

KEYWORD: Guideline B

DIGEST: The Judge made finding that appear to contradict his conclusions under Guideline B. Adverse decision remanded.

CASENO: 07-04281.a1

DATE: 10/28/2008

DATE: October 28, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-04281
)	
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.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law because the Judge failed to give proper weight to Mitigating Condition (MC) 8(b) and failed to articulate a satisfactory explanation as to why the evidence presented was not sufficient to overcome the government's security concerns.

Whether the Record Supports the Judge's Factual Findings

A. Facts

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 PhD 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 would 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.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same 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 evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant does not appeal the Judge's factual findings. Rather, Applicant claims error regarding the Judge's conclusions, especially the relationship between MC 8(b) and the Judge's ultimate conclusions.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate 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). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

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 concluded that Applicant had not met that burden in this case.

Specifically in regard to MC 8(a) and (c), the Judge found that Applicant had not presented evidence sufficient to mitigate the presence of his relatives, in-laws, and colleagues in India. That is, the Judge found that Applicant had not established that "it is unlikely [Applicant] will be placed in a position of having to choose between the interests of [his Indian family] and the interests of the U. S."¹ Decision at 8. In this regard, the Judge discussed Applicant's close relationships with family members in India and his continuing contacts with former colleagues in India, as well as India's collection of sensitive information and materials.

However, with regard to MC 8(b), the Judge pointed out Applicant's significant ties to the United States and concluded that "[Applicant] can be expected to resolve any conflict of interest in favor of the United States' interests." Decision at 9.

When the Judge then performed a whole-person analysis, he discussed evidence both favorable and unfavorable to Applicant. Among the favorable factors, the Judge mentioned Applicant's loyalty, the positive testimony of his supervisor and neighbor, and the fact that his children are American citizens and are thoroughly immersed in American culture and lifestyle. The Judge stated that "[t]here is no reason to believe that he would take any action which could cause potential harm to his sons' and his lifestyle in the United States." Decision at 10. Among the

¹See Directive ¶ E2.8(a).

negative factors, the Judge discussed Applicant’s personal and financial ties to India and India’s record on information-gathering. The Judge then concluded that Applicant had not mitigated the relevant security concerns and the Judge was left “with doubts as to Applicant’s security eligibility and suitability.” Decision at 11.

The Board has repeatedly found that the application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. *See, e.g.* ISCR Case No. 06-23384 at 3 (App. Bd. Nov. 23, 2007). Thus, 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*. 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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

However, in this case, Applicant is correct in finding portions of the Judge’s decision perplexing and contradictory. In discussing MC 8(b), the Judge made the unqualified statement that “[Applicant] can be expected to resolve any conflict of interest in favor of the United States’ interests.” Decision at 9. That conclusion is echoed in the Judge’s whole-person analysis, in which he said that “[t]here is no reason to believe that he would take any action which could cause potential harm to his sons’ and his lifestyle in the United States.” *Id.* at 10. Elsewhere in his decision, the Judge reached conclusions which appear to be at odds with those quoted above, and the Judge stated at the end of his decision that he had “doubts as to Applicant’s security eligibility and suitability.” *Id.* at 11. The Judge’s ultimate conclusion was a clearance denial. While there is record evidence to support the negative conclusions and the ultimate denial, the Judge’s statements above appear to contradict his ultimate conclusion. The case is therefore remanded to the Judge for clarification.

Order

The Judge’s decision denying Applicant a security clearance is REMANDED.

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