

KEYWORD: Guideline B; Guideline F; Guideline E

DIGEST: The Judge did not deny Applicant his right to submit evidence. The Judge erred by not considering Guideline E mitigating condition 17(c). However, had she done so the outcome of the case would have been the same. Therefore, the error is harmless. Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. Adverse decision affirmed.

CASE NO: 15-04446.a1

DATE: 12/22/2016

DATE: December 22, 2016

In Re:)	
)	
-----)	ISCR Case No. 15-04446
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 9, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On February 23, 2016, Department Counsel moved to amend the SOR by adding concerns under Guideline E (Personal Conduct). Applicant requested a hearing. On October 19, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey

Anderson denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal: Applicant was born in South Korea to a U.S. father and a South Korean mother. Applicant's father had moved to South Korea after leaving the U.S. military. Applicant was raised on U.S. military installations, and, as a teenager, he joined the U.S. military. He did so in order to provide financial assistance to his family. Due to such assistance, Applicant's family was able to build a house in South Korea, of which Applicant is a co-owner.

Applicant is married to a resident and citizen of South Korea. His wife has a sibling who works in that country, as do her parents. Applicant's wife contacts her parents every day. Applicant's father resides in South Korea and his mother is a citizen and resident of that country. He has advised both parents that he is applying for a security clearance. Applicant's mother has an extended family in South Korea, with whom she maintains regular contact.

South Korea is a stable democracy. However, it has a history of collecting U.S. protected information. It has centered its efforts on computer systems, aerospace technologies, and nuclear technologies. It is one of seven countries that is most engaged in economic and industrial espionage against the U.S.

Applicant was administratively discharged from the U.S. military in 2006. The basis of the discharge was an instance of underage drinking and several instances of showing up late for mandatory formations. Applicant was punished under Article 15, UCMJ. Applicant attributed his chronic lateness to sleep apnea. He has recently been determined to have suffered from this while in the military. He is seeking to have his service characterization upgraded from a General to an Honorable.

The Judge's Analysis

Applicant's foreign contacts are significant. These include his wife, parents, and in-laws. In addition, he co-owns a home in South Korea and has provided his family with financial support. Applicant's conduct while in the military showed immaturity. The Judge stated that she did not believe that Applicant's alleged sleep apnea caused many of the infractions that led to his discharge. She stated that Applicant had not met his burden of persuasion that he should have a clearance.

Discussion

Applicant cites to favorable evidence, such as his good security record. He argues that the Judge did not give him an opportunity to present administrative notice documents to rebut those submitted by the Government. He argues that the Judge’s mitigation analysis is flawed.

Concerning Applicant’s right to submit evidence, we note that the Judge held the record open after the hearing to give him an opportunity to present additional documentation about the status of a debt to a credit union. She also advised Applicant that he could submit “any additional documents that you thought would be helpful.” Tr. at 71, 97. Applicant submitted four documents, which the Judge admitted. Decision at 2. There is nothing in the record to suggest that Applicant sought to submit other evidence, whether about the geopolitical situation of South Korea or anything else, much less that the Judge prevented him from doing so. There is no reason to believe that Applicant did not understand his right to present evidence or that the Judge impaired that right. *See, e.g.*, ISCR Case No. 15-00092 at 2 (App. Bd. Apr. 8, 2016).

Applicant challenges the Judge’s analysis of the mitigating conditions. We find no error in her treatment of the Guideline B concerns. Evidence that Applicant has close relatives, including his wife, who are citizens and residents of South Korea and that he has a significant property interest in a country that practices espionage against the U.S. support her decision. *See, e.g.*, ISCR Case No. 14-06958 (App. Bd. Oct. 28, 2016).

We reach a different conclusion, however, regarding the Guideline E concerns. Although the Judge stated that none of the mitigating conditions applied, she did not discuss them in any detail, particularly mitigating condition 17(c).¹ Given that Applicant’s military discharge occurred in 2006, the Judge did not explain why she concluded that it was not attenuated by time or why, in any event, the underlying conduct continued to cast doubt upon Applicant’s eligibility for a clearance. A Judge should discuss significant evidence that a reasonable person would expect to be addressed. *See, e.g.*, ISCR Case No. 11-13999 at 6 (App. Bd. Feb. 3, 2014). The Judge’s unfavorable findings under Guideline E are not sustainable. However, because the decision is independently sustainable under Guideline B, there is no reason to remand the case for additional analysis.

Applicant submits two Hearing Office cases which, he believes, support his effort to obtain a clearance. We give these cases due consideration as persuasive authority. However, there is nothing in them that would compel a different overall result. In any event, Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 15-04096 at 3 (App. Bd. Nov. 22, 2016).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The 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

¹Directive, Enclosure 2 ¶ 17(c): “[S]o much time has passed . . . that [the offense] is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.”

concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board