

KEYWORD: Guideline B; Guideline E

DIGEST: Appeal Board has no authority over how clearance investigations are conducted, and federal officials are entitled to a presumption of good faith in the discharge of their duties. Accordingly, Applicant has not demonstrated that he was denied due process. Applicant failed to rebut the presumption that the Judge was unbiased.

CASE NO: 11-01618.a1

DATE: 01/24/2013

DATE: January 24, 2013

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In Re:)	
)	
-----)	ISCR Case No. 11-01618
)	
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 March 16, 2012, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 25, 2012, after the hearing, Administrative Judge Robert E. Coacher denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge failed to consider all of the record evidence; whether Applicant was denied due process; whether the Judge was biased; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's decision.

The Judge made the following findings pertinent to the issues raised on appeal: Applicant is an employee of a Defense contractor. He has held a security clearance since 1985. Born in Bangladesh, he came to the U.S. to attend graduate school. He holds a Ph.D. and a M.B.A. He married a U.S. citizen, but the couple divorced after 30 years of marriage. He has two adult children and is engaged to be married.

The SOR alleged security concerns arising from Applicant's connections in India and in two other foreign countries. It also alleged a number of Personal Conduct concerns. The Judge cleared Applicant on all but three of these allegations. One of these three allegations, and the only one under Guideline B which the Judge found against Applicant, pertains to an apartment that Applicant owns in India. It is worth \$500,000 in today's market and has no encumbrances. Although he has rented it out in the past, it is currently unrented because Applicant is trying to sell it. The remaining security concerns found against Applicant were alleged under Guideline E. Applicant has had numerous romantic relationships with foreign women, including at least one from Russia, while Applicant was married. Additionally, Applicant videotaped sexual acts and/or massages with at least some of these women.¹ The Judge also found that, while undergoing divorce proceedings, Applicant had borrowed \$100,000 from his employers at the time. Although he paid back \$83,000, he has not repaid the balance because, when he left the company, he believed he was owed for bonuses and other payments. Applicant did not provide documentation that would support his contention.

Applicant is recognized as an outstanding worker and citizen, the most recent performance evaluation in the record rating him in the top category. Applicant also is highly praised by students whom he teaches in performing adjunct professor duties at two universities.

In the Analysis, the Judge concluded that Applicant's property interest in India was substantial and that Applicant had failed to produce evidence that it could not become a basis for coercion or manipulation by foreign interests. He also concluded that Applicant's having videotaped sex acts and having failed to pay back the loan cast doubt on his judgement and reliability. In the

¹Applicant discussed these videotapes in his clearance interview, a summary of which is included in Government Exhibit 8, Answers to Interrogatories. He claimed that he had videotaped sexual acts with some of his paramours because he was concerned that he might later be subject to a lawsuit for paternity or charged with rape. He stated that each of the women consented to being videotaped. These videos fell into the hands of his wife and became relevant during the proceedings leading up to the divorce. During the pendency of the divorce, one of the women whom Applicant had videoed became alarmed and threatened to institute legal proceedings of her own. Applicant stated that the videotapes were eventually turned over to his lawyer, who destroyed them.

whole-person analysis, the Judge stated that, despite Applicant's good work record, the poor judgement evidenced by his security-significant conduct militated against the grant of a clearance.²

Applicant argues that the Judge overlooked certain evidence. He cites to his evidence that he was in the process of selling his apartment house and that he has devoted lifelong service to the U.S. He also cites to evidence concerning the circumstances of the loan. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-05027 at 2-3 (App. Bd. Nov. 26, 2012). The Judge discussed record evidence concerning the matters that Applicant has cited. His overall adverse decision is consistent with the record that was before him. Applicant has not rebutted the presumption that the Judge considered all of the evidence. In support of his appeal, Applicant has submitted evidence from outside the record, including his statement that he had sold his apartment in India. We cannot consider new evidence on appeal. Directive ¶ E3.1.29 ("No new evidence shall be received or considered by the Appeal Board.") However, even if the Judge did not extend sufficient weight to the evidence that was in the record concerning the proposed upcoming sale, his overall decision would have been the same, given Applicant's other security significant conduct.

Applicant contends that he was denied due process. He argues that the investigation of his case was too intrusive, inquiring into matters that were of limited security significance. He also argues that the SOR contained allegations that were of limited or no concern and that Department Counsel engaged in unprofessional conduct by focusing on Applicant's relationships with women. The Appeal Board has no authority over how clearance investigations are conducted. *See, e.g.*, ISCR Case No. 01-03683 at 3 (App. Bd. Aug. 9, 2002). Moreover, Federal officials and employees are entitled to a presumption of good faith in the discharge of their duties, and a party seeking to rebut that presumption has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 07-18065 at 2 (App. Bd. Nov. 18, 2008). We have examined the record and conclude that Applicant has failed to demonstrate improper conduct by Department Counsel or any other person. Applicant has not rebutted the presumption that the officials involved in processing his case and conducting the hearing acted in good faith. We find no reason to conclude that Applicant was denied the due process afforded by the Directive.

Applicant contends that the Judge exhibited bias against him. Again, a party claiming that a Judge was biased bears a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 11-05027, *supra*, at 3. In the case currently before us, Applicant's argument amounts to a disagreement with the Judge's weighing of the evidence. He has not demonstrated that the Judge lacked the requisite impartiality. He also contends that the decision contains inconsistent statements. However, we have examined the statements cited by Applicant and find no error in the Judge's analysis. It is not an inconsistency for a Judge to conclude that Applicant's conduct raises security

²One of the allegations which the Judge found in Applicant's favor concerned Applicant's having numerous contacts in Russia, to include high level space officials, trainers for cosmonauts and fighter pilots, etc. The Decision contains no analysis explaining this favorable finding, although Applicant contended that the persons who provided him with training were not government officials but, rather, private citizens.

concerns but, after considering Applicant's evidence, further to conclude that the concerns had been mitigated.

The record supports a conclusion that the Judge examined the relevant data and articulated 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 Judge's adverse decision is sustainable on this record. "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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

The Judge's decision is **AFFIRMED**.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board