that it, along with Egypt, violate human rights and manifest anti-U.S. sentiments. Both countries engage in the illegal collection of U.S. technologies and proprietary material.

In completing his security clearance application (SCA), Applicant stated that the reason that he left a prior employment as a linguist was that he had completed his contract. He did not advise that he had in fact been terminated from that position. In his answer to the SOR, and his response to the File of Relevant Material (FORM), he stated that his termination had been wrongful, as evidenced by his having received unemployment compensation. He stated that the employer had alleged that he had made derogatory comments about the national government and coalition forces.

Applicant enjoys an excellent reputation for the quality of his work performance as well as for his integrity and sense of duty. A commander for whom Applicant worked strongly recommended that he be considered for continued translator duties.

The Judge's Analysis

The Judge concluded that Applicant's circumstances raised concerns under both Guidelines alleged in the SOR. In analyzing Applicant's case for mitigation under Guideline B, she stated that, in light of the presence of terrorists in Sudan and hostilities expressed toward the U.S. by Egypt, Applicant had failed to demonstrate that it is unlikely that he could be put in a position of choice between the interests of the U.S. and those of Sudan. Under Guideline E, the Judge concluded that Applicant's failure to mention his job termination was deliberate. She stated that Applicant understood the questions at issue and that the possible wrongful nature of the termination was not a reason to have failed to disclose it. She concluded that Applicant's continued assertions to the contrary raise questions about his judgment.

¹Applicant discussed this apartment during his clearance interview. He advised the interviewer that the dwelling was paid off in 2010. He stated that his wife anticipated their living in the apartment during retirement, expressing no disagreement. Item 6, Clearance Interview, at 11.

Discussion

Applicant challenges the Judge's finding that his failure to mention his job termination on his SCA was deliberate. We examine a Judge's findings of fact to see if they are supported by substantial record evidence. Substantial evidence is "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." ISCR Case No. 10-06089 at 2 (App. Bd. Sep. 11, 2013) (internal citation omitted). In analyzing an applicant's *mens rea*, a Judge must consider the applicant's answers in light of the entire record. *See, e.g.*, ISCR Case No. 11-14265 at 3 (App. Bd. Aug. 28, 2013). In explaining the challenged finding, the Judge cited to the clarity of the questions, to Applicant's apparent ability to understand them, and to Applicant's explanation for his omission, contained in Applicant Exhibit (AE) A, Response to the FORM. In this response, Applicant made a statement to the effect that, if one assumed his termination had been proper, it would cast a negative light on his integrity and trustworthiness, which supports a conclusion that the omission was deliberate.² Applicant also challenges the Judge's finding he had been terminated for having made derogatory statements about coalition partners. Applicant denied having made such statements. However, the Judge did not find that this conduct actually occurred, only that it was the basis for the job termination. The Judge's material findings of security concern are based upon substantial record evidence. Any errors in these findings are harmless.

Applicant cites to aspects of his family circumstances that, he contends, support his case for mitigation under Guideline B, including evidence that Applicant's relatives moved to Sudan following a communist takeover of their native country. The Judge made fairly extensive findings about Applicant's foreign relatives. Applicant has failed to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-04641 at 3 (App. Bd. Sep. 24, 2013). Neither has he demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

Applicant cites to decisions by the Hearing Office which, he contends, support his case for mitigation. We have given these cases due consideration as persuasive authority. However, they possess significant differences from Applicant's, viewing his security-significant conduct as a totality. We note that one of the cases that Applicant has cited was reversed on appeal. In any event, other Hearing Office cases are binding neither on us nor other Hearing Office Judges. *See, e.g.*, ISCR Case No. 11-10178 at 3 (App. Bd. Aug. 29, 2013).

² Applicant also never referenced his job termination during his clearance interview, stating that "no adverse actions or disciplinary actions were levied against [him] at this employment." Item 6, Clearance Interview, at 5. Although not alleged in the SOR, this additional omission is relevant in evaluating Applicant's intent. *See, e.g.*, ISCR Case No. 10-03732 at 6, n. 4 (App. Bd. Jun. 14, 2013), citing to Federal Rule of Evidence 404(b) regarding the admissibility of other acts or wrongs to establish motive, intent, absence of mistake, etc.

Applicant challenges the Judge’s application of the mitigating conditions. However, after reviewing the Decision in light of the record as a whole, we find no reason to disturb the Judge’s analysis. An applicant with family members in a hostile country bears a “very heavy burden” to show that these relatives are not a means of coercion or exploitation. The presence of terrorist activity in a foreign country is a significant factor in Guideline B cases as well. ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011). In addition, an applicant’s failure to provide truthful information during the adjudication of his or her SCA is “an offense that strikes at the heart of the security clearance process.” ISCR Case No. 09-01652 at 7 (App. Bd. Aug. 8, 2011). The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. “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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairperson, 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