

KEYWORD: Guideline B; Guideline E

DIGEST: The Judge did not address the security concerns presented by Applicant's husband. The Judge should issue a new decision. Favorable decision remanded.

CASENO: 06-07292.a1

DATE: 04/16/2008

DATE: April 16, 2008

In Re:)	
)	
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)	ISCR Case No. 06-07292
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 12, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under 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 November 27, 2007, after the hearing, Administrative Judge Darlene Lokey Anderson granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's favorable security clearance decision under Guideline B is arbitrary, capricious, or contrary to law.¹ Finding error, we remand the case to the Judge for the issuance of a new decision.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following relevant findings of fact related to the Guideline B allegations: Applicant's husband was a dual citizen of the United States and Israel, but has now surrendered his Israeli passport and renounced his Israeli citizenship.

Applicant's mother-in-law and sister-in-law are citizens and residents of Israel. They do not speak English and Applicant's Hebrew is very limited. Therefore, although Applicant's husband speaks with his mother and sister on a regular basis, Applicant, for the most part, is unable to communicate with them.

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 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, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

To the extent that the Judge's findings are relevant to the assigned error, they will be discussed below.

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.'"

¹The Judge's favorable finding under Guideline E is not challenged on appeal.

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 the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 and E3.1.33.3.

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge erred in not applying Guideline B Disqualifying Condition (DC) 7(d).² Department Counsel also argues that the Judge erred in her analysis of the government’s security concerns by focusing only on Applicant’s relationship with her in-laws, instead of broadening that analysis to include the relationship between Applicant and her husband, whose clearance she denied. It is Department Counsel’s contention that this error is harmful because the security concerns presented by the independent, disqualifying relationship between Applicant and her husband could not be mitigated under the rationale given by the Judge in her decision.³ Department Counsel’s argument has merit.

In her decision, the Judge only applied DC 7(a), and analyzed Applicant’s situation only in the limited context of the security concerns presented by her relationship with her in-laws. The Judge did not discuss the application of DC 7(d), even though such a discussion was warranted by the record, and did not reasonably address the security concerns presented by the relationship between Applicant and her husband, whose clearance the Judge denied.⁴ Accordingly, the Judge’s favorable clearance decision is not sustainable. The Judge should issue a new decision which

²“[S]haring living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.”

³*See* Decision at 6.

⁴In her reply brief, Applicant’s counsel points out that Department Counsel did not argue for the applicability of DC 7(d) at the time of the hearing in either her opening or closing statements. However, Applicant’s contention in that regard is of no moment. As in all cases, the Judge was obligated to consider the record evidence as a whole in conjunction with all pertinent conditions and factors.

discusses the application of DC 7(d) in light of the Judge's ultimate findings and conclusions with regard to Applicant's husband.

Order

The Judge's favorable security clearance decision is REMANDED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
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