KEYWORD: Guideline B

DIGEST: The State Department's official pronouncements are appropriate sources for taking administrative notice of facts regarding a foreign country. Applicant cites no authority in support of his argument that findings of fact based on the State Department excerpts should be stricken from the record. Adverse decision affirmed.

CASENO: 17-01962.a1

DATE: 10/25/2018

DATE: October 25, 2018

In Re:	)	
-------------------------	)	ISCR Case No. 17-01962
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Alexander M. Laughlin, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 26, 2017, 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 a decision on the written record. On July 3, 2018, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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's findings of fact based on the Government's request for administrative notice should be stricken; whether the Judge erred in making findings of fact not supported by record evidence; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant admitted the four SOR allegations. He was born in Lebanon, began working for his current employer in 2005, and came to the United States in 2007. His employer sponsored him for permanent U.S. residency. He married a U.S. citizen in 2013 and became a U.S. citizen in 2016. He has two children who were both born in the United States.

Applicant's parents and two siblings are citizens and residents of Lebanon. His father is self-employed. Applicant listed his siblings' employers, but not their occupations. He has weekly contact with his parents and siblings. He estimated he provided his mother about $40,000 in support over eight years. He traveled to Lebanon five times to visit family members between 2010 and 2015. He disclosed no financial interests in Lebanon. He has a home, investments, savings, and other assets in the United States. He provided character references that describe him as a person of high character who is hardworking, loyal, and respected.

The U.S. State Department warns U.S. citizens to avoid travel to Lebanon because of the threat of terrorism and other potential violence. U.S. Government-designated terrorist organizations operate in Lebanon and have claimed responsibility for suicide bombings there. Numerous bombings along roads, at financial institutions, and in other commercial and residential areas have killed or wounded a significant number of innocent people. Kidnappings for ransom and political motives have occurred there. Lebanon also has significant human rights issues.

The Judge's Analysis

Applicant's family residing in Lebanon creates a heightened risk and a potential foreign influence concern. He has a close relationship with his family in a country in which terrorism and

human rights abuses are significant. The Judge found that Disqualifying Conditions 7(a)[1] and 7(b)[2] applied. The Judge concluded that she could not find it is unlikely that Applicant would be placed in a position of having to choose between his foreign family members and the interests of the United States. Applicant only recently became a U.S. citizen. "It is too great a burden to expect him to be loyal to the interests of the United States and resolve any conflicts in favor of the United States over those of his parents and siblings." Decision at 7. The heightened risks raised by his foreign family members create security concerns that remain unmitigated.

Discussion

Whether the Judge's findings of fact based on the Government's request for administrative notice should be stricken

In the File of Relevant Material (FORM) dated September 27, 2017, Department Counsel requested the Judge take administrative notice of certain facts pertaining to Lebanon. The request for administrative notice contains portions of three supporting U.S. Department of State documents: (1) *Lebanon Travel Warning*, dated February 15, 2017; (2) *Country Reports on Terrorism 2016*, published July 2017; and (3) *Lebanon 2016 Human Rights Report*, published March 3, 2017. As the Appeal Board previously noted, administrative notice or official notice in administrative proceedings is broader than judicial notice under the Federal Rules of Evidence (FRE). *See, e.g.*, ISCR Case No. 04-11571 at 2 (App. Bd. Feb. 8, 2007), citing *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93, n.4 (3rd Cir. 1986) ("[O]fficial notice also allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise."). "Official pronouncements by the President, State Department, Department of Defense, or other appropriate federal agency on matters of national security are equivalent to legislative facts for purposes of DOHA adjudications in that they bind the Judge and are not subject to refutation." ISCR Case No. 05-11292 at 4, n.1 (App. Bd. Apr. 12, 2007).[3]

Applicant contends that the *Lebanon Travel Warning* and *Country Reports on Terrorism 2016* "are incomplete and should not have been the subject of administrative notice." Appeal Brief at 4. Applicant also argues that the incomplete documents rebuts the presumption that the Judge

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[1] Directive, Encl. 2, App. A ¶ 7(a) states "contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion[.]"

[2] Directive, Encl. 2, App. A ¶ 7(b) states "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology[.]"

[3] This cited footnote also stated, "the Board acknowledges that an accurate geopolitical context is crucial in Guideline B cases."

considered all of the record evidence and the Judge's findings of fact based on those incomplete documents should be stricken from the record. These arguments are not persuasive. First, as discussed above, the State Department's official pronouncements are appropriate sources for taking administrative notice of facts regarding a foreign country. Second, Applicant cites no authority in support of his argument that findings of fact based on the State Department excerpts should be stricken from the record. Third, the lack of completeness of the challenged excerpts is an evidentiary issue. FRE 106 states, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." FRE 106 envisions that, absent an appropriate objection or request, partial documents may be admitted into evidence and considered by the trier of fact. In this case, Applicant received a complete copy of the FORM on October 3, 2017, which contained copies of the State Department excerpts. He was given 30 days from its receipt to file any objections or provide any additional information for consideration. In responding to the FORM, he neither objected to the Judge's consideration of the State Department excerpts nor requested the introduction of other parts of those documents. Consequently, Applicant forfeited any possible objection to the Judge's consideration of those partial documents.

Applicant also argues the *Lebanon Travel Warning* cannot be found on the State Department's website, including in its archives.[4] The travel warning was issued about seven months before the FORM. Applicant presented no argument or proffer that the travel warning was not in effect when the FORM was issued. Travel warnings, like other documents on the State Department's website, change over time, and we are unaware of any requirement for such documents to remain on the website when they are no longer in effect. To the extent Applicant may be arguing that the travel warning was not authentic, we do not find that argument persuasive. It appears regular on its face. When he received the FORM, Applicant had the opportunity to object to the document on the basis of authentication,[5] but failed to do so. We find no reason to disturb the Judge's ruling to admit the State Department excerpts into evidence and consider them in making findings of fact about Lebanon.

Applicant further argues that excluded portions of State Department documents contained information that was favorable to him. However, having admitted the SOR allegations, he was

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[4] A hard copy of the travel warning excerpt, as opposed to a cite to an Internet URL where that document may possibly be retrieved, is needed to create a reviewable record. In ADP Case No. 14-01655 (App. Bd. Nov. 3, 2015), we remanded a case in which Department Counsel merely cited to URLs for documents referenced in a request for administrative notice. "We stated in part that, '[b]ecause of the dynamic nature of the Internet, a reference to a document's URL in the case record would not necessarily be sufficient to preserve the matter for meaningful appellate review.'" *Id*. at 2, citing ISCR Case No. 02-24875 at 4, n.3 (App. Bd Mar. 29, 2006).

[5] FRE 901(a) states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Moreover, it is possible to authenticate a document by means of its distinctive characteristics, *i.e.*, its appearance, contents, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances. *See*, FRE 901(b)(4).

responsible for presenting evidence to rebut, extenuate, or mitigate the security concerns arising from those allegations, and he also had the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15. If there were other portions of the State Department excerpts that he wanted considered in his security clearance adjudication, the burden was on him to present those matters to the Judge. Applicant has cited no harmful errors in the Judge findings of fact based on the Government's administrative notice request.

Whether the Judge erred in making findings of fact not supported by record evidence

Applicant argues that the Judge "took administrative notice of certain facts not set forth in the source documents supporting the administrative notice request[.]" Appeal Brief at 3. However, he did not identify any specific finding of fact that is not supported by record evidence. There is no presumption of error below. The appealing party has the burden of raising and demonstrating factual or legal error by the Judge and must set forth its claims of error with specificity. *See, e.g.*, ISCR Case No. 00-0050 at 2-3 (App. Bd. Jul. 23, 2001)(discussing the reasons why assignments of error must be set forth with specificity). Here, Applicant's assertion that facts are not supported by record evidence fails for lack of specificity. The Appeal Board does not conduct *de novo* reviews. *See, e.g.*, ISCR Case No. 15-01564 at 2 (App. Bd. Jul. 8, 2016). Similarly, we are not responsible for checking all of the findings of fact to ensure they are supported by record evidence. On the other hand, a party's "appeal brief must state the specific issue or issues being raised, and cite specific portions of the case record supporting any alleged error." Directive ¶ E3.1.30.

Applicant also contends that the Judge's conclusions that Disqualifying Conditions 7(a) and 7(b) applied were not supported by record evidence. He does not detail the basis for that contention other than stating: "A review of all the record evidence as a whole and the Decision results in the conclusion that the record evidence is incomplete and was not properly considered because the Decision fails to address all the matters contained in the record." Appeal Brief at 7. First, as noted above, if the record was incomplete from Applicant's perspective, he had the opportunity and obligation to present such matters. Second, Applicant has failed to establish that any piece of evidence that the Judge did not discuss in the decision constituted harmful error. Third, there is a rebuttable presumption the Judge considered all of the evidence in the record, and he or she is not required to discuss each and every piece of evidence, which would be a practical impossibility. *See, e.g.* ISCR Case No. 12-01500 at 3 (App. Bd. Aug. 25, 2015). Fourth, from our review of the record, the Judge's material findings of a security concern are based on substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Whether the Judge's adverse decision was arbitrary, capricious, or contrary to law

Applicant contends the Judge's analysis of the evidence was flawed. For example, he asserts that the matters addressed in the request for administrative notice are not directly relevant to his family members in Lebanon; that the record evidence does not establish a heightened risk of foreign exploitation, inducement, or coercion; that the mitigating conditions were not correctly applied; and that inappropriate weight was given to Applicant's affidavit and other record evidence. In essence,

Applicant is seeking an alternative weighing of the evidence. 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*. 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. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

Applicant's request that the Appeal Board take administrative notice on appeal

Applicant states that "[b]ecause of the importance of making accurate and timely assessments of the political landscape in foreign countries when adjudicating Guideline B cases, the Board should take administrative notice of additional facts concerning Lebanon on appeal." Appeal Brief at 13-14. He requests the Board take administrative notice of certain facts in particular State Department documents that were not previously presented to the Judge for consideration. The Board disagrees with Applicant's implication as to the significance of the proposed information for the purpose of adjudicating his security clearance eligibility. Even if the Judge had noticed the cited State Department documents, the Board believes it would not likely have altered the outcome of the case. Therefore, there is no reason to remand the case for the Judge to consider these documents.[6] In the past, we have stated that a party that does not ask a Judge to take administrative notice of specific matters below has a heavy burden on appeal of demonstrating the Judge's lack of findings about those matters was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-27081 at 6 (App. Bd. Nov. 10, 2004). In this case, we are not persuaded that the Judge erred in her analysis of the facts concerning Lebanon.

Applicant's request for remand

Applicant requests the case be remanded to reopen the record. He also requests that he be provided the opportunity to withdraw his request for a decision on the written record and be permitted to have a hearing. The Board may only remand a case to correct an identified error. Directive ¶ E3.1.33.2. Applicant has failed to establish any error occurred below that would warrant a remand. Additionally, it is well settled that, absent a showing of factual or legal error that affects a party's right to present evidence in the proceeding below, a party does not have the right to have a second chance at presenting his or her case before a Judge. *See, e.g.*, ISCR Case No 14-02730 at 2 (App. Bd. Jun. 24, 2016).

Conclusion

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[6] The Appeal Board does not have fact-finding power. *See, e.g.*, ISCR Case No. 14-02394 at 3 (App. Bd. Aug 17, 2015). In previous cases, when we have taken official notice of legislative facts, or the equivalent, that were germane to an issue on appeal, we have remanded the case to the Judge for the purpose of expanding the record to include the officially noticed matters. *Id.*

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* at 528. *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.