KEYWORD: Guideline C; Guideline B

DIGEST: Nothing in the Directive gives the Board jurisdiction or authority to pass judgment on the wisdom or desirability of guidance provided by the ASDC3I. The Judge sustained an objection regarding the potential of other persons to have citizenship in a foreign country while holding a clearance. The issue in this case regards Applicant's exercise of foreign citizenship. Furthermore a Judge is not obliged to reconcile his decision with other hearing office adjudication in ostensibly similar cases. The Judge's ruling is sustainable. Adverse decision affirmed.

CASENO: 05-17030.a1

DATE: 07/02/2007

DATE: July 2, 2007

In Re:	)	
----------	)	ISCR Case No. 05-17030
SSN: ---------	)	
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 April 27, 2006, 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 December 11, 2006, after the hearing, Administrative Judge Martin H. Mogul denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.[1]

Applicant raised the following issues on appeal: whether the requirements of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence, dated August 16, 2000 (ASDC3I Memo) conflict with the language found in the Directive; whether Applicant was denied due process; whether the Judge's adverse clearance decision under Guideline C is arbitrary, capricious or contrary to law.

(1) Applicant argues that the ASDC3I Memo requirement that ". . . clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use from the appropriate agency of the United States Government" conflicts with the language found in Directive Guideline C, which states only that possession and/or use of a foreign passport "may" be disqualifying. This claim essentially challenges the wisdom or desirability of the guidance provided by the ASDC3I memo. The Board's jurisdiction and authority are limited to reviewing security clearance decisions by Hearing Office Administrative Judges. *See* Directive ¶¶ E3.1.28 - 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 ASDC3I. *See* ISCR Case No. 99-0480 at 8 (App. Bd. Nov. 28, 2000). Therefore, the Board does not have the jurisdiction or authority to address Applicant's appeal argument in this regard. *See, e.g.,* ISCR Case No. 99-0457 at 5 (App. Bd. Jan. 3, 2001).

(2) Applicant argues that the Judge's adverse clearance decision should be reversed because: (a) one of Applicant's witnesses was not allowed to testify that he knew of a few people who were granted clearances even though they currently possessed duel citizenship; (b) the Judge did not "help [Applicant] fully understand why [her] witness's testimony could not be heard"; (c) Applicant "d[id] not feel the judge or the defense lawyer truly acted in a casual manner, as [she] was led to believe they would by [Department Counsel]"; and (d) Applicant's "ignorance with the jargon involved in [her] case also tested the patience of the judge."[2] The Board construes Applicant's arguments as raising the issue of whether she was denied due process. However, in that regard, Applicant has not demonstrated error.

During direct examination, Applicant asked her witness "if there are any persons . . . that currently are in a situation that I'm in where they either are applying for Clearance or they have Clearance, but they also have citizenship in foreign countries?" Department Counsel objected to the question because it "call[ed] for speculation." The Judge sustained the objection on the basis of

[1]The Judge found in Applicant's favor under Guideline B. That favorable finding is not at issue on appeal.

[2]Applicant's Brief at 1.

relevance and Applicant did not request any further explanation of the ruling from the Judge.[3] The issue of security concern in Applicant's case was not whether she possessed foreign citizenship, but the extent to which she had actually "exercised" foreign citizenship. Moreover, the Board has previously noted that a decision by a Judge in another case 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). The Judge was not legally obligated to reconcile his decision in this case with the decisions of other Judges or adjudicators in ostensibly similar cases. *See, e.g.,* ISCR Case No. 02-24752 at 3 (App. Bd. July 31, 2006). Accordingly, the Judge's ruling as to the testimony in question is sustainable.

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 his role as an impartial presiding official. *See, e.g.,* ISCR Case No. 02-17574 at 2 (App. Bd. July 24, 2006). Applicant 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 or the Department Counsel. *See, e.g.,* ISCR Case No. 03-00740 at 2 (App. Bd. June 6, 2006).

Applicant was given timely notice of the hearing and had received a copy of the Directive. At the beginning of the hearing, Applicant stated that she was 35-years-old and possessed a Masters degree in Secondary English Education. She also stated that she understood that she had a right to bring an attorney, but that she had decided to represent herself, and that she had read the government's documents and generally understood them. The Judge relaxed the judicial and technical rules of evidence in order to give the parties the opportunity to develop a full administrative record.[4] The record indicates that Applicant answered questions coherently, made an opening and closing statement, testified on her own behalf, called and questioned six witnesses, and offered six documentary exhibits in support of her case. Although *pro se* applicants cannot be expected to act like a lawyer, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.,* ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.,* ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). The Board has previously noted that a *pro se* applicant cannot complain about the quality of self-representation. *See, e.g.,* 03-04779 at 3 (July 20, 2005).

(3) Finally, Applicant contends that the Judge failed to properly weigh the evidence in this case and that his overall unfavorable decision under Guideline C is arbitrary, capricious and contrary to law. In support of that contention, Applicant argues that she has a proven track record, that she is not a threat to the United States, that she has nothing to hide, that her character has stood the test of time, and that she has earned the trust of the United States Government. Applicant's arguments do not demonstrate the Judge erred.

The application of disqualifying and mitigating conditions 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

[3]Transcript at 57.

[4]Transcript at 12.

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 under Guideline B. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns under Guideline C. 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 him, the Judge's ultimate unfavorable clearance decision under Guidelines C is sustainable. Thus, the Judge did not err in denying Applicant a clearance.

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

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