

KEYWORD: Guideline B

DIGEST: There is a rebuttable presumption that federal officials and employees carry their duties in good faith. A party seeking to rebut that presumption has a heavy duty on appeal. Given the record, the Judge's finding of deliberate falsification is sustainable. Adverse decision affirmed.

CASENO: 07-18065.a1

DATE: 11/18/2008

DATE: November 18, 2008

_____)	
In Re:)	
)	
-----)	ISCR Case No. 07-18065
)	
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 May 9, 2008, DOHA issued a statement of reasons (SOR) 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 September 9, 2008, after the hearing, Administrative Judge Noreen A. Lynch 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 issues on appeal: whether Applicant was denied due process because Department Counsel acted improperly; whether the Judge’s findings are based on substantial evidence; whether the Judge erred in concluding that Applicant had deliberately provided false or misleading information to an investigator; and whether the Judge’s adverse clearance decision under Guideline B is sustainable.¹

(1) Applicant contends that he was denied due process because Department Counsel acted improperly. In support of that contention, he argues that the Department Counsel engaged in an aggressive cross-examination of his character witness, asking him questions which Applicant had not anticipated him asking. The Board does not find this argument persuasive.

There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sep. 20, 2001). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant has not met that heavy burden in that he fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to conclude that Department Counsel acted improperly, unfairly or unprofessionally. *See, e.g.*, ISCR Case No. 06-26704 at 2 (App. Bd. Jun. 19, 2008)(no denial of due process where Department Counsel “subjected [Applicant] to an aggressive cross-examination which elicited adverse details about his alcohol use that went beyond the specific facts recited in the SOR and the documentary exhibits, and undermined his credibility with the Judge”); ISCR Case No. 03-04927 at 3 (App. Bd. Mar. 4, 2005)(no denial of due process where *pro se* Applicant claimed “she was no match for the ‘very serious and prepared professionals’ who represented the government”); ISCR Case No. 03-21262 at 2-3 (Jul. 10, 2007)(no denial of due process where *pro se* Applicant claimed that “Department Counsel raised his voice . . . and attempted to sway the Judge with emotional arguments”).

(2) Applicant argues that the Judge’s adverse clearance decision should be reversed because the Judge erred with respect to several of her findings. The Board does not find this argument persuasive.

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

¹In support of his appeal, Applicant attaches new documentary evidence. The Board cannot consider this new evidence on appeal. *See* Directive ¶ E3.1.29.

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).

After reviewing the record, the Board concludes that the Judge's findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

(3) Applicant contends that he did not deliberately provide false or misleading information to an investigator, when he stated he had not called or written his siblings in Iraq since he came to the United States in the 1990s. In support of this contention, he argues that allegation resulted from a misunderstanding. Applicant has not demonstrated that the Judge erred.

A review of the Judge's decision indicates that she considered the circumstances surrounding the allegation in light of Applicant's explanation and the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant had provided false or misleading information:

Applicant listed in his security application that he maintained contact with his [siblings] who are residents and citizens of Iraq. He later changed that information in an interview with an investigator in 2007. He had an opportunity to clarify or correct this information in interrogatories in 2008. He made certain corrections but did not change the reference to contact with his [siblings]. At the hearing, he was inconsistent with his statements and answers to questions by counsel. I allow for the second language and possible misunderstandings, but I did not find Applicant credible, especially in light of his strong desire to maintain employment.²

Given the record that was before her, the Judge's finding of deliberate falsification is sustainable.

(4) Applicant argues that the Judge's adverse decision should be reversed based on his favorable character references, his good job performance, and his strong ties to the United States. Applicant's arguments in that regard do not demonstrate that the Judge erred.

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 clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs

²Decision at 8.

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, 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. 07-00434 at 3 (App. Bd. Jul. 18, 2008).

A review of the record 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 conditions and factors. She reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable record 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). 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)). Therefore, the Judge's conclusion that "it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance"³ is sustainable. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Order

The decision of the Judge denying Applicant a security 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

³Decision at 10.

Administrative Judge
Member, Appeal Board