

KEYWORD: Guideline E; Guideline D; Guideline B

DIGEST: Applicant's multiple inconsistent statements reduce the weight that can be assigned to his testimony. The Judge made sustainable findings that Applicant has a significant history of poor judgment. Adverse decision affirmed.

CASENO: 13-00255.a1

DATE: 07/09/2014

DATE: July 9, 2014

In Re:)
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-----) ISCR Case No. 13-00255
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Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Philip D. Cave, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 30, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline E (Personal Conduct); Guideline D (Sexual Behavior); and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 1, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge James F. Duffy denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

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

The Judge made the following findings of fact: Applicant is 41 years old. He was terminated from jobs in 2000 and 2002 for missing work. In 2007 he was terminated from a job for stealing money from his employer. Applicant had extra-marital affairs in 2002 and 2007 when he traveled overseas. In 2007, at the time of his trip, his wife believed he was going overseas to visit his brother. Applicant now claims he did not have sex with the woman on the 2002 trip. He also submitted a letter from his wife in which she acknowledged his infidelity. From the letter, it cannot be determined whether she is referring to one of these incidents or both.

Applicant was born in Morocco. He immigrated to the United States in the late 1990s and became a U.S. citizen in the mid-2000s. Also, in the 2000s, Applicant married, had a child, purchased a house, and acquired bank accounts in the U.S. He owns no property in Morocco. Applicant’s parents, brothers and his sister are citizens of Morocco. All are residents of Morocco except for one brother who lives in France. He has two sisters-in-law and a brother-in-law who are citizens and residents of Morocco.

Applicant’s mother is a housewife who cannot read or write. She has never held any government positions. His father is a retired employee of the Moroccan government who receives a government pension. Applicant talks to his parents weekly on the telephone. He visited them in 2012 and 2013. Earlier, he gave his parents \$40,000 to purchase an apartment in Morocco which he could inherit part of in the future. He sends them \$100 to \$200 a quarter for their support. Applicant speaks to one brother once or twice a month and speaks to his other two brothers about once a month. He speaks to his sister about once every two weeks. Applicant traveled to Morocco eight times in the last decade. The purpose of these trips was to visit family.

There is a potential for terrorist violence against U.S. interests and citizens in Morocco. In 2012, al-Qa’ida expanded its efforts to recruit Moroccans for combat in other countries and called for attacks on U.S. ambassadors in Morocco and the region. Morocco and the United States work closely on counter-terrorism efforts. Morocco has a comprehensive counter-terrorism program of vigilant security measures, regional and international cooperation, and counter-radicalism policies. Morocco’s most significant human rights problems are lack of citizens’ right to change the constitutional provisions establishing a monarchical government, corruption in all branches of government, and widespread disregard for the rule of law by security forces.

The Judge reached the following conclusions: It appears that Applicant's wife is just referring to the 2007 extra-marital in her letter acknowledging his infidelity. He still remains vulnerable to exploitation for his extra-marital affair in 2002, the one he no longer admits. Under Guideline E, Applicant has engaged in questionable conduct on a number of occasions. When viewed as a whole, Applicant's personal conduct continues to raise questions about his reliability, trustworthiness and good judgment. The evidence presented does not support a conclusion that such questionable conduct is in the past and is unlikely to recur. None of the mitigating conditions fully apply. Under Guideline D, Applicant's extra-marital affairs reflect a lack of discretion and judgment. He now denies the 2002 extra-marital affair, which potentially makes him vulnerable to coercion or exploitation. For the reasons stated under the mitigating conditions for Guideline E, none of the Guideline D mitigating conditions fully apply. Under Guideline B, due to the threat of terrorism and the potential for human rights abuses in Morocco, the presence of Applicant's family members in that country creates a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. Those family members also create a potential conflict of interest with his obligation to protect sensitive information. Because of the nature of his close family contacts in Morocco as well as the terrorist threats and human rights abuses there, Applicant may be placed in a position of having to choose between foreign interests and the interests of the United States. Insufficient evidence has been provided to support a conclusion that Applicant would resolve any potential conflict of interest in favor of U.S. interests. Applicant's performance of duties in support of U.S. forces has been laudable, but it does not rise to the level that would mitigate the security concerns.

Under a whole-person analysis, Applicant's inconsistent statements about termination from employment, his relationship with a woman he met overseas in 2002, and other inconsistencies reduce the weight that can be given to his testimony. He has failed to meet his burden of mitigating the security concerns raised under each guideline.

Applicant asserts that the Judge's adverse security clearance decision was not based on substantial evidence and was therefore arbitrary, capricious, or contrary to law. He states that the Judge failed to adequately examine the allegations against him within the overarching concept of the whole person. Specifically, Applicant argues that: (1) the job terminations he experienced were minor incidents and have grown stale with the passage of time; (2) his questionable sexual conduct has been mitigated as his acts were not criminal, his wife now has knowledge of his transgressions, there is no longer a basis for coercion, exploitation or duress, and the Judge "attempts to make more of it than it really is;" (3) regarding foreign influence, he has significant ties to the United States, he has served in combat zones in support of U.S. interests, and Morocco is a stable and comparatively moderate Arab Muslim nation whose policies and interests are not inimical to those of the United States; and (4) regarding foreign influence, there is no evidence that Morocco has sought to engage in any military or economic espionage against the United States. Applicant's arguments do not establish error on the part of the Judge.

Applicant states that the positive aspects of his life and career overshadow any behavior on his part that might be of security concern. However, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.,* ISCR Case

No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). 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). The arguments Applicant relies on in his brief are largely a disagreement with the Judge's interpretation of the record. In this case, the Judge made sustainable findings that Applicant had a significant history of conduct that indicated a lack of judgment. The Judge concluded that the lack of clear evidence that Applicant's wife knew of a second extra-marital affair created an ongoing risk of exploitation or coercion. This conclusion is supported by the record. The Judge also found that Applicant has close ties with immediate family members in Morocco. Those ties raise the prospect of conflicts of interest. Regarding Applicant's assertion that Morocco does not actively seek sensitive information from the United States, the Government is not required to prove a threat of espionage. See, e.g., ISCR Case No. 02-09907 at 7 (App. Bd. Mar. 17, 2004). The Judge listed the potentially applicable mitigating conditions and then discussed applicable components of those factors in his analysis. Applicant has not demonstrated that the Judge erred when he weighed the mitigating evidence against the seriousness of the disqualifying conduct.

In support of his appeal, Applicant points to decisions by the Hearing Office, which he argues support his request for a favorable determination. The Board gives due consideration to these cases. However, each case must be decided on its own merits. Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. See, ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008).

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 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 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 security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Ra'anan
Michael 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