

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

MOHSEN NIKPOUR)
)
 Plaintiff,)
)
 v.) Civil No. 1:04CV439
 DEFENSE OFFICE OF HEARINGS AND APPEALS,)
 UNITED STATES DEPARTMENT OF DEFENSE)
 4015 Wilson Boulevard)
 Arlington, VA 22203-1945)
 Serve: Leon Schachter, Director)
 4015 Wilson Boulevard)
 Suite 1100)
 Arlington, VA 22203-1945)
)
 Defendant.)

COMPLAINT

**(UNDER THE APA TO SET ASIDE A FINAL AGENCY
DECISION DENYING PLAINTIFF A SECURITY CLEARANCE)**

1. This is an action under the Administrative Procedures Act 5 U.S.C., ' 551 et. seq. to set aside a final decision of the United States Department of Defense, Defense Office of Hearings and Appeals, denying Plaintiff a security clearance.

JURISDICTION

2. This court had jurisdiction pursuant to 28 U.S.C. ' 1331 because this matter arises under the laws of the United States. It further has jurisdiction under 5 U.S.C. ' 702 because, as a result of a final agency decision, plaintiff has suffered a legal wrong within the meaning of a relevant statute or regulation of the United States.

VENUE

3. Venue properly lies in this court pursuant to 28 U.S.C. ' 1391(e)(1). Defendant is an agency of the United States with its principal headquarters in the County of Arlington, Commonwealth of Virginia.

THE FACTS

4. Mohsen Nikpour, plaintiff, is a naturalized citizen of the United States whose country of origin is Iran. He is and was at all times relevant to this complaint employed as an electrical engineer by a contractor which has classified contracts with the Department of Defense.

5. The Defense Office of Hearings and Appeals (hereinafter ADOHA@) is an agency of the United States Department of Defense. Among the duties of DOHA is to adjudicate applications by employees of defense contractors to determine whether to grant or continue a security clearance for those employees.

6. DOHA carries out its duties pursuant to Executive Order 10865, as amended, as implemented by DoD Directive 5220.6, dated January 2, 1992 as amended.

7. On February 27, 2001, plaintiff, at the request of his employer, submitted an application to be granted a national security clearance so that he could work on the classified contracts which his employer was engaged to perform for the Department of Defense.

8. Because of questions raised during the security clearance investigation, a Statement of Reasons was issued by DOHA recommending that his case be submitted to a DOHA Administrative Judge for a determination whether to grant or deny plaintiff's security clearance application. (That Statement of Reasons is attached hereto as Exhibit 1).

9. The recommendation to refer plaintiff's application to a DOHA administrative judge was based on issues raised under DoD Directive 5220.6, ' E2.A2. (Guideline B, Foreign Influence) and on DoD Directive 5220.6., ' E2.A3 (Guideline C, Foreign Preference).

10. Guideline B states:

The concern: A security risk may exist when an individual's immediate family including cohabitants and other persons to whom he or she may be bound by affection, influence or obligation are *not* citizens of the United States or *may* be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interest in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure. (Emphasis in original) (DoD Dir. 5220.6, ' E2.A2.1.1)

11. Guideline B further states, in pertinent part, conditions that could *raise* a security concern which may be disqualifying to include: *AA*n immediate family member, or person to whom the individual has close ties of affection or obligation, [who] is a citizen of, or resident or present, in a foreign country[@]. (DoD Dir. 5220.6, ' E2.A2.1.2.1).

12. Guideline B further states, in pertinent part, conditions that could *mitigate* security concerns which include:

A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States. (Emphasis in original) (' E2.A2.1.3.1),

and

Contacts and correspondence with foreign citizens are casual and infrequent. (' E2.A2.1.3.3).

13. On January 30, 2003, a hearing was held on plaintiff's application for a security clearance before DOHA Administrative Judge Burt Smith.

14. On June 2, 2003, Administrative Judge Smith issued a decision finding that: **A**In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant applicant's request for a security clearance. (The Administrative Judge's decision is attached hereto as Exhibit 2).

15. The Department of Defense appealed the decision of the Administrative Judge Smith to the DOHA Appeal Board on June 9, 2003.

16. On February 25, 2004, the DOHA Appeal Board reversed the Administrative Judge's favorable security clearance decision with respect to Guideline B, for the stated reason that the Iranian

government was hostile to the United States and that applicant did not dispute that evidence or seek to prove otherwise. (The Appeal Board's decision is attached hereto as Exhibit 3).

17. The Appeal Board imposed a standard of proof so high that it impossible for plaintiff or any other person to provide proof to support a finding that would give effect to the mitigating conditions of Guideline B.

18. DoD directive 6220.6 specifically allows for consideration of American Citizens who have relatives living in other countries to hold a security clearance. There is nothing in DoD Directive 5220.6 or elsewhere in the law which automatically disqualifies American citizens with relatives living in Iran from holding a security clearance, but that is the effect of the Appeal Board's decision.

19. The effect of the Appeal Board's decision was to nullify, ignore or negate that portion of the controlling DOHA regulation which would permit plaintiff to mitigate security concerns.

20. DOHA, as a federal agency, is obligated to follow its own regulations.

21. The DOHA Appeal Board failed to follow or apply DOHA's controlling regulations.

22. The decision of the DOHA Appeal Board is a final agency decision for which there is no further administrative appeal.

23. Plaintiff has exhausted his administrative remedies.

24. The decision of the DOHA Appeal Board is final agency action for which there is no other adequate remedy at all.

25. The decision of the DOHA Appeal Board reversing the favorable security clearance determination of Administrative Judge Smith was arbitrary, capricious, an abuse of discretion and not in accordance with law.

26. The decision of the DOHA Appeal Board is unwarranted by the facts to the extent that the facts are subject to trial de novo by this court.

27. As a result of the DOHA Appeal Board decision, plaintiff has been denied a security clearance.

28. Plaintiff will suffer irreparable harm by the denial of a security clearance because he is and will continue to be unable to work for any government agency or any private company with contracts with a government agency on any matters dealing with classified national security information or on any matters unclassified, but considered sensitive, requiring an equivalent clearance. Virtually all of the electrical engineering work in the Washington Metropolitan region where plaintiff resides involves working for government agencies or for contractors doing business with the government on classified national security matters or on matters which are unclassified but are categorized as sensitive.

29. As a result of the denial of plaintiff's security clearance application, he has been denied the ability to work on

any classified contracts of his employer, or any contracts dealing with sensitive but unclassified matters, or to obtain employment with any government agency or government contractor dealing with such matters.

WHEREFORE, plaintiff prays: (1) that the decision of the DOHA Appeal Board be reversed; (2) that this case be remanded to DOHA for redetermination under all of the applicable DOHA mitigating regulations; (3) that DOHA be directed to apply a standard of proof on applicants that would give effect to the mitigating conditions of the DOHA regulations; and (4) that plaintiff be awarded his attorney's fees and costs.

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