

KEYWORD: Guideline B

DIGEST: Applicant failed to meet his heavy burden of persuasion on the question of whether the Judge was biased against him. Moreover, the Directive presumes a nexus between proven circumstances under one or more of the Guidelines and an applicant’s clearance eligibility. Adverse decision affirmed.

CASENO: 07-16765.a1

DATE: 01/28/2009

DATE: January 28, 2009

In Re:)	
)	
-----)	ISCR Case No. 07-16765
)	
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 April 22, 2008, 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 November 12, 2008, 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's adverse clearance decision under Guideline B is arbitrary, capricious or contrary to law.

Applicant argues that it was unfair of the Judge to deny him a clearance just because he was originally from Iraq and had family members living in that country and in-laws living in Syria. Applicant's argument does not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether an applicant personally believes the Judge was unfair, but whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question her fairness. *See, e.g.*, ISCR Case No. 06-09462 at 2 (App. Bd. Jul. 19, 2007). Lack of partiality is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 06-09462 at 2 (App. Bd. Jul. 19, 2007). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased or prejudiced. *See, e.g.*, ISCR Case No. 04-03834 at 2 (App. Bd. Jul. 2, 2007). Applicant has not met this heavy burden of persuasion, in that he fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness, impartiality, or professionalism of the Judge. *See, e.g.*, ISCR Case No. 03-00740 at 2 (App. Bd. Jun. 6, 2006).¹

The Directive presumes there is a nexus or rational connection between proven circumstances under any of its Guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 03-22643 at 7 (App. Bd. Jun. 24, 2005). Direct or objective evidence of nexus is not required. *See, e.g.*, ISCR Case No. 03-18218 at 3 (App. Bd. Oct. 7, 2005). DOHA has adjudicated foreign preference cases involving applicants associated with or having family ties to a wide variety of countries. Foreign ties such as the ones maintained by Applicant are of legitimate concern to the Department in assessing risks to the nation's security. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. 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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the

¹To the extent that Applicant's brief is challenging the hiring policy of private companies, the Board is in no position to comment. Our authority is defined by the Directive and does not extend to such matters.

seriousness of the disqualifying circumstances and considered the possible application of relevant conditions and factors. She found in favor of Applicant as to one of the SOR factual allegations.² However, she reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns under Guideline B. The Board does not review a case *de novo*. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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 under Guideline B is sustainable.

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: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

²SOR paragraph 1(c).