

KEYWORD: Guideline B

DIGEST: Applicant failed to mitigate security concerns arising out of his ties to Taiwan. Prior Hearing Office cases are not binding on the Appeal Board. Adverse decision affirmed.

CASENO: 06-25743.a1

DATE: 01/10/2008

DATE: January 10, 2008

In Re:)	
)	
-----)	ISCR Case No. 06-25743
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 22, 2007, 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 August 16, 2007, after the hearing, Administrative Judge Elizabeth M. Matchinski 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.

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 mis-weighed the evidence, by failing to give adequate consideration to the favorable evidence. Based upon the record as a whole, Applicant asserts that the security concerns presented by his ties to Taiwan were outweighed by his ties to the United States. Applicant also argues that the Judge erred with respect to several of her findings and that her overall unfavorable conclusion is inconsistent with other hearing-level decisions in which applicants in ostensibly similar circumstances had been granted a clearance. Applicant's arguments do not demonstrate error on the part of the Judge.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such 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, (1966).

We have considered the challenged findings in light of the record and conclude they are based on substantial evidence. Applicant has not met his burden of demonstrating that the Judge's material findings as to his circumstances of security concern, and the inferences drawn from those findings, do not reflect a reasonable or plausible interpretation of the record evidence.

Applicant points to several hearing-level cases by the Judge which he contends support granting him a clearance. The Board gives due consideration to these cases. *See, e.g.*, ISCR Case No. 06-05903 at 3 (App. Bd. Oct. 15, 2007). However, the Board has previously noted that decisions in other hearing-level cases are not legally binding precedent, even if an applicant can establish close factual similarities between those cases and his case. *See, e.g.*, ISCR Case No. 04-04004 at 2 (App. Bd. Jul. 31, 2006). Accordingly, the Judge was not legally obligated to reconcile her decision in this case with her decisions in other ostensibly similar cases. *See, e.g.*, ISCR Case No. 02-24752 at 3 (App. Bd. Jul. 31, 2006). “The adjudicative process is the careful weighing of a number of variables known as the whole-person concept.” Directive at ¶ 2.(a). “Each case must be judged on its own merits . . .” *Id.* at ¶ 2.(b).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. “The application of disqualifying and

¹The Judge found in favor of Applicant with respect to SOR paragraphs 1.c and 1.f. Those favorable findings are not at issue on appeal.

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. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See, e.g.*, ISCR Case No. 06-04371 at 2 (App. Bd. Oct.18, 2007). “ Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable 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*.” *See, e.g.* ISCR Case No. 06-09542 at 2 (App. Bd. Sep. 4, 2007). “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.” *See, e.g.*, ISCR Case No. 06-08116 at 2 (App. Bd. Jul. 2, 2007).

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 with respect to several of the factual allegations. However, she 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 ¶ 2.(c). In some instances, this process led to favorable findings for Applicant. However, the Judge also articulated a reasonable concern that Applicant’s circumstances could create a conflict of interest or be used to influence, manipulate, or pressure him. That concern is based on close family ties and significant financial interests in Taiwan, 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 her 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. Directive ¶ 2.(b).

Order

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

Signed: Jean E. Smallin
Jean E. Smallin
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