

KEYWORD: Guideline C; Guideline B

DIGEST: The method and scope of background investigations are outside the scope of review of the Appeal Board. There is a rebuttable presumption that a Judge is unbiased and impartial. Adverse decision affirmed.

CASENO: 07-05809.a1

DATE: 05/27/2008

DATE: May 27, 2008

)	
In Re:)	
-----)	ISCR Case No. 07-05809
)	
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 August 28, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 21, 2008, after the hearing, Administrative Judge Paul J. Mason denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issues on appeal: whether Applicant was denied due process; and whether the Judge’s adverse security clearance decision under Guideline B is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

(1) Applicant argues that he was denied due process because he did not receive a full investigation of the case, and a fair and impartial common sense determination based upon a totality of the evidence. The Board does not find this argument persuasive.

The method and scope of background investigations are outside the scope of review of the Appeal Board. *See, e.g.*, ISCR Case No. 99-0293 at 4 (App. Bd. May 5, 2000). The hearing is the Applicant’s opportunity to produce other evidence beyond that developed by his background investigation for the purpose of rebutting, explaining, extenuating, or mitigating facts to which he has admitted or which have been proven by Department Counsel. *See, e.g.*, Directive ¶ E3.1.15. The Judge is then duty bound to consider all of the evidence developed on the record of the case before him. Any attempt on the part of the Judge to independently investigate allegations or develop facts would, of course, conflict with the Judge’s role as an impartial fact finder. *See, e.g.*, ISCR Case No. 02-32606 at 3 (App. Bd. Jan. 21, 2004).

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or unfair. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Lack of partiality is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Applicant has not met the heavy burden of persuasion noted above, in that he fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness, impartiality, or professionalism of the Judge. *See, e.g.*, ISCR Case No. 03-00740 at 2 (App. Bd. Jun. 6, 2006).

(2) Applicant also argues that the favorable evidence in the record was sufficient, as a matter of law, to overcome any security concerns presented by his close ties to family members in Ukraine. The Board does not find this argument persuasive.

¹The Judge’s favorable findings under Guideline C and SOR paragraph 1(b) are not at issue on appeal.

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*. 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. 06-24013 at 2-3 (App. Bd. Mar. 4, 2008).

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 found in favor of Applicant under Guideline C and SOR paragraph 1(b). However, he reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns under Guideline B. The Judge's decision exhibits a discerning weighing of a number of variables to reach a commonsense determination. Directive ¶ E2.2. In some instances, as noted earlier, this process led to favorable findings for Applicant. But, the Judge also articulated a reasonable concern that Applicant's circumstances created a conflict of interest that could potentially make him vulnerable to coercion, exploitation or pressure. That concern is based on close family ties in Ukraine, 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 under the disqualifying and mitigating factors and the whole-person concept, 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. *See, e.g.*, ISCR Case No. 06-04371 at 3 (App. Bd. Oct. 18, 2007).

Order

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

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