KEYWORD: Guideline C; Guideline B; Guideline J; Guideline E

DIGEST: The Board concludes that the Judge's finding that Applicant severed in the Afghan military is supported by substantial evidence. In DOHA proceedings the Federal Rules of Evidence serve only as a guide. The Judge noted numerous unresolved inconsistencies between Applicant's version of events and the government's evidence. Adverse decision affirmed.

CASENO: 04-12449.a1

DATE: 05/14/2007

DATE: May 14, 2007

In Re:	)	
	)	
---------	)	ISCR Case No. 04-12449
SSN: -------	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Gina L. Marine, Esq., Department Counsel

FOR APPLICANT
Edward O. Lear, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August16, 2005, 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), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 21, 2006, after the hearing, Administrative Judge Darlene Lokey Anderson denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether certain of the Judge's findings of fact were supported by substantial evidence; and whether the Judge's treatment of the relevant mitigating conditions was arbitrary, capricious, and contrary to law.[1] Finding no harmful error, we affirm the Judge's decision.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant was born in Afghanistan. He obtained a degree in Public Administration and Diplomacy in 1972 from Kabul University. Applicant attended a "special program" in the Academy of War, enabling him to satisfy his country's one-year military service requirement. From 1973 until 1975 he attended classes, wore a uniform, and held the position of "Third Lieutenant." The Judge found that "more likely than not, the Applicant served in the . . . Afghan military for a one year period."

Following his participation in this program, Applicant worked for the Afghan government from 1973 until at least 1992 in a variety of positions, including First Secretary of the Afghan Embassy in Japan; Director of Diplomatic Service and Member Protocol Department of the Afghan Foreign Affairs Ministry; and President of the Deputy Prime Minister's Office. In June 1992 he obtained an Afghan diplomatic passport, which was reissued on February 28, 2002 and extended to February 27, 2004.

In 1992 Applicant immigrated to the United States. He became a naturalized citizen in 2000 and was issued a valid U.S. passport. In July 2002 Applicant started work for a company as a translator. Although he changed jobs, he was working in Afghanistan as a translator in 2004 when "it was determined that [his] security clearance eligibility was in question." Applicant then returned to the U.S.

On November 11, 2001, Applicant was arrested and charged with assault and battery. His defense attorney filed a motion with the court to dismiss the charge on the grounds that Applicant was a diplomat of the government of Afghanistan, entitled to full immunity from prosecution. "The Motion to Dismiss (Exhibit 3) indicates that the Applicant possessed a valid diplomatic passport that was extended until February 2004 and that he traveled to attend a conference in Germany in 2002, wherein an interim government for the country of Afghanistan was formed."

As to the facts underlying the charge, the Judge found that Applicant had gone to the hospital for treatment following a fall from a ladder. Applicant requested pain medication from a nurse whereupon, according to three witnesses, Applicant spat in her face. This information was found

[1]The Judge's favorable decision under Guideline B is not at issue in this appeal.

in a Police Report included in Exhibit 3. Applicant was convicted of the charge, sentenced to jail, and fined $100.

The Judge found that Applicant answered three questions on the Security Clearance Applicant (SCA) falsely. The first of the three was Question 11, which asked if he had ever served in the military, to include a foreign military service. The next, Question 15, asked if, within the previous seven years, Applicant had ever possessed a passport issued by a foreign government. Applicant answered "no" to both of these questions. The third, Question 16, asked if Applicant had ever traveled outside the U.S. on other than official U.S. business. Applicant stated "yes" and listed pleasure trips to Germany, the Netherlands, and France in 1996 and 2000. However, he did not mention the trip to Germany in 2002, described in the Motion to Dismiss included in Exhibit 3.

The Judge included in her findings a summary of the evidence Applicant submitted in his own behalf. These included the testimony of six character witnesses, to the effect that Applicant is reliable, trustworthy, and of high integrity. These opinions were corroborated by numerous letters of recommendation. The Judge held the record open for Applicant to submit additional information. Applicant's daughter submitted a statement to the effect that Applicant did not "falsify his diplomatic passport" but that she, the daughter, knows who did. The Judge concluded that this submission was untimely and, in any event, was not of a nature to cast doubt on the validity of Applicant's diplomatic passport, included in Exhibit 3.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence–such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant has challenged the Judge's finding that he had served in the miliary of Afghanistan. He also challenges the Judge's admission of Exhibit 3 on the grounds that it is hearsay.

1. Foreign Military Service: Applicant contends that the Judge erred in finding that he had served in the Afghan military. Applicant claims that he never actually entered active duty, attending the Academy of War in a civilian capacity. *See, e. g.*, Tr. at 203. In his appeal brief, Applicant analogized his status to that of cadets at a U.S. military college, who are not in active duty status while pursuing their studies. On the other hand, we note the Judge's finding that while performing this service, Applicant wore a uniform and held an apparent military rank. Additionally, in his response to the SOR, Applicant states, "Like all other men in Afghanistan, I did serve my time with the Afghan military."[2] We conclude that the Judge's finding is based upon substantial evidence.

[2]Applicant Exhibit A contains, among other things, Applicant's resume. This document states that Applicant graduated from high school in 1968. It also states that, the same year, he graduated from the Army Academy "as a reserved [sic] officer." While this might corroborate the view that Applicant had indeed served in the Afghan military,

Even if the finding is in error, however, it is not reasonably likely to have affected the outcome of the case. *See* ISCR 01-23362 at 2 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 at 5 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 at 5 (App. Bd. Aug. 26, 2002). Therefore, any error would be harmless.

2. Hearsay Nature of Court Documents: Applicant contends that it was error for the Judge to admit the documents contained in Exhibit 3 (Motion of Dismiss and Police Report) and to consider them for the truth of such contested matters as Applicant's possessing a foreign passport; having traveled to Germany in 2002; and for the facts underlying the assault charge.

In DOHA proceedings, the Federal Rules of Evidence service only as a guide. They may be relaxed by the Judge (with one exception not applicable to this appeal) in order to permit the development of a full and complete record by the parties. Directive ¶ E3.1.19. By design, the DOHA process encourages Judges to err on the side of initially admitting evidence into the record and then to consider a party's objections when deciding what, if any, weight to give to that evidence. Because DOHA proceedings are conducted before impartial, professional fact finders, there is less concern about the potential prejudicial effect of specific items of evidence than there is in judicial proceedings conducted before a lay jury. *See, e.g.*, ISCR Case No. 04-11571 at 2-3 (App. Bd. Feb. 8, 2007).

In this case, the Motion to Dismiss was prepared by Applicant's attorney,[3] who certified under penalty of perjury that the facts contained therein, including a copy of the Afghan passport, were true. Furthermore, the Police Report was detailed, internally consistent, bore the name and badge number of the investigating police officer, and was an official record prepared for a purpose other than at DOHA. We have examined the documents and conclude that they possess sufficient indicia of reliability so as to have been admissible in Applicant's hearing. *See* ISCR Case No. 01-02677 at 3 (App. Bd. Oct. 17, 2002) (Internal company investigation report containing evidence of applicant misconduct admissible insofar as it possessed "sufficient indicia of reliability"). We conclude that the Judge did not err in admitting the documents contained in Exhibit 3. Furthermore, we hold that the Judge's findings that are drawn from this exhibit are based upon substantial evidence.

Whether the Record Supports the Judge's Ultimate Conclusions

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 choices 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 general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'" *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary,

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we note that it is five years prior to the earliest date of service referenced in the SOR and in the Judge's findings. The Judge makes no reference to it in her decision, and neither party relies upon it in their appellate briefs. Therefore, we have disregarded this matter in resolving the issue on appeal.

[3]This is a different attorney from the one who represented Applicant at the hearing and upon this appeal.

capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert den* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply 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* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

Applicant contends that his evidence and testimony satisfied his burden of persuasion as to the relevant mitigating conditions. The Board does not find that contention persuasive. We do not agree with Applicant. Even if one assumes that her finding as to Applicant's military service was error, the remaining findings support the Judge's conclusion that Applicant had failed to meet his burden of persuasion as to the security concerns raised under Guidelines C, J, and E. These findings include his possession and use of a foreign passport after becoming a U.S. citizen, as reflected in the Motion to Dismiss; his lengthy service to the government of Afghanistan; and his criminal conduct, to include the false answers to Questions 15 and 16. The Judge also noted numerous unresolved inconsistencies between Applicant's version of the pertinent events and that contained in the Government's evidence. Accordingly, we hold that her adverse clearance decision is not arbitrary, capricious, or contrary to law.

Order

The Judge's decision denying Applicant a clearance is AFFIRMED.

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

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

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