

KEYWORD: Guideline B; Guideline C; Guideline E

DIGEST: The Board’s jurisdiction and authority is limited to reviewing security clearance adjudications made under the Directive. Unfavorable decision affirmed.

CASENO: 03-23190.a1

DATE: 07/12/2007

DATE: July 12, 2007

In Re:)	
)	
-----)	ISCR Case No. 03-23190
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

FOR APPLICANT

Nathan Lewin, Esq., Alyza D. Lewin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 14, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference), 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 December 11, 2006, after the hearing, Administrative Judge Marc E. Curry denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

¹The Judge found in favor of Applicant under Guidelines C and E. Those favorable findings are not at issue on appeal.

Applicant raised the following issues on appeal: whether the Judge applied the correct Adjudicative Guidelines; whether the Judge's unfavorable clearance decision deprived Applicant of constitutional or statutory rights; whether the Judge's adverse clearance decision is arbitrary, capricious or contrary to law because it is inconsistent with the decisions of other Hearing Office Judges; whether the Judge's adverse clearance decision is arbitrary, capricious or contrary to law because Applicant was previously granted a security clearance; and whether the Judge articulated a sustainable rationale for his unfavorable clearance decision, given his findings of fact. Finding no error, we affirm the Judge's adverse security clearance decision.

A Judge is required to "examine the relevant data and articulate 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 Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Judge. We review matters of law *de novo*.

The Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 at 3 (App. Bd. Mar. 18, 1996); DISCR Case No. 91-0109 at 7 (App. Bd. July 1, 1993). The Board reviews a decision as a whole, rather than focusing on isolated sentences or passages in it, to discern what the Judge meant. *See, e.g.*, DISCR Case No. 90-1874 at 4 (App. Bd. July 30, 1993). There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 at 3 (App. Bd. Apr. 3, 1997); DISCR Case No. 93-1186 at 5 (App. Bd. Jan. 5, 1995). Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 at 5 (App. Bd. Sept. 18, 1992). Close cases should be resolved in the favor of national security, rather than in the favor of the Applicant. *See, e.g.*, DISCR Case No. 93-1390 at 8 (App. Bd. Jan. 27, 1995).

(1) Applicant argues that the Judge committed harmful error by basing his decision on the Directive's Enclosure 2 Adjudicative Guidelines rather than the Revised Adjudicative Guidelines. The Revised Adjudicative Guidelines were circulated to agencies involved in security clearance determinations after December 29, 2005. They were implemented by the Department of Defense in a memo dated August 30, 2006, for SORs issued on or after September 1, 2006. The SOR in Applicant's case was issued on May 14, 2004. The Judge correctly based his decision on the Adjudicative Guidelines in effect at that time. *See* ISCR Case No. 05-03846 at 3 (App. Bd. Nov. 14, 2006).

Applicant is essentially challenging the implementation of the Revised Adjudicative Guidelines by the Under Secretary of Defense. The Board's jurisdiction and authority are limited to reviewing security clearance decisions by Hearing Office Administrative Judges. *See* Directive ¶¶ E3.1.28 through E3.1.35. Nothing in the Directive gives the Board the jurisdiction or authority to pass judgment on the wisdom or desirability of guidance provided by the Under Secretary of Defense. *See, e.g.*, ISCR Case No. 99-0457 at 5 (App. Bd. Jan. 3, 2001).

(2) Applicant argues that the Judge's denial of a security clearance under the Directive conflicts with Applicant's constitutional rights to freely exercise his religion and educate his

children, and his statutory rights under the Religious Freedom Restoration Act. The Board has no jurisdiction or authority to adjudicate Applicant's claim in this regard.

The Supreme Court has acknowledged the inherently discretionary nature of security clearance decisions and concluded "[i]t should be obvious that no one has a 'right' to a security clearance." *Department of Navy v. Egan* 484 U.S. 518, 527-28 (1988). Given the inherently discretionary nature of security clearance decisions, no applicant has any reasonable expectation of having a vested interest in or right to a security clearance. Moreover, the federal courts have repeatedly held there is no property right or interest in a security clearance or a job requiring a security clearance. *See Jones v. Navy*, 978 F.2d, 1223 (Fed. Cir. 1992); *Dorfmont v. Brown*, 913 F.2d 1399, 1403-04 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991); *Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989); *Chesna v. U.S. Department of Defense*, 850 F. Supp. 110, 118-19 (D. Conn. 1994); *Williams v. Reilly*, 743 F. Supp. 168, 172 (S.D.N.Y. 1990).

The Board's jurisdiction and authority is limited to reviewing security clearance adjudications made under the Directive. *See* Directive ¶¶ E3.1.28 through E3.1.35. The Board does not have the jurisdiction or authority to entertain challenges to the wisdom or legality of provisions of the Directive. *See* DISCR Case No. 90-0208 at 6 (App. Bd. Oct. 24, 1991)(no Board authority to hold that the Directive is unconstitutional); DISCR Case No. 99-0457 at 6 (App. Bd. Jan. 3, 2001) *citing Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)(adjudication of constitutionality of statutes is beyond the jurisdiction of administrative agencies). Nor does the Board have jurisdiction or authority to adjudicate an applicant's rights under provisions of the U.S. Code. *See* ISCR Case No. 02-33144 at 4-5 (App. Bd. Sept. 7, 2004). The Board has reviewed the record in this case and concludes that the Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive.

(3) Applicant argues that the Judge's adverse clearance decision is arbitrary, capricious or contrary to law because it is inconsistent with the decisions of other Hearing Office Judges in ostensibly similar cases. Applicant's argument does not demonstrate that the Judge erred.

The decisions in other DOHA Hearing Office cases cited by Applicant on appeal do not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases, even if Applicant establishes close factual similarities between the cited cases and the instant case. ISCR Case No. 04-04004 at 2 (App. Bd. July 31, 2006); ISCR Case No. 03-23776 at 3 (App. Bd. June 13, 2006). Likewise, the cited cases are not legally binding precedent on the Board, and the Board need not reconcile the Judge's decision below with those decisions. ISCR Case No. 02-24752 at 3 (App. Bd. July 31, 2006); ISCR Case No. 01-22606 at 3-5 (App. Bd. June 30, 2003). To the extent those decisions offer a persuasive alternative analysis for the facts and circumstances of the present case that could lead to a different result, they are of no moment. As noted above, the Board does not review cases *de novo*, and it may not substitute its judgment for that of the Judge.

(4) Applicant argues that the Judge's adverse clearance decision is arbitrary, capricious and contrary to law because Applicant was granted a clearance in 1996 in order to execute a government project, and held that clearance without any problems until the project was completed in 1999. Applicant's argument does not demonstrate that the Judge erred.

The Board has previously held that there is no right to a security clearance, nor is there a presumption in favor of granting or continuing a security clearance. *See, e.g.*, ISCR Case No. 02-00318 at 8 (App. Bd. Feb. 25, 2004); ISCR Case No. 03-08073 at 3 (App. Bd. Oct. 25, 2005). Prior security clearance adjudications and the granting of clearances for the Applicant have no bearing on the legal sufficiency of the Judge's adverse clearance decision here. *See, e.g.*, ISCR Case No. 03-04927 at 5 (App. Bd. Mar. 4, 2005). The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications. *See, e.g.*, ISCR Case No. 01-24506 at 3 (App. Bd. Feb. 11, 2003). In that regard, the government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct or circumstances having negative security significance. *See, e.g.*, DISCR Case No. 91-0775 at 3 (App. Bd. Aug. 25, 1992); ISCR Case No. 02-17609 at 3-4 (App. Bd. May 19, 2004).

(5) Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Judge to conclude, as a matter of law, that he had rebutted, mitigated or extenuated the security concerns raised by the Guideline B allegations. In support of that argument, Applicant contends that the Judge's conclusion that Applicant's sons are vulnerable to coercion is unsupported by the record. He also contends that under the whole-person concept, the Judge gave insufficient weight to Applicant's favorable evidence, including the fact that: Applicant was a U.S. citizen by birth, with long-standing personal, family and financial ties to the U.S.; he had renounced his Israeli citizenship and given up his Israeli passport; he had previously held a clearance without any problems; and his family members in Israel held U.S. citizenship. Applicant's arguments in this regard do not demonstrate that the Judge erred.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of Adjudicative Guidelines disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). 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*. Applicant's disagreement with the Judge's weighing of the record evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant had the burden of presenting evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proved or that Applicant admitted regarding his foreign family and personal ties and financial interest. Applicant also had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive ¶ E3.1.15. The Judge had to evaluate the facts and circumstances of Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive ¶ E3.1.15. The fact that Applicant's explanations and his mitigating evidence did not lead the Judge to the decision desired by Applicant does not establish error. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision.

A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. The Judge found in favor of Applicant under Guidelines C and E, and articulated a rational basis for not favorably applying any mitigating conditions or factors with respect to the Guideline B allegations. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns.

The Judge's decision shows that he did more than merely verbalize an adherence to the "whole-person" concept. *See, e.g.*, ISCR Case No. 03-24428 at 5 (App. Bd. May 3, 2006). The decision exhibits a discerning weighing of a number of variables to reach a commonsense determination. Directive ¶ E2.2. In some instances, as noted earlier, this process led to favorable findings for the Applicant. However, the Judge also articulated a reasonable concern that Applicant's circumstances could potentially make him vulnerable to coercion, exploitation or pressure—an important consideration in the "whole-person" analysis. Directive E2.2.1.8. That concern is based on a combination of close family and personal ties and a substantial financial interest in Israel, considered in the context of the overall political/security profile of that country *vis-a-vis* the United States. Applicant offers a rational alternative interpretation of the record evidence. However, that alternative interpretation of the record evidence is insufficient to render the Judge's interpretation arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 03-19101 at 2 (App. Bd. Oct. 13, 2006). The Judge has articulated a rational explanation for his unfavorable security clearance determination under disqualifying and mitigating factors and the whole-person concept, and there is sufficient record evidence to support that determination—given the standard that required the Judge to err on the side of national security.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board
