

DATE: July 25, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02757

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 5, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 30, 2005, after the hearing, Administrative Judge Michael H. Leonard denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge's adverse clearance decision under Guideline B is arbitrary, capricious or contrary to law, ⁽¹⁾ and whether the Appeal Board should grant Applicant a clearance with a warning. Department Counsel raised the following issue on cross-appeal: whether the Administrative Judge's denial of the government's motion to amend the SOR was arbitrary, capricious and contrary to law.

(1) Applicant argues that the Administrative Judge should have concluded that the security concerns raised under Guideline B had been mitigated, as a matter of law, under the Guideline B Mitigating Conditions and the "whole person" concept. Applicant also argues that the Judge's adverse clearance decision should be reversed because the Judge made several errors with respect to his findings. In support of his arguments, Applicant cites to Hearing Office decisions in which applicants with ostensibly similar cases were granted clearances. He also presents new evidence in the form of statements that his wife is no longer employed at the Italian Embassy and no longer possesses an Italian security clearance. The Board does not find Applicant's arguments persuasive.

The Board may not consider Applicant's new evidence on appeal. *See* Directive ¶ E3.1.29. And its submission does not demonstrate error on the part of the Administrative Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005).

The decisions in other DOHA Hearing Office cases cited by Applicant on appeal do not demonstrate error by the Administrative Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases, even if Applicant establishes close factual similarities between the cited cases and the instant case. *See, e.g.*, ISCR Case No. 03-23776 at 3 (App. Bd. Jun. 13, 2006). Likewise, the cited cases are not legally binding precedent on the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

The findings which Applicant challenges are either permissible characterizations by the Administrative Judge or harmless error, in that they would not be reasonably likely to change the outcome of the case. Applicant has not met his burden of demonstrating that the Administrative Judge's material findings with respect Applicant's circumstances of security concern do not reflect a reasonable or plausible interpretation of the record evidence. The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies 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 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 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.

In this case, the Administrative Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and circumstances, and considered the possible application of relevant mitigating conditions and "whole person" factors. The Judge found in favor of Applicant with respect to the Guideline F allegations. The Judge articulated a rational basis for not fully applying any mitigating conditions or favorably applying the "whole person" factors with respect the Guideline B allegations, and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines B is not arbitrary, capricious or contrary to law.

(2) Applicant's request that he be issued a clearance with a warning under Directive ¶ E2.2.6 is not reasonable given the facts of this case. The Administrative Judge found and the record evidence supports that, as of the close of the record, Applicant's wife is employed by the Italian Embassy and has an Italian security clearance. Applicant's circumstances do not fit those described in Directive ¶ E2.2.6 ("If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access").

(3) At the hearing, Department Counsel moved to amend the SOR to conform to the evidence by adding new allegations under Guidelines E and J. *See* Directive E3.1.17. Although Applicant did not object to this amendment, the Administrative Judge denied the motion noting that he could consider the evidence supporting such an amendment in assessing Applicant's credibility, that he had concerns about the sufficiency of notice to the Applicant, and that the amendment would create a situation where it would be necessary to take new evidence on the new allegations in a hearing that had already been lengthy. Department Counsel argues that it was arbitrary and capricious for the Judge to deny Department Counsel's motion, a circumstance which denied the government due process.

Given the record at the time of Department Counsel's motion, it would have been proper to amend the SOR to included the allegations sought by the Department Counsel. However, because the Administrative Judge's failure to do so was not outcome determinative, such failure was ultimately harmless.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), 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

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