

KEYWORD: Guideline C; Guideline B

DIGEST: There is a rebuttable presumption that a Judge is impartial and unbiased a party seeking to rebut that presumption has a heavy burden. The Judge's challenged credibility determination is predicated on her findings which are supported by substantial record evidence. Adverse decision affirmed.

CASENO: 05-04923.a1

DATE: 04/24/2007

DATE: April24, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 05-04923
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 13, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as

amended) (Directive). Applicant requested a hearing. On August 31, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge was biased, prejudiced or unprofessional; whether the Judge's adverse credibility determination is sustainable; whether the

Judge's adverse clearance decision under Guidelines C and B is arbitrary, capricious or contrary to law.¹

(1) Applicant essentially argues that the Judge's adverse clearance decision is unfair because the Judge in his case was tougher than other DOHA Judges. Applicant does not identify any specific cases in which a similarly situated applicant was treated differently or received a different result. Nor does he point to anything in the record to support his assertion in this regard. Rather, Applicant points to the purported statements of two [unnamed] attorneys, experienced with the security clearance process,² that Applicant says he had contacted in an effort to secure representation.³ The Board construes Applicant's argument as raising the issue of whether the Judge was biased, prejudiced or unprofessional.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Bias or prejudice is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing

¹The Judge found in Applicant's favor with respect to SOR paragraphs 1.a and 1.b. Those favorable findings are not at issue on appeal. As part of his appeal, Applicant offers new evidence in the form of additional explanations about his circumstances. The Board cannot consider this new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.*, ISCR Case No. 05-03143 at 2 (App. Bd. Dec. 20, 2006).

²In his brief, Applicant states that he originally hired an attorney (other than the two referenced in the text above) who practiced in the area of "real estate and loan closings" to represent him in this case. However, Applicant discharged that attorney prior to the hearing—apparently because the attorney lacked a sufficient knowledge of security clearance process, was too expensive, Applicant had been advised to represent himself by an employee of another government agency, and Applicant had "... a mistrust of attorneys in general." Applicant appeared *pro se* at the hearing and states "I did a poor job of representing myself and I know this." Applicant's Brief at 1, 2, and 6. The Board has previously noted that a *pro se* Applicant cannot complain about the quality of self-representation. *See, e.g.*, ISCR Case No. 03-04779 at 3 (App. Bd. July 20, 2005).

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alone, does not demonstrate the Judge was biased or prejudiced. *See, e.g.*, ISCR Case No. 98-0515 at 5 (App. Bd. Mar. 23, 1999).

Applicant has not met the heavy burden of persuasion noted above, in that he fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness, impartiality, or professionalism of the Judge. *See, e.g.*, ISCR Case No. 03-00740 at 2 (App. Bd. June 6, 2006). A review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive, and that the Judge conducted the hearing in a professional manner, consistent with her role as an impartial presiding official. *See, e.g.*, ISCR Case No. 02-17574 at 2 (App. Bd. July 24, 2006). A decision by another Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases, even if an applicant can establish close factual similarities between the cases. *See, e.g.*, ISCR Case No. 04-04004 at 2 (App. Bd. July 31, 2006). Accordingly, the Judge was not legally obligated to reconcile her decision in this case with the decisions of her fellow Judges in ostensibly similar cases. *See, e.g.*, ISCR Case No. 02-24752 at 3 (App. Bd. July 31, 2006).

(2) Applicant argues that the Judge's adverse credibility determination with respect to the Applicant is unsupported by the record evidence. The Board does not find Applicant's argument persuasive.

The Board's review of a Judge's findings 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 finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966). Although a Judge's credibility determination is not immune from review, the party challenging that determination has a heavy burden on appeal. *See* ISCR Case No. 04-00225 at 2 (App. Bd. Nov. 9, 2006). After reviewing the record, the Board concludes Applicant has not met that burden.

In this case, the Judge's adverse credibility determination is predicated on her findings that Applicant testified that his Iranian passport had expired in May 2003 and he had not renewed it, when in fact it had been renewed with an expiration date of May 2008.⁴ Decision at 4. Those findings are supported by substantial evidence and are sustainable.⁵ In light of the foregoing, the Judge's adverse credibility determination constitutes a permissible interpretation of the record evidence and is not arbitrary, capricious or contrary to law.

⁴Applicant's brief raises one other issue. Applicant asserts that Department Counsel advised him to turn in his passport to Iran. In that regard, he states that although Department Counsel “. . . was aware that I did not want to turn my passport to the Iranian government but told me that I had no choice but to turn it in and advised me to mail in my passport to the Iranian Interest Section.” Applicant's Brief at 3. Applicant's acknowledgment that he did not want to surrender his Iranian passport is not insignificant. Applicant's claims regarding Department Counsel are not supported by record evidence. Furthermore, there is a presumption of good faith and regularity.

⁵In his brief, Applicant acknowledges the problem raised by his testimony on this issue stating: “This as much as I hate to admit, was mainly due to my own stupidity not because I was trying to hide anything.” Applicant's Brief at 2.

(3) Finally, Applicant argues that the Judge mis-weighed the evidence in this case and that her overall unfavorable decision under Guidelines C and B is arbitrary, capricious and contrary to law. The Board does not find this argument persuasive.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the security concerns raised by his foreign ties and connections had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

The application of disqualifying and mitigating conditions 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). Thus, 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*. An applicant'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.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the nature and seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions. The Judge found in favor of the Applicant with respect to several of the factual allegations. However, the Judge articulated a rational basis for not fully applying any mitigating conditions in this case, and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. June 29, 2005). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines C and B is sustainable. Thus, the Judge did not err in denying Applicant a clearance.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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