

KEYWORD: Guideline B: Guideline E

DIGEST: There is a presumption of good faith and regularity on the part of DOHA judges as they engage in the process of deciding cases. The presumption has not been overcome in this case. Conduct not charged in the SOR may be considered for assessing an applicant's credibility. Adverse decision affirmed.

CASENO: 08-07648.a1

DATE: 06/25/2009

DATE: June 25, 2009

_____)	
In Re:)	
)	
-----)	ISCR Case No. 08-07648
)	
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 December 16, 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 April 24, 2009 after the hearing, Administrative Judge LeRoy F. Foreman denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (a) whether the Judge’s consideration of a March 2003 incident as a security violation establishing a pattern of rules violations was error; and (b) whether the Judge erred in not basing his decision on the whole person concept. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge found, *inter alia*, that while on active duty with the military in March 2003 Applicant prepared a briefing for military and civilian attendees that contained Special Access Program (SAP) information. Not all attendees were cleared for SAP information. Applicant admitted he had not submitted his briefing for classification review before it was presented. Applicant was counseled but was allowed to retain his clearance and SCI eligibility.

The Judge concluded that the 2003 incident was a security violation and that, taken in conjunction with other incidents alleged in the SOR, it formed part of a pattern of rules violations. The Judge acknowledged that the March 2003 security violation was not alleged in the SOR. However, he noted that conduct not alleged in the SOR may be considered to assess an applicant’s credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole person analysis. The Judge stated that he was considering the March 2003 incident for these limited purposes.

Applicant asserts: (i) the March 2003 incident was not in the SOR; (ii) the incident resulted in no compromise of classified material, no formal action was taken against him and no verbal reprimand was issued; (iii) his failure to obtain a review of the briefing beforehand was not a violation of existing policy; (iv) the cognizant authority at the time determined that the incident was not a security violation. Applicant argues that the March 2003 incident led the Judge to deny his request for a security clearance.

A review of the record convinces the Board that there was substantial evidence to support the Judge’s characterization of the March 2003 incident as a “security violation.” The record also reasonably supports the Judge’s conclusion that the incident was part of a pattern of rules violations. Regarding Applicant’s suggestion that the Judge used the March 2003 incident improperly as the basis for his adverse security clearance decision, the Judge correctly noted in his decision that the March 2003 incident could be used for limited purposes.¹ He stated that he considered the incident only for those limited purposes. There is a presumption in favor of regularity and good faith on the

¹The Judge appropriately cited ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006) as authority for his conclusion that incidents or evidence not covered by the SOR could be used for limited purposes.

part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). A review of the Judge's decision and his use of the March 2003 incident convinces the Board that this presumption has not been overcome, and that the Judge used the evidence for the limited purposes stated.

Applicant points to the favorable aspects of his service to the military and the government in asserting that the Judge erroneously concentrated on a three year period of 2003-2006, instead of considering his entire career. 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). 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).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He found in Applicant's favor regarding several allegations under Guideline B and one allegation under Guideline E. However, the Judge concluded that there was insufficient evidence to mitigate the Guideline B allegations relating to Applicant's relationship with his wife (who is a citizen of and has ties to Thailand) and to mitigate the remaining Guideline E allegations relating to Applicant's trustworthiness. These conclusions are reasonably supported by the record. After considering the Judge's decision, the Board concludes that the Judge's whole person analysis complies with the requirements of Directive ¶ E2.2.1 in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See*, ISCR Case No. 05-03948 at 3-4 (App. Bd. May 21, 2007).

Furthermore, Applicant's appeal brief does not specifically address the Judge's adverse findings under Guideline B. There is no presumption of error below, and the appealing party has the burden of raising and demonstrating factual or legal error by the Judge. *See, e.g.*, ISCR Case No. 00-0051 at 3 (App. Bd. Jul. 23, 2001). Thus, the Judge's adverse security clearance decision is sustainable based on the Judge's resolution of the Guideline B allegations alone.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board