KEYWORD: Guideline B

DIGEST: Applicant's argument that, in a decision without a hearing, a Judge was duty-bound to inquire as to Applicant's ability to proceed *pro se* was without merit. Applicant failed to rebut the presumption that the Judge considered all of the evidence.

CASE NO: 12-00120.a1

DATE: 02/10/2014

DATE: February 10, 2014

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
Richard Murray, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 11, 2013, DoD 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 that the case be decided on the written record. On November 5, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Claude R. Heiny denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether Applicant was denied due process; and (2) whether the Judge's findings and conclusions are supported by the record evidence. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant is 46 years old. He was born in India and became a naturalized U.S. citizen in 2009. His wife is a resident alien Indian citizen living in the United States. He has two children who are U.S. citizens, having been born in the United States. In 2012, he renounced his Indian citizenship.

Applicant's mother and father are citizens and residents of India. Applicant has telephone contact with his parents three times a week and visits them every one to two years. Applicant has two sisters. One is a citizen and resident of India, with whom he maintains monthly contact, while the other is a Canadian citizen living in Canada, with whom he maintains weekly contact. Applicant has two aunts who are citizens and residents of India whom he calls seven or eight times a year and sees when he visits India. Applicant's mother-in-law and father-in-law are citizens and residents of India. He has monthly telephone contact with them and sees both of them when he visits India. Applicant has two sisters-in-law who are citizens and residents of India and who work at various levels of government in India. He has telephone contact with them two to four times a year and sees them when he visits India. Applicant has numerous other relatives and in-laws who are citizens and residents of India. He contacts these people two to four times a year and sees them when he returns to India. Applicant has a friend in India who owns a business school and management center.

Applicant's parents live in a home he owns in India worth $150,000. He also owns three pieces of residential property in India collectively worth $190,000. The properties were purchased for investment purposes. Applicant spent 21 days in India in 2012, 18 days in 2011, 8 days in 2008, 21 days in 2007, 22 days in 2006, and 21 days in 2005. He has a bank account in India with a balance of approximately $5,000.

There is nothing in the record showing what assets Applicant owns in the United States. From the record, it is uncertain if he owns a home, has bank accounts, or has other property in the United States.

India, the world's most populous democracy, uses a federal form of government, similar to the United States. It has an active market-oriented economy, and conducts most of its international trade with the United States. The United States and India have differences over India's nuclear weapons programs, the pace of India's economic reforms, and India's bilateral strategic partnership with Iran. Nevertheless, the strategic partnership between the United States and India is based on shared values such as democracy, pluralism, and the rule of law. The United States and India share a common interest in fighting terrorism and in creating a strategically stable Asia. However, India is one of many countries engaged in economic intelligence collection and industrial espionage directed at the United States. The United States has long-standing economic issues with India regarding protection of intellectual property rights and trade in dual-use technology. The Indian government generally respects the rights of its citizens, but there are serious problems involving

abuses by the police and security forces. There is no evidence that India uses torture or abuse against its citizens to extract economic intelligence.

The Judge concluded: The concern is that Applicant has such close bonds to his parents and sister in India that he could be placed in the position of having to choose between their interests and his obligation to protect classified information. His relationships with family members create a heightened risk of foreign pressure. His connections to his family also create a potential conflict of interest because the relationships are sufficiently close in nature and could raise a security concern over Applicant's desire to help his family. Applicant owns or has interests in $340,000 worth of real property in India and $5,000 in an Indian bank account. The record is silent as to assets Applicant may have in the United States. The Government produced substantial evidence of the Guideline B disqualifying conditions and the burden shifted to Applicant to produce evidence and prove mitigation.

Applicant has been a resident of the United States for 22 years and has been a U.S. citizen for four years. These facts, without more, are insufficient to establish that Applicant has a deep and longstanding relationship and loyalties to the United States. In requesting an administrative determination, Applicant chose to rely on the written record. However, in so doing, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the foreign influence security concerns. He failed to offer evidence of his connections to the United States. By failing to provide such information, and in relying only on a scant explanation in his response to the SOR, the foreign influence security concerns remain.

Applicant requests that the Judge's decision be remanded in order for him to obtain a hearing conducted with the assistance of counsel. He bases this request on an argument that the Judge's decision, and the record from which it was derived, contravened the requirement that he obtain a fair hearing.

Applicant asserts that, due to a misunderstanding, he believed that the allegations contained in the SOR were only "application questions," and consequently, he simply returned the SOR after affirming each issue raised by the government in order to expedite the process. He states that his actions confirm that he completely misunderstood the process, was unaware of the significance of his scant responses to the SOR allegations, was unaware of his ability to raise mitigating factors to the allegations, and he did not comprehend that the charges necessitated the retention of counsel to benefit from the process of administrative review. Applicant states that, under these circumstances, the Judge was required to make a formal finding stating the basis for his decision that Applicant could sufficiently represent himself without a hearing or without assistance of counsel and still properly comply with the fair proceeding requirement of the Directive.

Applicant's assertions regarding his belief that the SOR contained only application questions are matters not contained in the case record. The Board notes that it cannot consider new evidence on appeal. Directive, ¶ E3.1.29. However, the Board is not prohibited from considering non-record

statements that implicate an impairment of procedural or due process rights. *See*, ISCR Case No. 08-07352 at 2 (App. Bd. Jul. 28, 2009).

There is no merit in Applicant's assertion that the Judge, in the context of a case decided without a hearing, was duty bound to make inquiry into Applicant's ability to proceed without counsel. When a *pro se* applicant has chosen to have a hearing, the Board has long recognized that the Judge, who has the applicant before him in a hearing, should carefully inquire into the ability of that applicant to understand the proceedings and to represent himself. *See*, *e.g.*, DISCR OSD Case No. 92-1257 at 3 (App. Bd. Nov. 22, 1993). As a matter of practicality, the same requirement cannot be imposed upon a Judge who, as a result of an applicant's decision to forgo a hearing, has only the applicant's response to the SOR in front of him, and may or may not have subsequent documentary input from Applicant in response to the government's File of Relevant Material (FORM).

In the instant case, Applicant clearly responded to each SOR allegation and in two instances provided a sentence or two of additional explanation. He then clearly requested that his case be decided without a hearing. There is nothing on the face of his response to the SOR to indicate that Applicant did not fully understand the process, or that he reasonably misinterpreted the SOR as a questionnaire. There was no basis to require the Judge to make inquiries of Applicant, or otherwise make an affirmative finding that Applicant could sufficiently represent himself without a hearing or assistance from counsel. On its face, the SOR asks no questions of Applicant. It states that DoD has been unable to find that it is clearly consistent with the national interest to grant Applicant access to classified information and it recommends that the case be submitted to an Administrative Judge for a determination whether to deny or revoke a security clearance. Any reasonable reading of the SOR would clearly indicate that the SOR marked the beginning of adversarial proceedings by the government and was not merely a continuation of the application process. The record indicates that Applicant holds a doctorate degree from a U.S. university. Applicant wrote by hand the following words: "I do not wish to have a hearing before Administrative Judge." These facts cast significant doubt on Applicant's claim that he interpreted the SOR as a questionnaire. Had he indeed interpreted the SOR as such, there is no reasonable basis to support such an interpretation. *Pro se* applicants are expected to take timely, reasonable steps to protect their rights under the Directive. *See*, *e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). Those steps necessarily include becoming sufficiently knowledgeable about the processing of one's case, which necessarily includes careful consideration of documents submitted by the Government. If applicants fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See*, *e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). Here, even if Applicant did not understand the true nature of the SOR and proceedings against him, it could only have been the result of haste or inadvertence.

Subsequent to his choice of having his case adjudicated on the written record, Applicant did not provide any documentation in response to the government's FORM, notwithstanding the fact that he had been informed of this right by a letter accompanying the FORM. This letter, which is appended to Department Counsel's reply brief as "Attachment 1," placed Applicant on notice of his

right to hire counsel and also unmistakably described the proceedings as adversarial in nature. This further undercuts Applicant's assertion that he did not understand the nature of the process.[1]

Applicant argues that the Judge failed to evaluate properly the mitigating conditions and to properly review the "whole person concept." He asserts that the facts existing in the record required a finding that Applicant successfully mitigated any security concern raised under Guideline B. He states that the Judge ignored facts establishing his deep and longstanding connections to the United States, such as his renunciation of his Indian citizenship, his maintenance of a U.S. passport exclusively, his obtaining of an education in the U.S. and his two American born children. Applicant has failed to establish error on the part of the Judge.

There is a rebuttable presumption that a Judge considered all the record evidence unless the Judge specifically states otherwise. *See*, *e.g.*, ISCR Case No. 02-15935 at 6 (App. Bd. Oct. 15, 2003). With the exception of Applicant's exclusive use of his U.S. passport, the Judge specifically mentions all of Applicant's ties to the U.S. that Applicant sets forth in the preceding paragraph. While the Judge does not discuss all of these facts in his analysis section, a Judge is not required to discuss each and every piece of record evidence in making a decision. *See*, *e.g.*, ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). The Board is convinced that the Judge was sufficiently aware of Applicant's ties to the U.S. that were established by the record when determining whether those

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[1]Department Counsel also included an "Attachment 3" with its brief, and asserts that Attachments 1, 2, and 3 "are part of the administrative record in this case and can be considered on appeal for the purposes of determining whether Applicant received due process." This statement is true insofar as it pertains to Attachments 1 and 2. Attachment 3, however, is a different matter. Attachment 3 is a cover letter of the type the Board has seen in other case files, and it is used to accompany the SOR when it is submitted to Applicant. A review of the entire case file reveals that Attachment 3 is not contained therein. It appears only as an attachment to Department Counsel's brief. Because it is absent from the case file, Department Counsel's assertion that it is part of the administrative record is erroneous. Department Counsel had an opportunity to make Attachment 3 part of the record (the Board notes that documents of this type are sometimes found in the government's FORM). They did not. They have introduced the document on appeal, after the close of the record, and after Applicant's only permitted brief was submitted. Applicant has not had an opportunity to respond to it during the appeal process.

Additionally, Attachment 3 as submitted is a two page, unsigned document. The Board notes that it is familiar with documents that are identical in language and format to Attachment 3 from its review of other cases, and a complete document of this type is normally a three page document with the last page containing a signature. Thus, Attachment 3 suffers from the additional infirmity of being incomplete.

The Board has two choices: decline to consider Attachment 3 or remand the case so that the document can be added to the record and processed in a manner that would allow Applicant to review it and respond to it. The Board elects to pursue the former course of action. In evaluating Applicant's due process claim, the Board has considered neither Attachment 3 nor the portions of Department Counsel's argument that rely on the contents of Attachment 3. Absent consideration of Attachment 3, Applicant's claim of denial of due process still fails. Thus, the Board sees no useful purpose in remanding the case.

ties were sufficient to mitigate the government's concerns over the numerous close ties with multiple family members in India, and Applicant's substantial economic interests in India.[2]

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security 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. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Here, the Judge concluded that, despite the ties to the U.S. that were established by the record, the record evidence concerning Applicant's assets in the U.S. was insufficient to establish that Applicant has a deep and longstanding relationship to the United States such that the presence of his substantial family and economic ties to India was mitigated. This analysis is sustainable.

The Board does not review a case *de novo*. The favorable 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 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes 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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

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

Signed: Jeffrey D. Billett

[2]The Board notes that the Judge misstated the mitigating condition's standard in one paragraph of his analysis (AG¶ 8(c), loyalties *to* the U.S., as opposed to loyalties *in* the U.S.). However, elsewhere in the same paragraph and on a prior page as well, the Judge cited the correct language. Therefore, we conclude that the error was harmless.

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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