KEYWORD: Guideline B; Guideline C

DIGEST: If Applicant believed that the transcript or other evidence presented at the earlier hearing were germane to her current case for mitigation, she could have submitted it. See Directive ¶ E3.1.15 regarding an applicant's responsibility to present evidence in mitigation. The Judge cannot be faulted for having failed to consider evidence that was not before him. We are not persuaded by Applicant's argument that the Judge erred by not amending the SOR on his own motion, Applicant herself having failed to so move. The SOR, an administrative pleading, was sufficient to place Applicant on notice of the concerns arising from her foreign relatives. Applicant's apparent argument that the Judge should have amended it to include some information that she submitted in mitigation is founded upon nothing in the Directive or in our prior case law. Applicant was not denied due process. Adverse decision affirmed.

CASENO: 14-02117.a1

DATE: 11/02/2018

DATE: November 2, 2018

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Erin P. Thompson, Esq., Department Counsel

FOR APPLICANT
Joseph E. Schmitz, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 28, 2017, 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 C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 17, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez 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 Applicant was denied due process, whether the Judge's findings of fact contained errors, and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline C are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge made the following pertinent findings of fact: Applicant was born in Iran. She came to the U.S. with her husband, who held Iranian and U.S. citizenship, and she became a citizen of this country in the mid-2000s. Because her husband was abusive, Applicant divorced him and began her own career. She has worked for a Federal contractor since 2012. She owns her own home, has a retirement account, and is involved in community affairs.

In 2014, Applicant received an SOR that alleged similar concerns to the one at issue before us. The case went to a hearing, but DOHA lost jurisdiction. Applicant's parents and siblings are Iranian citizens. Her parents hold permanent resident status in the U.S., and they spend about half their time in this country and the other half in Iran. The parents are both retired and have no connection with the Iranian government.

Iran is a state sponsor of terrorism, and persons acting on behalf of that country have been implicated in cyber attacks against the U.S. Iran has a poor human rights record and at times places foreign visitors under surveillance. Iran does not recognize dual citizenship, and Iranian Americans have sometimes been unjustly detained and imprisoned.

The Judge's Analysis

Applicant has a close relationship with her parents, who spend half the year in Iran. The Judge concluded that the favorable evidence that Applicant had submitted was not enough to mitigate the serious concern that she could be subjected to foreign influence by means of her parents' connections in Iran. In a footnote, the Judge stated that he considered the exceptions set forth in Directive, Encl. 2, App. C, specifically "whether the grant of a clearance subject to additional security measures" would mitigate Applicant's concerns. Decision at 8. He stated, however, that the entirety of the record evidence, including a paucity of evidence as to whether Applicant's employer would be willing to monitor her compliance with additional security measures, militated against such a holding.

Discussion

Applicant's brief includes new evidence, which we cannot consider. Directive ¶ E3.1. 29. Applicant argues that the Judge erred by not considering the transcript of Applicant's earlier DOHA adjudication, which would have demonstrated that her employer was indeed willing to monitor her compliance with security procedures. Applicant also contends that the Judge erred by not amending the SOR. A Judge has the discretion to amend an SOR on motion of either party or *sua sponte*. Directive ¶ E3.1.17. We review a Judge's decision to amend an SOR for abuse of discretion. *See, e.g.*, ISCR Case No. 14-00019 at 4 (App. Bd. Sep. 18, 2014).

The record contains the SOR, and Applicant's answer thereto, from the prior DOHA adjudication. It also contains the security clearance application that Applicant completed in 2013 (and that is the basis for her current adjudication) and her 2013 clearance interview summary. However, it does not include the transcript of her earlier hearing. If Applicant believed that the transcript or other evidence presented at the earlier hearing were germane to her current case for mitigation, she could have submitted it. See Directive ¶ E3.1.15 regarding an applicant's responsibility to present evidence in mitigation.[1] As it stands, the Judge cannot be faulted for having failed to consider evidence that was not before him.

Moreover, we are not persuaded by Applicant's argument that the Judge erred by not amending the SOR on his own motion, Applicant herself having failed to so move. The SOR, an administrative pleading, was sufficient to place Applicant on notice of the concerns arising from her foreign relatives. *See, e.g.*, ISCR Case No. 17-01842 at 3 (App. Bd. Jun. 29, 2018).[2] Applicant's apparent argument that the Judge should have amended it to include some information that she submitted in mitigation is founded upon nothing in the Directive or in our prior case law.[3] Applicant was not denied due process.

Applicant argues that the Judge's findings about her parents' circumstances contain errors. We have examined the Judge's findings in light of the record as a whole and conclude that they are supported by record evidence, including Applicant's own testimony at the hearing. The Judge's material findings of security concern are based upon substantial evidence. *See, e.g.,* ISCR Case No. 17-02145 at 3 (App. Bd. Sep. 10, 2018). The balance of Applicant's brief is, in effect, a disagreement with the Judge's weighing of the evidence, which is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02463 at 2 (App. Bd. Sep. 10, 2018).

[1]Applicant did not request the Judge to consider granting a conditional clearance. Instead, through counsel, she simply argued that the evidence did not support an adverse decision. Tr. at 52-53.

[2]The purpose of an SOR is to place an applicant on notice of the reasons why the government believes it is not clearly consistent with the national interest to grant or continue a security clearance. Directive ¶E3.1.2. It is not intended to be a mechanism for pleading factors in mitigation.

[3]"Instead of 'Your mother and father are citizens and residents of Iran," the SOR should have read 'Your parents, who have been legal permanent residents of the United States since [date], and who just renewed their U.S. permanent residence status and applied for U.S. citizenship in [date], still have Iranian passports.'" Appeal Brief at 3.

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, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

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

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board