

KEYWORD: Guideline B; Guideline E

DIGEST: Applicant failed to establish a factual predicate for her claim that the Judge was biased against her. Applicant failed to rebut the presumption that the Judge considered all of the evidence. Applicant failed to establish that the Judge erred in her credibility determination. A Judge may base a determination that Applicant made false statements on circumstantial evidence. Adverse decision affirmed.

CASE NO: 12-07657.a1

DATE: 08/19/2013

DATE: August 19, 2013

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In Re:)	
-----)	ISCR Case No. 12-07657
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Christopher Graham, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 20, 2012, DoD 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). On March 5, 2013, DOHA amended the SOR to add an allegation under Guideline B and allegations under Guideline E (Personal Conduct). Department Counsel requested a hearing. On April 10, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. On

July 3, 2013, the Appeal Board remanded the case to the Judge for the purpose of obtaining the amendments to the SOR and the Applicant's responses thereto. On July 25, 2013, the amended SOR and the response thereto were received by the Board.

Applicant raises the following issues on appeal: (1) whether the Judge erroneously discounted or ignored portions of Applicant's testimony; and (2) whether the Judge's whole-person analysis is sustainable. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.¹

The Judge found: Applicant is 42 years old. She has three sisters who are citizens and residents of Afghanistan. When she completed a security clearance application in 2009, Applicant listed one sister who is a citizen and resident of Afghanistan, but she did not disclose that she had two other sisters who are residents and citizens of Afghanistan. She also did not disclose this information during a 2009 counterintelligence screening. Applicant did not disclose her third marriage to an Afghan citizen that took place in 2009 on the security clearance application. She also did not disclose the marriage during her counterintelligence screening. She also failed to disclose on her security clearance application the fact that she had traveled to Pakistan to get married to her third husband.

Applicant claimed that she did not list her two Afghan sisters on the security clearance application because she did not know their addresses. She claimed that she was instructed to omit the information. Applicant indicated that she did list the names of the two sisters on a subsequent security clearance application.

Applicant claimed that she did not list her third husband because he was abusive to her. She stated he threatened her and she did have documentation that showed bruises. She stated that she couldn't remember why she did not list her third husband on the security clearance application, but when further questioned, stated that her reason for not listing him was that he was abusive and told her not to put his name on the application. Applicant later stated that there were too many applications and that she was confused.

Applicant was not truthful on several occasions concerning two of her sisters and her third husband. She could have noted the names of her sisters and omitted the addresses. Her explanation about the advice she was given when completing the security clearance application was not credible. Applicant made representations that her third husband was a "friend" to whom she lent money. She also noted during her counterintelligence screening that she was just separated from her second husband and did not report that she was divorced.

The Judge concluded: Applicant did not disclose relevant information on several occasions to Government officials. She provided no corroboration for her claim that she was advised not to list her two sisters. She did not present any documentary information that she listed the sisters on

¹The Judge made formal findings favorable to Applicant under Guideline B. Those favorable findings are not at issue on appeal.

a later security clearance application. Applicant noted that she was under a threat from her third husband, but that does not discount the fact that she deliberately failed to disclose information. This affects her judgment, trustworthiness, and reliability. Applicant did not present any credible information to support any of the mitigating conditions under the personal conduct guideline. Under the whole-person concept, Applicant served the United States in a dangerous, high-risk situation, and her character references establish her significant contributions to the U.S. national security. However, she did not disclose material information on her security clearance application and during a counterintelligence screening. She did not present credible information that she made good-faith efforts to correct the misleading information.

Applicant argues that the Judge indicated a bias by failing to give credence to Applicant's testimony that she did not disclose the information about her third husband because he threatened her. She argues variously that the Judge mischaracterized Applicant's testimony about the abusive nature of her third husband, or else ignored her testimony. Applicant has failed to establish error on the part of the Judge.

Applicant's argument is predicated on her position that the Judge did not believe her testimony about her third husband being abusive, or else ignored the evidence of abuse. After a review of the Judge's decision, the Board concludes that the Judge did consider this evidence, and essentially made a finding that the threats and abuse did take place. There is nothing in the Judge's decision to suggest that she disbelieved Applicant when she testified that her third husband threatened her. The decision also indicates that the Judge did not ignore Applicant's claim of a threat. There are several references to the husband and the threat in the Judge's findings of fact, and the Judge's Analysis acknowledged Applicant's claim that the husband was threatening her, but that threat did not counter the fact that she deliberately failed to disclose the information. The Board need not address in detail Applicant's claim of bias on the part of the Judge, inasmuch as the factual predicate for the claim of bias has not been established. Applicant has not overcome the strong presumption that DOHA Judges are unbiased. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008).

Applicant does not indicate in what manner the Judge mischaracterized the evidence of the threat from the husband.. The appealing party must set forth claims of error with specificity. *See, e.g.*, ISCR Case No. 00-0429 at 2 (App. Bd. Jul. 9, 2001). Applicant also asserts that the Judge erred by not mitigating the Guideline E concern based on Applicant's dilemma of whether or not to risk a beating by disclosing the information about her husband. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). On this record, the Judge was not compelled, as a matter of law, to conclude that Applicant's situation eliminated the government's security concerns.

Applicant argues that the Judge erred in not assessing Applicant's credibility more favorably regarding the stated reasons for the omission of the two sisters from Applicant's security clearance application. The Board gives deference to the credibility determinations of the Judge. Directive, Additional Procedural Guidance, ¶ E3.1.32.1. Although a Judge's credibility determination is not

immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 02-05988 at 2 (App. Bd. Dec. 18, 2003). Here, Applicant has not established that the Judge's credibility determination was in error. The Judge noted several inconsistencies in Applicant's cited reasons for answering her security clearance application (and the subsequent counterintelligence screening) the way she did, and these bolster an already sustainable credibility determination. Nor were the Judge's findings and conclusions concerning Applicant's state of mind when she omitted information improperly based on speculation, as Applicant asserts. It is not merely speculation or surmise for a judge to draw a conclusion about an applicant's state of mind based on circumstantial evidence. To the contrary, where an applicant has not admitted the falsification, it is legally permissible for a judge to determine falsification based on circumstantial evidence of the applicant's state of mind. *See, e.g.*, ISCR Case No. 00-0623 at 2 (App. Bd. Sep. 26, 2001).

When considered as a whole, Applicant's appeal arguments appear to go largely toward the weight that the Judge assigned to the evidence. A party'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. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant largely argues for her interpretation of the record evidence.

Applicant asserts that the Judge's whole-person analysis is unsustainable because it runs contrary to and is unsupported by the record evidence. This argument centers on the Judge's evaluation of Applicant's explanations concerning her failure to list two sisters, her third husband, and her brief trip to Pakistan on her security clearance paperwork. Applicant also notes her loyal, dedicated, and excellent support in assisting the U.S. Mission in Afghanistan. After a review of the entire record, the Board concludes that the Judge's whole-person analysis is sustainable.

The Board does not review a case *de novo*. The favorable 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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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