

KEYWORD: Guideline B

DIGEST: The Judge is not legally obligated to reconcile his decision with decision in ostensibly similar cases. Adverse decision affirmed.

CASENO: 07-04012.a1

DATE: 04/09/2008

DATE: April 9, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-04012
)	
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 June 20, 2007, DOHA issued a statement of reasons (SOR) 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 December 21, 2007, after the hearing, Administrative Judge Robert J. Tuider 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 issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant contends that the Judge erred in concluding that the security concerns raised under Guideline B had not been mitigated. In support of that contention, Applicant argues that the Judge erred with respect to several of his findings (especially as regards the relationship between Applicant, his wife, and his Taiwanese in-laws) and reached conclusions that were not supported by the record. He also argues that the Judge's overall unfavorable conclusion is inconsistent with other hearing-level decisions in which applicants in ostensibly similar circumstances had been granted a clearance. The Board does not find Applicant's arguments 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). In this instance, even if the challenged findings were changed to reflect Applicant's interpretation of the record evidence, it would not have undermined the Judge's conclusions. Therefore, any such error would be at most harmless. *See* ISCR Case No. 05-08459 at 2, n.1 (App. Bd. Nov. 16, 2006). Considering the record as a whole, the Judge's material findings with respect to Applicant's circumstances of security concern reflect a sustainable interpretation of the record evidence and are supported by substantial evidence. *See, e.g.*, ISCR Case No. 03-21933 at 2 (App. Bd. Aug. 18, 2006).

Applicant points to several hearing-level cases by this Judge which he contends support granting him a clearance. The Board gives due consideration to these cases. *See, e.g.*, ISCR Case No. 06-05903 at 3 (App. Bd. Oct. 15, 2007). However, the Board has previously noted that decisions in other hearing-level cases are not legally binding precedent, even if an applicant can establish close factual similarities between those cases and his case. *See, e.g.*, ISCR Case No. 04-04004 at 2 (App. Bd. Jul. 31, 2006). Accordingly, the Judge was not legally obligated to reconcile his decision in this case with his decisions in other ostensibly similar cases. *See, e.g.*, ISCR Case No. 06-25743 at 2 (App. Bd. Jan. 10, 2008). “The adjudication process is the careful weighing of a number of variables known as the whole-person concept.” Directive at ¶ E2.2(a). “Each case must be judged on its own merits . . .” *Id* at ¶ E2.2(b). Furthermore, Applicant's reading of the Judge's decision regarding Applicant's age at the time he immigrated to the U.S. is not dispositive. The Judge may reasonably have been discussing Applicant's ties to Taiwan prior to his immigration.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. 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*. See, e.g., ISCR Case No. 06-09542 at 2 (App. Bd. Sep. 4, 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., ISCR Case No. 04-08116 at 2 (App. Bd. Jul. 2, 2007).

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. The Judge reasonably explained why the evidence 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(c). It articulated a reasonable concern that Applicant's circumstances could create a conflict of interest or be used to influence, manipulate, or pressure him. 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 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. Directive ¶ E2.2(b).

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board