KEYWORD: Guideline E

DIGEST: We conclude that the Judge did not deny Applicant a fair opportunity to prepare his case. Directive ¶ E3.1.17 provides that the SOR may be amended by the Judge at the hearing for good cause and that the Judge may grant a request for additional time for further preparation. Neither at the hearing nor on appeal has Applicant contended that there was no good cause for the amendment. Rather, he simply argues inadequate preparation time. Even if he had not waived this issue by withdrawing the objection, the issue is groundless. The Judge was willing to entertain a request for a continuance, which Applicant declined to seek. Adverse decision affirmed.

CASENO: 18-00753.a1

DATE: 03/05/2019

DATE: March 5, 2019

In Re:	)	
---------------------------	)	ISCR Case No. 18-00753
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Department Counsel

FOR APPLICANT
Danel A. Dufresne, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 17, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 31, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in admitting evidence; whether the Judge denied Applicant due process; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant works for a Defense contractor. He also is employed by a U.S. agency. It is in his capacity as a contractor that he has applied for a clearance, although the circumstances that form the basis of this adjudication arose during the course of his agency employment. Applicant began working for the U.S. government in early 2015. He previously served in the U.S. military, deploying three times to the Middle East.

When Applicant met his current spouse, he was not aware that she was a foreign national residing in the U.S. Rather, he believed that she was a U.S. citizen. When he discovered otherwise, he disclosed his relationship to the appropriate authorities within the agency that employed him. Applicant's employer initiated removal against him, based upon his association with his now-wife. Although the agency characterized Applicant's conduct as "very serious" and "directly related" to his employment, it mitigated the removal to a suspension without pay. It did so in view of Applicant's clean disciplinary record, good job performance, and his having successfully sought permanent resident alien status for his wife.

In addition to his wife, Applicant has ongoing contact with his wife's parents-in-law and brother in law. His mother-in-law, a Mexican citizen, resides in the U.S. as an undocumented alien. His brother-in-law's status is unclear due to the Deferred Action for Child Arrival program. His father-in-law is also from Mexico. Though he has an alien registration number, the father-in-law is pending deportation action through an immigration court. Applicant's weekly contact with his in-laws is at family dinners. In addition, his mother-in-law provides child care for Applicant and his wife. Applicant disclosed these circumstances in his security clearance application (SCA) and during his background investigation. Applicant's in-laws were not included in the adverse action that his agency lodged against him.

The Judge's Analysis

The Judge concluded that Applicant's ongoing association with undocumented aliens, *i.e.,* his mother-in-law and brother-in-law, raises a concern under Directive, Encl. 2, App. A ¶ 16(d), because that association poses "an obvious conflict of interest with his responsibilities" as a federal

employee. Decision at 8. Regarding Applicant's case for mitigation, he stated that the nature of Applicant's agency duties might allow him potentially to gain access to information about his in-laws status, especially regarding his father-in-law's potential deportation. Applicant's "circumstances create the potential for an insider threat, which is a major concern of the federal government's risk management program." *Id.* Though acknowledging Applicant's military service and his understandable loyalties to his family, he concluded that Applicant's association with illegal aliens raised concerns that his evidence was not sufficient to mitigate.

Discussion

Evidentiary Ruling

Applicant contends that the Judge erred by admitting Government Exhibit (GE) 4, a document whereby he informed his agency of his relationship with his now-wife. He argues that this document is not relevant because it references only Applicant's wife, who was not mentioned in the SOR. Moreover, he notes that at the time he prepared the document, he was not married and, therefore, had no in-laws to disclose. We conclude that this exhibit was relevant to matters properly before the Judge, including but not limited to a consideration of the whole-person concept. The challenged evidentiary ruling was not arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-05047 at 4 (App. Bd. Nov. 8, 2017).

Due Process

Applicant contends that the Judge denied him due process. He notes first that the SCA which is the basis for Applicant's adjudication was prepared in regard to his duties as a Defense contractor. However, the SOR alleged circumstances pertaining to his agency employment. He contends that the Judge erroneously found his job with the agency to be "more important and relevant" than his security clearance eligibility with the contractor. He argues that the Judge erred by focusing on a conflict of interest involving Applicant's agency job rather than addressing his job with a contractor. We have considered this assignment of error in light of the record and conclude that the challenged analysis does not call into question whether Applicant received due process, in that it addressed things that were within the explicit scope of the SOR. *See* footnote 1 below. The Directive does not prohibit security officials from considering conduct unrelated to an applicant's current employment by a contractor when that conduct raises concerns about the applicant's ability to protect classified information. *See, e.g.*, ISCR Case No. 14-04190 at 2 (App. Bd. Jan. 18, 2017), in which an applicant was denied a clearance due to conduct during a previous job rather than the one he held at the time of his clearance application.

Applicant also argues that he was denied due process because he did not have sufficient time to prepare for the case. He notes that the SOR originally alleged that he knowingly associated with

his in-laws, who were engaged in criminal activity and illegally present in the U.S. However, at the beginning of the hearing, the Judge granted Department Counsel's motion to amend the allegation to delete reference to criminality.[1] Tr. at 24. Applicant's counsel objected on the ground that he had not had time to prepare to meet the allegation as amended. The Judge asked how much time he would need, specifically if Applicant wanted to reschedule the case for a later time. Eventually counsel stated that he would proceed without rescheduling, citing added financial costs of a continuance. After so stating, he withdrew the objection. Tr. at 23-24. At the end of the hearing the Judge gave Applicant an additional week to submit evidence regarding the amended allegation. Tr. at 107.

We conclude that the Judge did not deny Applicant a fair opportunity to prepare his case. Directive ¶ E3.1.17 provides that the SOR may be amended by the Judge at the hearing for good cause and that the Judge may grant a request for additional time for further preparation. Neither at the hearing nor on appeal has Applicant contended that there was no good cause for the amendment. Rather, he simply argues inadequate preparation time. Even if he had not waived this issue by withdrawing the objection, the issue is groundless. The Judge was willing to entertain a request for a continuance, which Applicant declined to seek. Even so, he granted Applicant a week after the hearing to submit additional evidence. One day after the hearing, Applicant's counsel advised the Judge by email as follows: "I appreciate your offer but *[Applicant] does not need any additional time to respond to the modified SOR*[.]" Email from Applicant's Counsel to Judge, dated September 21, 2018 (emphasis added). The Judge did not abuse his discretion in the manner in which he amended the SOR. *See, e.g.*, ISCR Case No. 14-00019 at 4 (App. Bd. Sep. 18, 2014). In particular he did not fail to observe the requirement of the Directive that he grant either party's request for additional preparation time, insofar as neither party, particularly Applicant, led him to believe that such time was needed. Applicant may be unhappy with the Judge's ultimate conclusions, but he was not denied the due process afforded by the Directive.

Whether the Decision is Arbitrary, Capricious, or Contrary to Law

Applicant contends that the Judge employed the wrong adjudicative factors in evaluating his case. Noting the Judge's conclusion that his relationship with undocumented relatives posed a conflict of interest with his duties at his agency employment, he argues that Guideline E "does not address any so-called concerns about a conflict of interest." Appeal Brief at 12. He argues that the Judge improperly applied a Guideline B criterion in his treatment of Guideline E.

It is true that Guideline B, which focuses upon the extent to which an applicant might be subject to influence by or on behalf of a foreign country, embraces circumstances in which foreign

[1]The SOR allegation originally read as follows: "You have knowingly continued to associate with your mother-in-law and brother-in-law despite their criminal activity and illegal presence in the United States." The amended allegation, re-designated 1.a, read as follows: "You have knowingly continued to associate with your mother-in-law and brother-in-law even after learning that they are illegal aliens residing in the United States." The amendment included the deletion *in toto* of an original allegation 1.a that was in essence duplicative of the one just quoted. It left a third allegation untouched, except that it was re-designated 1.b rather than its previous designation of 1.c. This allegation stated, in effect, that Applicant associated with his in-laws despite his employment by the agency.

relatives might pose a conflict of interest between an applicant's concern for these relatives and his or her duty to protect classified information. *See* Directive, Encl. 2, App A ¶ 7(b). It is also true that the disqualifying conditions listed under Guideline E do not make explicit reference to conflicts of interest. *See* Directive, Encl. 2, App. A ¶¶ 15 - 17. However, the disqualifying and mitigating conditions set forth under each guideline of the Directive are illustrative, not exclusive. They provide an analytical framework for decision-making but are not to be applied in the strict manner required of criminal statutes. In fact, it is not improper for a Judge to conclude that none of the listed disqualifying conditions strictly apply yet nevertheless find that an applicant's conduct raises concerns under the guideline at issue. *See, e.g.*, ISCR Case No 14-03701 at 2-3 (Apr. 12, 2017).

In light of the above, we see no reason to conclude that conflicts of interest involving foreign citizens are to be addressed exclusively under Guideline B and not elsewhere, such as Guideline E. This latter guideline states, in pertinent part, that "conduct involving questionable judgment . . . or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information." Directive, Encl. 2, App. A ¶ 15. Although much of Guideline E addresses false statements or omissions, it is broad enough to include other things. In the case before us, Applicant works for an agency that enforces immigration policy. He has an ongoing relationship with foreign citizens who are living in this country in violation of that policy. This does indeed suggest a possible conflict of interest, not due to the foreign citizenship *per se* of his relatives but to their presence in the U.S. unsanctioned by the laws Applicant's agency enforces. Characterized in this way, this sort of conflict does not necessarily fall under Guideline B, but it does call Applicant's judgment into question, a central concern of Guideline E. *See, e.g.,* ISCR Case No. 10-10307 (App. Bd. Jul. 18, 2012), in which foreign contacts were alleged both under Guideline B and Guideline E.

Indeed, Applicant's own exhibit, the memorandum setting forth his agency's decision regarding his proposed removal, advised him that his ongoing relationship with his then-girlfriend was "very serious[.]" It went on to state, "Your actions call your personal judgment into question and directly contradict the expectation that federal employees uphold the responsibility of complying with federal statutes, rules, regulations, and policies established by the Agency." Applicant Exhibit C. Given that Applicant's relationship with the person who became his wife called into question his willingness to abide by rules and regulations, the Judge did not err in examining whether Applicant's ongoing relationship with foreign in-laws, who had even less legal status than his wife, posed a similar concern. The Judge's conclusion that these relationships impugn Applicant's willingness to follow rules and regulations–not only those of his agency but those that govern the handling of classified information–constitutes a reasonable interpretation of the record that was before him. Applicant's circumstances satisfy the overarching criteria of Guideline E, and we find no error in the manner in which the Judge evaluated the security concerns raised by the SOR.

After considering the entirety of Applicant's appeal brief in light of the record as a whole, we conclude that he has not demonstrated that the Judge committed any harmful error. To the contrary, the Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "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). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board