KEYWORD: Guideline B

DIGEST: The Board concludes the Judge acted reasonably in granting Department Counsel motion to amend the SOR in light of the good cause shown. DOHA proceedings are conducted before impartial professional fact-finders and there is less concern about prejudicial effect of certain evidence than there is in proceeding conducted before a lay jury. Administrative notice or official notice are broader than judicial notice. Adverse decision affirmed

CASENO: 07-07635.a1

DATE: 08/22/2008

DATE: August 22, 2008

In Re:	)	
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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 October 10, 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 May 8, 2008, after the hearing, Administrative Judge Elizabeth Matchinski 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 Judge erred in amending the SOR; whether the Judge erred in taking administrative notice of documents containing facts pertaining to Russia and its relations with the United States; whether Applicant was denied due process because Department Counsel acted improperly; and whether the Judge erred by not considering relevant mitigating conditions. Finding no error, we affirm the Judge's decision.

(1) The Directive provides in relevant part that: "The SOR may be amended at the hearing by the Administrative Judge on his or her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted or for other good cause. When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or other good cause." *See* Directive ¶ E3.1.17. Applicant argues that the Judge erred in granting Department Counsel's motion to amend the SOR to conform with the evidence. The Board does not find this argument persuasive.

After Applicant's testimony at the March 24, 2008 hearing, the government moved to amend the SOR to add two allegations under Guideline B—that Applicant's husband was a dual citizen of the United States and Iran, and since 1996, he had traveled to Iran on at least three occasions. In support of the motion, Department Counsel cited the lack of previous knowledge of the extent of Applicant's spouse's travel to Iran and his possession of a current Iranian passport. Based on the government's concerns that Applicant's spouse could be at risk when traveling to Iran, and in light of Applicant's testimony that her spouse had been asked by his employer to surrender his Iranian passport, the Judge withheld ruling on the motion pending further clarification, noting that surrender of the passport would render future travel (to Iran) a moot issue.

On April 3, 2008, the government renewed its motion to amend and submitted documentation from a defense contractor indicating Applicant's spouse had not surrendered his Iranian passport as of April 1, 2008. Good cause having been shown, the Judge amended the SOR as requested on April 8, 2008. In response, Applicant filed a document on April 30, 2008 showing that her spouse had turned over his Iranian passport to his employer on that date.

After reviewing the record, the Board concludes that the Judge acted reasonably within her discretion in granting the government's motion to amend the SOR to add the additional allegations under Guideline B.

(2) In DOHA proceedings, the Federal Rules of Evidence serve only as a guide. They may be relaxed by the Judge (with one exception not applicable to this appeal[1]) in order to permit the development of a full and complete record by the parties. Directive ¶ E3.1.19. By design, the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider a party's objections when deciding what, if any, weight to give to that evidence. Because DOHA proceedings are conducted before impartial, professional fact-finders, there is less concern about the potential prejudicial effect of specific items of evidence than there is in judicial proceedings conducted before a lay jury. *See, e.g.,* ISCR Case No. 04-11571 at 2-3 (App. Bd. Feb. 8, 2007). Moreover, the Board has previously noted that administrative or official notice in administrative proceedings is broader than judicial notice under the Federal Rules of Evidence. *See, e.g.,* ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) citing *McLeod v. Immigration and Naturalization Service,* 802 F. 2d 89, 93 n. 4 (3rd Cir. 1986).

Applicant argues that the Judge erred in taking administrative notice of several documents containing facts pertaining to Russia and its relations with the United States. The Board does not find this argument persuasive.

On January 9, 2008, the government requested that administrative notice be taken of certain facts pertaining to Russia and its relations with the United States. The request was based on publications from the U.S. Department of State, the Congressional Research Service, the Office of the National Counterintelligence Executive, the Center for Counterintelligence and Security Studies, and a statement for the record by the Director, Defense Intelligence Agency. By order dated January 18, 2008, the Judge gave Applicant until February 7, 2008, to respond to the government's request. Applicant did not file a response by the aforesaid date. Applicant acknowledged receipt of both the government's documents and the Judge's order.[2] At the hearing, the Judge asked Applicant if she objected to the Judge taking administrative notice of the facts requested by the government in the January 9, 2008 motion. Applicant answered: "No . . . I do not have any objections."[3] In light of the foregoing, the Board concludes that the Judge acted reasonably within her discretion in taking administrative notice of the government's documents containing facts pertaining to Russia and its relations with the United States.

(3) Applicant contends that she was denied due process because Department Counsel acted improperly. In support of that contention, she argues that the Department Counsel selectively picked facts to use against her, took advantage of situations that occurred during the process, and pointed out inconsistencies in her presentation that undermined her credibility with the Judge. The Board does not find Applicant's arguments persuasive.

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[1]*See* ISCR Case No. 01-23356 at 7-8 (App. Bd. Nov. 24, 2003)(addressing the exception that is established by Directive ¶ E3.1.20).

[2]*See* Transcript at 11-13, March 24, 2008.

[3]*See Id.* at 13.

There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sep. 20, 2001). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant has not met that heavy burden in that she fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to conclude that Department Counsel acted improperly, unfairly or unprofessionally. *See, e.g,* ISCR Case No. 06-26704 at 2 (App. Bd. Jun. 19, 2008)(no denial of due process where Department Counsel "subjected [Applicant] to an aggressive cross-examination which elicited adverse details about his alcohol use that went beyond the specific facts recited in the SOR and the documentary exhibits, and undermined his credibility with the Judge"); ISCR Case No. 03-04927 at 3 (App. Bd. Mar. 4, 2005)(no denial of due process where *pro se* Applicant claimed "she was no match for the 'very serious and prepared professionals' who represented the government"); ISCR Case No. 03-21262 at 2-3 (Jul. 10, 2007)(no denial of due process where *pro se* Applicant claimed that "Department Counsel raised his voice . . . and attempted to sway the Judge with emotional arguments").

(4) Finally, Applicant argues that the Judge's adverse security clearance decision should be reversed because she failed to closely consider relevant mitigating conditions. Applicant's argument in this regard does not demonstrate that the Judge erred.

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.

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying circumstances and considered the possible application of relevant conditions and factors. She reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns.[4] The Board does not review a case *de novo*. The favorable record 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 2 (App. Bd. Sep. 4, 2007). The Judge examined the relevant data and articulated a satisfactory explanation for her 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

[4]The Judge made a formal finding for Applicant under one of the allegations in the SOR, *i.e.*, paragraph 1(b). That finding is not in issue on this appeal.

security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Given the record that was before her, the Judge's unfavorable clearance decision is not arbitrary, capricious nor contrary to law. *See* Directive ¶ E3.1.32.1.

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