

KEYWORD: Guideline B; Guideline E

DIGEST: It is well-settled that administrative agencies, such as DOHA, have limited authority. DOHA Judges, whether those in the Hearing Office or on the Appeal Board, have no authority to entertain constitutional challenges to statutes, regulations, or, as in this case, a General Order promulgated by a military commander. DOHA proceedings are intended to adjudicate security eligibility of individual applicants and not as a forum to pass judgment on Federal laws or processes. Moreover, the due process rights that an applicant enjoys are those provided by Executive Order 10865 at Section 3 and by the Directive. Adverse decision affirmed.

CASENO: 17-02862.a1

DATE: 05/22/2018

DATE: May 22, 2018

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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**

Ronald Payne, Personal Representative

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 20, 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 E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 12, 2018, after the hearing, 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 denied him due process; whether the Judge was biased against him; 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 was born and educated in Afghanistan. He worked as a contractor for the U.S. military during the mid-2000s. During that time, he received a letter from the enemy threatening to kill him if he did not quit his job. Later, while working for another contractor, Applicant was videoed with high-ranking U.S. officers in Afghanistan. These videos were made available to the public. Applicant stated that this exposure was “not a good thing.” Decision at 2. He believed that it was risky for him to be seen under those circumstances.

Applicant was concerned that if he continued working for the U.S. in Afghanistan, his life would be in danger. He came to the U.S. on a special visa and became a naturalized citizen of this country a few years ago. Applicant’s wife, children, parents, siblings, and in-laws are citizens and residents of Afghanistan. He has one sibling who lives in another country because he had been targeted by terrorists in Afghanistan. Applicant has visited his family in Afghanistan “at varying intervals” over the past ten years. In a 2014 interview, he disclosed that he provided about \$1,000 to \$1,500 every three months to his father in Afghanistan. Applicant does not own a house in the U.S., nor does he own property in Afghanistan. His assets in the U.S. are worth about \$230,000.

In 2010, while working for a contractor, Applicant received a verbal warning after a co-worker accused him of making racist remarks. A year later he received a written warning for having conducted a prohibited personal relationship with a female employee. The warning stated that the misconduct violated General Order No. 1 and that he would be recommended for termination. Although he denied these allegations, Applicant resigned in lieu of termination. In 2015, Applicant was again terminated from employment due to failure to be present for duty. Applicant denied that he had committed the offense. When completing his security clearance application (SCA), Applicant did not disclose these resignations/terminations. He stated that, for the earlier one, he believed that it was too old to report. Concerning the second, he stated that he thought he had been released rather than terminated. The Judge found these explanations to be lacking credibility. She found that Applicant deliberately failed to disclose his job terminations.

Afghanistan is a country in which terrorists operate, planning attacks against U.S. and coalition forces. The Afghani government struggles to assert control over regions in which terrorists

find safe haven. There is widespread disregard for the law and little accountability for those who violate it. The country is an important partner with the U.S. in the fight against terrorism.

### **The Judge's Analysis**

Under Guideline B, the Judge noted Applicant's close relationship with his family in Afghanistan, the danger to those living or visiting there, and the presence of terrorist groups in the country. Though noting Applicant's loyalty and devotion when working with the U.S., and paying special attention to the dangers he has undergone in support of U.S. operations, the Judge cited to evidence that Applicant had been personally threatened. She also cited to the videos that depicted Applicant working with U.S. personnel, which could garner him unwanted attention. All in all, the Judge concluded that Applicant could well be subjected to pressure by those seeking classified information.

Under Guideline E, the Judge stated that Applicant's explanations for his omissions were not credible. She found insufficient evidence that he had made prompt, good-faith efforts to correct the omissions. She described these omissions as "not minor." Decision at 13. She stated that Applicant had not taken steps to alleviate factors that had led to his omissions and that she could not conclude that such conduct would not likely recur. Though citing to evidence of Applicant's service to the U.S., she ultimately concluded that he had not met his burden of persuasion.

### **Discussion**

Applicant contends that he was denied due process. He argues that the Judge violated his due process rights by limiting his effort to present a case for mitigation. He cites to various cases by the U.S. Supreme Court, Federal Appeals Courts, and cases by the Court of Appeals for the Armed Forces and the military service courts. Among other things, he argues that the Judge erred by not permitting him to challenge the constitutionality of General Order No. 1, an alleged violation of which resulted in one of his job terminations.

It is well-settled that administrative agencies, such as DOHA, have limited authority. *See, e.g., Thunder Basin Coal Company v. Reich*, 510 U.S. 200, 215 (1994). DOHA Judges, whether those in the Hearing Office or on the Appeal Board, have no authority to entertain constitutional challenges to statutes, regulations, or, as in this case, a General Order promulgated by a military commander. *See, e.g., ISCR Case No. 04-01961* at 3 (App. Bd. Jul. 12, 2007). It is also well-settled that DOHA proceedings are intended to adjudicate security eligibility of individual applicants and not as a forum to pass judgment on Federal laws or processes. *See, e.g. ISCR Case No. 03-06174* at 8 (App. Bd. Feb. 28, 2005) and *ISCR Case No. 14-03734* at 3 and fn. 2 (App. Bd. Feb. 18, 2016). Moreover, the due process rights that an applicant enjoys are those provided by Executive Order 10865 at Section 3 and by the Directive. *See Directive, Encl. 1*. In the case before us, the Judge complied with the Executive Order and the Directive, permitting Applicant to present evidence and to testify at length. She told Applicant that he could provide her with copies of the cases that he believed relevant and she would consider them, although she was not bound by them. Tr. at 12.

This was not erroneous. Applicant was not denied the administrative due process afforded him by the Executive Order and the Directive.

Applicant contends that the Judge was biased against him. Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 12-09421 at 2 (App. Bd. Nov. 15, 2017). Adverse rulings alone do not demonstrate judicial bias. *See, e.g.*, ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017).

In the case before us, the Judge questioned Applicant off and on during the hearing, sometimes at length. On the whole, this appears to have been in attempt to clarify Applicant's testimony, which, in some instances, appeared confusing. He argues that the Judge did not permit him to present constitutional challenges to some of the Government's evidence. However, the Judge's rulings on evidence and any limitations she may have placed on the scope of Applicant's presentation were not indicative of an inflexible predisposition to decide the case adversely to him. Applicant has not rebutted the presumption that the Judge was impartial.

Applicant challenges the Judge's rulings on evidence, contending that the Judge based her decision on inadmissible hearsay. Applicant does not specify which pieces of documentary evidence he believes to have been inadmissible. We note that the Judge told Applicant that she would sustain any objection he might have to two written summaries of his clearance interviews. Applicant did not object to any of the Government's proffered documents. Tr. at 20-21. Even if Applicant had not waived this issue, the remaining documents were admissible under Directive ¶ E3.1.20. We find no error in the Judge's evidentiary rulings.

The balance of Applicant's brief is, in effect, an argument that the Judge either did not consider certain pieces of evidence or that she mis-weighed the evidence. He cites to evidence of his undeniable bravery in support of U.S. operations and to other things that were favorable to him. The Judge made findings about Applicant's many laudable qualities, especially his devotion to his family and his service to the U.S. However, her analysis focused on evidence that Applicant had already come to the attention of terrorist forces who had threatened his life and that he had been publicly identified as someone cooperating with U.S. forces, as well as his many family connections in Afghanistan. Her conclusion that he may well come to the attention of those who might use his family members as a means of coercion is sustainable. Applicant has not rebutted the presumption that the Judge considered all of the evidence, nor has he shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-00257 at 3 (App. Bd. Dec. 7, 2017). Applicant also challenges the Judge's conclusions about the lack of believability of his explanations for his SCA omissions. We give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. Applicant's argument is not sufficient to undermine the Judge's credibility determination in this case.

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