

KEYWORD: Guideline C; Guideline B; Guideline E

DIGEST: 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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. Applicant has submitted new evidence on appeal, which the Board cannot consider. Adverse decision affirmed.

CASE NO: 09-04933.a1

DATE: 05/24/2011

DATE: May 24, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-04933
)	
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 August 13, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On March 14, 2011, after considering the record, Administrative Judge Henry

Lazzaro denied Applicant's request for a security clearance. Applicant 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 is arbitrary, capricious or contrary to law.

Applicant argues that the Judge's adverse decision should be reversed because the evidence is sufficient to establish that he mitigated the security concerns under Guidelines B and C, and that he did not deliberately and intentionally provide false information during the security clearance process as alleged under Guideline E. Along with his brief, he submits new evidence, in the form of additional explanations and several documentary exhibits. The Board cannot consider this new evidence on appeal. *See* Directive ¶ E3.1.29.

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*. 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. 07-13837 at 2 (App. Bd. Sep. 28, 2010).

With respect to the Guidelines B and C allegations, the Judge weighed the available evidence, evaluated the seriousness of the disqualifying circumstances, and considered the possible application of relevant conditions and factors. He reasonably explained why there was insufficient mitigating evidence to overcome the government's security concerns. Decision at 5-6. 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 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). Therefore, the Judge's unfavorable security clearance decision under Guidelines B and C is sustainable.

With respect to the Guideline E allegations, Applicant's argument has merit, given the representations by Department Counsel in the case. *See* FORM at 16-17. However, because the Judge's adverse decision under Guidelines B and C is sustainable, error in this regard would not change the ultimate outcome of the case, and is deemed harmless. *See, e.g.,* ISCR Case No. 04-11181 at 2 (App. Bd. May 8, 2007).

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, 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