

KEYWORD: Guideline B

DIGEST: The Board may not consider new evidence on appeal. An Administrative Judge is not obliged to reconcile his decision with that of another Judge in an ostensibly similar case. The government's security concerns are not mitigated by an applicant's technical abilities. Adverse decision affirmed.

CASENO: 06-17714.a1

DATE: 07/03/2007

DATE: July 3, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 06-17714
)	
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 August 16, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant

requested a hearing. On December 29, 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 issue on appeal: whether the Judge erred by concluding that the security concerns raised under Guideline B had not been mitigated.

Applicant contends that the Judge erred in concluding that the security concerns raised under Guideline B had not been mitigated.¹ In support of that contention, Applicant essentially restates the facts of his case and argues that the Judge misweighed the evidence, by failing to give adequate consideration to the favorable evidence. Based upon the record as a whole, Applicant asserts that his circumstances were not of sufficient seriousness to be of security concern. As part of his appeal, Applicant offers new evidence in the form of a statement as to what additional steps he has been taking to mitigate the government's security concerns and citations to web sites supportive of his position. Applicant also cites to several DOHA Hearing Office decisions in which applicants in ostensibly similar circumstances had been granted a clearance. Finally, Applicant emphasizes the fact that his employer submitted a letter of compelling need for his continued services. Applicant's arguments do not demonstrate error on the part of the Judge.

The Board may not consider Applicant's 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. 02-12789 at 3 (App. Bd. May 13, 2005).

The Board has previously noted that 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).

The Board has also noted that the security concerns raised by an applicant's conduct and circumstances under Guideline B are not mitigated by whether the applicant possesses a technical ability that could be useful to a Department of Defense contract or project. *See, e.g.*, ISCR Case No. 03-04090 at 6-7 (App. Bd. Mar. 3, 2005).

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. *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,

¹The Judge found in favor of Applicant with respect to SOR paragraph 1.c. That favorable finding is not at issue on appeal.

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 reasonably weighed the mitigating evidence against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and whole person factors. Although she found in favor of Applicant with respect to one of the factual allegations, she reasonably explained why there was insufficient mitigating evidence to overcome all of the government's security concerns. The Board does not review a case *de novo*. The favorable evidence cited by the 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 Guideline B is sustainable.

Order

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

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board