

Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 3, 2007, after the hearing, Administrative Judge Martin H. Mogul denied Applicant's request for a security clearance. On May 15, 2007, Department Counsel filed a Motion for Expedited Remand. On May 16, 2007, Applicant filed a response to the government's motion stating that he had no objection. The case was remanded to the Judge on May 29, 2007. On June 15, 2007, the Judge again 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 issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.¹

Applicant argues that the Judge erred, as a matter of law, in concluding that Applicant was vulnerable to foreign influence, because Applicant had previously been granted clearances and had held them without adverse incidents under ostensibly similar circumstance to those in this case—family members in Iran with whom he had periodic contact. In the alternative, Applicant argues that the Judge erred, as a matter of law, in concluding that Applicant had not mitigated the government's security concerns inasmuch the favorable evidence presented by the Applicant, including his testimony as to his strong ties to the United States and willingness to abide by security regulations and his favor character references, had not been refuted by the government. The Board does not find these arguments persuasive.

The Board has previously noted 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). On the contrary, “there 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). 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).

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

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

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 ties. 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 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 Applicant. However, the Judge also articulated a reasonable concern that Applicant's circumstances could potentially make him vulnerable to coercion, exploitation or pressure. That concern is based close family ties in Iran, considered in the context of the overall political/security profile of that country *vis-a-vis* the United States. Applicant offers an 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 determination under the 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: 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