

KEYWORD: Guideline B

DIGEST: Department Counsel persuasively demonstrates that the Administrative Judge's conduct could convince a reasonable person that he had a predisposition in favor of Applicant. Favorable decision remanded.

CASENO: 08-06795.a1

DATE: 05/25/2012

DATE: May 25, 2012

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| In Re:                           | ) |                        |
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|                                  | ) | ISCR Case No. 08-06795 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |
|                                  | ) |                        |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

Christopher Graham, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 19, 2011, 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 January 27, 2012, after the hearing, Administrative Judge Francisco Mendez granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge was biased; whether the Judge unreasonably restricted Department Counsel’s presentation of his case; whether the Judge erred in his application of the pertinent mitigating condition; and whether the Judge’s whole-person analysis was erroneous. Consistent with the following, we remand the case to a different Judge.

### **Facts**

The Judge made the following pertinent findings of fact: Applicant was born, raised, and educated in Pakistan. His father was a member of the Pakistani Army, who passed away when Applicant was a teenager. Applicant’s wife is a U.S. citizen. They conducted a long-distance relationship by telephone, first meeting in January 1999. They married two weeks later, in Pakistan. Applicant became a U.S. citizen in the mid-2000s.

Applicant’s mother is a citizen of Pakistan, who divides her residency between that country and the U.S. Applicant and his siblings support her financially. Applicant is close to his mother, speaking to her frequently by telephone. The two share a credit card account.

Applicant has several siblings. One is an officer in the Pakistani military. Another works for a private company, but this sibling previously worked for a contractor with the Pakistani government. He has three other siblings who are also citizens and residents of Pakistan. Applicant keeps in regular touch with one of these three siblings. He has another sibling who is a U.S. citizen living in the U.S. This sibling is married to a person who works for a U.S. Government contractor. The in-law and Applicant had previously attempted to start up a company to do business with the U.S. Government, but they failed to secure adequate financing.

Applicant has a cousin who is a U.S. citizen. Applicant borrowed a significant amount of money from him a few years ago, in order to pay off personal debt. He has since repaid the cousin and has lent him \$15,000 for the purchase of a condo.

Applicant has saved money over the past six years and is able to assist his family financially. He has lent them about \$50,000 altogether.

Applicant has a friend who is a contract barber working on a U.S. military installation in a conflict zone. Applicant testified that his relationship with her is platonic.

He has a childhood friend who is a citizen and resident of Pakistan and who lives close to Applicant’s mother. Applicant last traveled to Pakistan in the late 2000s, between Government

contracting jobs. He visited his family while there and complied with his employer's reporting requirements. He listed these trips on his security clearance application (SCA) and during clearance interviews.

Applicant began working as a Government contractor in the mid-2000s. He was assigned to a U.S. military unit in a conflict zone. He accompanied this unit on missions into the field two or three times a month. On a number of occasions, he saved the lives of members of his unit by listening in on enemy radio traffic and alerting his unit of possible ambushes. On one occasion, Applicant and the convoy he was attached to came under enemy fire.

Applicant's job circumstances did not allow for adequate vacation time and began causing trouble for his marriage. He left the employ of this contractor in the late 2000s.

Soon after, Applicant underwent counterintelligence screening, which expanded on information he had previously provided on his SCA. This investigation uncovered nothing of security significance.

Applicant began working for his current contractor employer in the year following this screening. He works as a linguist on a U.S. military installation in a conflict zone. Although he no longer accompanies troops to the field, he has been under constant attack from the enemy. At least once a week, the base is hit by enemy rockets and mortars. Applicant enjoys an excellent reputation at work. One person stated that there are few as committed to the job as Applicant and that Applicant is looking after the greater good of those who work on the installation. Another person testified that Applicant is an exemplary employee.

Applicant and his spouse have resided at the same address in the U.S. since 2001. The house is owned by Applicant's uncle and aunt. He has a substantial amount of money in his 401(k) plan, and he owns no foreign property.

Pakistan, a developing nation, is a parliamentary federal republic that has recently gone through an election cycle. The core of Al-Qa'ida (AQ) is based there, and its leader, Osama bin Laden, was killed there by U.S. forces. AQ, the Taliban, and other militant organizations operate from safe havens in that country and coordinate attacks from there. These groups specifically target U.S. and other Western citizens. Elements within the Pakistani government commit significant human rights abuses.

In the Analysis, the Judge concluded that the Pakistani citizenship of Applicant's mother and siblings, along with the geopolitical circumstances of that country, raised security concerns under Guideline B. The Judge discussed Applicant's case for mitigation in the context of Foreign Influence Mitigating Condition (FIMC) 8(b).<sup>1</sup> The Judge cited a prior Appeal Board case which

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<sup>1</sup>Directive, Enclosure 2 ¶ 8(b): "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest

extended favorable consideration to an applicant's "proven record of action in defense of the U.S." while serving as a translator in conflict zone.<sup>2</sup> The Judge noted that Applicant's bonds to his family in Pakistan are "long and deep, especially when it comes to his mother." Decision at 12. The Judge stated, however, that the chance of foreign exploitation of Applicant through his family has existed for several years, without incident or concern. Additionally, the Judge noted the counterintelligence screening which Applicant underwent, concluding that it buttressed Applicant's claims that he is not a security risk.

Applying the whole-person concept, the Judge cited to evidence of Applicant's having "put himself in harms way" in order to support U.S. security interests. Decision at 12. He noted evidence concerning the effect of Applicant's foreign service on his marriage and his compliance with Government requests for information. The Judge also noted Applicant's stated willingness to take a polygraph examination. He concluded that the record evidence as a whole left him with no "questions or doubts about Applicant's eligibility and suitability for a security clearance." Decision at 13.

### **Discussion**

A Judge is required to "examine the relevant data and articulate 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). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "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. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

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in favor of the U.S. interest[.]"

<sup>2</sup>See ISCR Case No. 07-00034 at 2 (App. Bd. Feb. 5, 2008).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel contends that the Judge was biased against the Government. There is a rebuttable presumption that a Judge is impartial. A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 09-07395 at 2 (App. Bd. Sep. 14, 2010).

In attempting to meet that burden, Department Counsel cites to instances during the hearing in which he believes the Judge evidenced bias. Department Counsel contends that the Judge evidenced bias during Government cross examination about persons who knew Applicant, a question on the SCA. Department Counsel was attempting to elicit information about the extent of Applicant's relationship with three named individuals. The Judge interjected:

[Judge]: For the last six years you've been in [conflict zone] fighting in the War on Terror, right?

[Applicant]: Right.

[Judge]: So you haven't had time to like associate with those folks back in [U.S. city] right?

[Applicant]: That's correct, sir.

[Judge]: Is that where you were going to?

[DC]: Your honor, the question is addressing the extent of his ties to the U.S.

[Judge]: I understand, counsel. Understand something, counsel. He's been in [conflict zone] for the last six years. I recognize that. I also hope that you recognize he's been in [conflict zone] for the last six years, basically at the tip of the sphere, so I'll let you go on with this, but *I just want to make sure that everybody here has that same perspective.* Tr. at 59-60. (emphasis added).

Department Counsel argues that this colloquy could suggest to a reasonable person that the Judge had already made up his mind concerning a major aspect of Applicant's case for mitigation,

his evidence of service to the U.S. under dangerous circumstances. We find this argument to be persuasive, noting in particular the italicized language above.

Department Counsel cites to other portions of the hearing in which the Judge appeared to demonstrate bias. Much of the Government's case was devoted to showing that Applicant's ties to the U.S. were relatively weak when compared to his ties within Pakistan. It was not improper, therefore, for Department Counsel to explore the circumstances of Applicant's wedding and his relationship with another woman, to include their trip together in the late 2000s. His brief notes record evidence that Applicant and his wife married within less than a year after she herself became a naturalized citizen, that they married only two weeks after their first face-to-face meeting, and that Applicant had a long-standing relationship with a woman (a foreign national living outside the U.S.) while he was married to his wife. Department Counsel argues that he sought to elicit at the hearing information about the marriage as well as about Applicant's friendship with the other woman, in order to demonstrate that Applicant's ties in the U.S. through his wife are relatively weak, thereby anticipating an argument under FIMC 8(b). However, the Judge cut off Department Counsel's questioning about the circumstances of the marriage, stating that he did not see the relevance of the respective ages of Applicant and his wife and asking if Department Counsel were suggesting that the marriage was fraudulent.<sup>3</sup> Department Counsel replied that he was exploring the extent to which Applicant's strongest tie to the U.S., his marriage, was "a relatively weak marital relationship[.]" Tr. at 53. The Judge replied "I've let you go on for a while. I'm not seeing it. Move on from this point." Tr. at 54.

Department Counsel also cites to his questions concerning Applicant's relationship with the other woman. In the late 2000s, the two took a trip together, spending eleven days in her native country before proceeding to the country where Applicant was based. The Judge asked if the woman's native country was a place from which Applicant was expected to enter and exit the country where he was based, and Applicant replied that it was. After this question by the Judge, Applicant stated in response to Department Counsel that his eleven-day stay in this country, during which he engaged in gambling activities, was merely a transit stop. Tr. at 75. Department Counsel argues that the effect of the Judge's *sua sponte* question was to influence Applicant's testimony so as to mis-characterize Applicant's travels with the woman.

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<sup>3</sup>In the questioning leading up to this, Department Counsel had asked Applicant whether his wedding ceremony were civil or religious. When Applicant replied that it was religious, Department Counsel asked what the religion was. At this point, the Judge interjected, stating that this evidence was not relevant. Tr. at 50. An applicant's religious beliefs, as such, generally have no security significance. Applicant's religion or choice of a wedding, viewed in and of itself, had no bearing upon his fitness for a clearance. The Judge's apparent belief that Department Counsel was suggesting otherwise may have colored his evaluation of the Government's case as a whole. It is well established DoD policy that an individual's religious affiliation plays no part in the security clearance process. *See, e.g.*, ISCR Case No. 10-02902 at 3 (App. Bd. May 16, 2011). The Judge did not err in interrupting Department Counsel to clarify the reasons for his question. However, reading this question in context, we do not conclude that Department Counsel was imputing security concerns to Applicant's religious beliefs. Rather, Department Counsel was trying to explore the depth of Applicant's connections to the U.S. through his wife and the extent to which Applicant's marriage was one of convenience to enable him to acquire U.S. citizenship. The nature of such a ceremony or a discrepancy between the spouses' views was relevant to this question.

Considering Department Counsel's arguments in light of the record as a whole, we conclude that the Judge's conduct, viewed *in toto*, could convince a reasonable person that he had an inflexible predisposition in favor of Applicant, influenced at least in part by an apparent acceptance, prior to the close of the record, of Applicant's evidence concerning his service under dangerous circumstances. A reasonable person could believe that this predisposition influenced the Judge's decisions to curtail Department Counsel cross examination and to interject comments that suggested to Applicant exculpatory answers to Department Counsel questions. While a Judge enjoys discretion in his conduct of a hearing, that discretion must be exercised with impartiality, both actual and apparent. We conclude that the best resolution of this case is to remand it to a different Judge for a new hearing.

### **Order**

The Judge's favorable security clearance decision is REMANDED.

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