KEYWORD: Guideline B; Guideline F

DIGEST: The Directive does not require the Government to prove such matters to raise Guideline B security concerns. Department Counsel need only prove controverted facts in the SOR allegations. Directive ¶ E3.1.14. Once the SOR allegations are admitted or proven, the burden shifted to Applicant to mitigate the resulting security concerns. Directive ¶ E3.1.15. By asking those questions, the Judge erred in placing the burden on the Government to prove matters that the Directive does not require. Furthermore, the Judge found "The PRC has a poor record with respect to human rights, suppresses political dissent, and its practices include arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. The PRC engages in espionage against the United States and is one of the two most active collectors of U.S. economic intelligence and technology." Favorable decision reversed.

CASENO: 14-02149.a1

DATE: 03/05/2019

DATE: March 5, 2019

In Re:	)	
	)	
----------	)	ISCR Case No. 14-02149
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Allison Marie, Esq., Department Counsel

FOR APPLICANT
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 23, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 26, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Grattan Metz, Jr., 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 issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is a 40-year-old employee of a defense contractor. As amended, the SOR alleges that Applicant received a Chapter 7 bankruptcy discharge in 2014, that he had four delinquent medical debts totaling about $4,000, that he had delinquent tax debts totaling about $13,000, that his wife is a citizen of the People's Republic of China (PRC) who resides in the United States, and that his parents-in-law are citizens and residents of the PRC.

Applicant received an honorable discharge from the U.S. military in 2000. From 2001 to late 2009, he worked for a U.S. Government agency. In 2007, he also started a company and mistakenly believed his investments in the company could be declared as losses on his income tax returns. In 2014, he learned that the IRS considered those investments as "hobby losses" that could not be recouped until the company generated income. Due to the disallowed losses, Applicant incurred an unpaid tax debt for 2011-2014. With the economic decline in 2007 and 2008, he also sustained losses on rental properties he had purchased.

While undergoing surgery in a foreign country in 2009, he suffered a "medical misadventure" that left him physically unable to perform his duties. Decision at 3. He retained counsel to pursue a medical malpractice claim and, on the advice of counsel, remained in the foreign country to participate in the case. He went into a leave-without-pay status after expending his accumulated leave. Later that year, he resigned from his job when the U.S. Government agency proposed removing him from that employment. He then used retirement funds to pay for living expenses and returned to school to pursue a new career.

Applicant's medical malpractice case took longer than expected to resolve. Despite having received disability payments for a portion of 2011, he started feeling financial pressure and used credit cards to fund living expenses. His injury and unemployment caused him to fall behind on his

mortgages, educational loans, and credit cards. In March 2011, he filed Chapter 7 bankruptcy.[1] In mid-2011, he began working for a defense contractor.

In early 2014, Applicant received a $380,000 medical malpractice settlement.[2] In March 2014, he received a bankruptcy discharge that did not absolve him of his tax debt or educational loans. Regarding the malpractice settlement, "Applicant estimates he spent $62,000 paying off his educational loans, invested $70,000 in his business, and paid $15,000 for his continuing education. With the $20,000 he gave to his father (for helping Applicant out in tough times), Applicant has fuzzily explained where the remaining $203,000 went." Decision at 4.

Applicant continued working for defense contractors until he was laid off in late 2014. He remained unemployed until he obtained his current job in late 2015. He and his wife earn about $134,000 annually. He provided proof that he paid a $52 medical debt in 2016. In that year, he also entered into a repayment agreement with the IRS for his 2011-2014 taxes. He provided proof of the required $212 monthly IRS payments from April through August 2016. He did not document payment of the three remaining medical debts that appear to have aged off his credit reports.

Applicant's wife was born in the PRC, attended college in the United States, and then worked in the PRC before returning to the United States following her engagement to Applicant. They married in 2016. She became a permanent U.S. resident in late 2016. Her parents as well as her extended family members are resident citizens of the PRC. Her father works at the district level of the PRC Government. Her mother is retired. Applicant communicates regularly with her mother

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[1] In his bankruptcy petition (*i.e.*, the Statement of Financial Affairs), Applicant checked the "None" box pertaining to the following request: "List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case." Government Exhibit (GE) 5. "Section 541 of the Bankruptcy Code provides that virtually all of a debtor's assets, including causes of action belonging to the debtor at the commencement of the bankruptcy case, vest in the bankruptcy estate upon the filing of a bankruptcy petition. 11 U.S.C. § 541(a)(1); *In re Swift*, 129 F.3d at 795; COLLIER ON BANKRUPTCY § 541.08. Thus, a trustee as representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed." *Kane v. National Union Fire Insurance Co.* 535 F.3d 380, 385 (5th Cir. 2008).

[2] The record does not reflect whether Applicant notified the bankruptcy court or trustee of his malpractice settlement before the bankruptcy discharge was issued. The record, however, contains the following exchange:

> [Department Counsel]: Okay. When you received it [the malpractice settlement], your bankruptcy wasn't fully discharged yet. Is that correct?
>
> [Applicant]: Correct.
>
> [Department Counsel]: Okay. Did you consider using any of the monies from your settlement to repay the lenders you owed under that bankruptcy as opposed to continuing with the discharge?
>
> [Applicant]: My trustee just wanted to close it out. Her name is . . . . [Tr. at 124.]

and seldomly with her father. She describes her extended family members as farmers and factory workers.

The PRC has an authoritarian government with a poor record for human rights. It is an active collector of U.S. economic intelligence and technology and engages in espionage against the United States. Its intelligence services and private industry frequently seek to exploit Chinese citizens or persons with family ties to the PRC to steal state secrets.

The Judge's Analysis

Applicant meets most of the mitigating conditions for financial considerations. He experienced financial problems due to conditions beyond his control -- including a medical misadventure that cost him a well-established career and periods of unemployment from December 2009 to June 2011 and from October 2014 to December 2015 -- and largely dealt with his finances responsibly. His financial difficulties are not recent and are not likely to recur. He promptly paid his education loans once he received the malpractice settlement and entered into a repayment plan with the IRS. He was in contact with creditors well before the SOR (although the Judge noted there is no evidence of Applicant's efforts to contact the creditors of the aged-off medical debts) and made a good-faith effort to resolve his debts. Given his actions, the unpaid debts have little security significance.

Applicant's wife and her parents create a potential heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, but only because of the rebuttable presumption that he has ties of affection and obligation to his wife and to his in-law through his wife. His wife is effectively beyond the reach of the PRC. She is a permanent U.S. resident and has no apparent connection to the PRC Government. These connections are too attenuated to raise any security risks.

Discussion

Department Counsel argues that the record in this case does not support the Judge's favorable mitigation analysis under Guidelines F and B. More specifically, she contends that the Judge did not consider important aspects of the case and his analysis runs contrary to the weight of the record evidence. Most of Department Counsel's arguments have merit.[3]

[3] Department Counsel makes an argument that the Appeal Board has repeatedly rejected, *i.e.*, "With respect to resolution of delinquent taxes, Mitigating Conditions 20(d) and 20(g) must be read in concert and harmony with the overall parameters of analysis set forth by the Appeal Board." Appeal Brief at 27. This is not accurate. As we have previously explained, "The Appeal Board and Hearing Office are creatures of the Directive. While some analysis and precedents might survive amendments to the Directive or guidelines, it is mistaken to believe that the guidelines are somehow inferior to Appeal Board decisions. More succinctly, the provision of the Directive, including the guidelines, are controlling." *See, e.g.*, ISCR Case No. 17-01213 at 4, n.2 (App. Bd. Jun. 29, 2018), ISCR Case No. 16-03187 at 4. n.4 (App. Bd. Aug. 1, 2018), and, most recently, ISCR Case No. 17-00944 at 3 (App. Bd. Feb. 15, 2019). The Reply Brief also notes that the Judge did not mention Mitigating Condition 20(g). Reply Brief at 17. Additionally, Department Counsel argues the Judge erred in finding Applicant "received disability payments for a portion of 2011" when he actually received such payments dating back to 2009. While that finding may not reflect the full picture of the disability payments that Applicant received, that finding is not erroneous.

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 national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 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.

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th 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. 16-02322 at 3 (App. Bd. Mar. 14, 2018).

In deciding whether the Judge's rulings or conclusions are erroneous, we 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. *Id.* at 4.

Department Counsel challenges a number of the Judge's Guideline F conclusions. For example, she opposes the Judge's determination that Applicant's debts are not recent. She argues that, while Applicant's tax and medical debts may have existed for years, those problems were still unresolved. The ongoing nature of most of his alleged delinquent debts vitiates a conclusion that his financial problems are not recent and, thus, they continue to impugn his trustworthiness and reliability. *See, e.g.*, ISCR Case No. 07-10575 at 3(App. Bd. Jul. 3, 2008). Department Counsel also notes that Applicant testified that he could have returned to work "much sooner" than he did following his medical misadventure,[4] and she argues the Judge's conclusion that Applicant "largely dealt with his finances responsibly" is flawed. She highlights that Applicant received the malpractice settlement of $380,000 about one month before the bankruptcy court issued the debt

[4] Appeal Brief at 19, citing Tr. at 69.

discharge order in March 2014.[5] Between receipt of the settlement payment and the hearing, Applicant fully expended the settlement funds without paying his past-due taxes or delinquent medical debts and can only account "fuzzily" for the expenditure of over $200,000 of those funds. His expenditure of the funds on discretionary matters, such as expending about $70,000 on an endeavor that the IRS regards as a "hobby," instead of expending them on his delinquent financial obligations calls into question whether he acted responsibly under the circumstances. Additionally, while Applicant established that he had an IRS installment agreement, he did not enter into that agreement until more than a year and a half after he submitted his security clearance application and more than two years after he received the settlement payment. The timing of an applicant's efforts at debt resolution is relevant in evaluating an applicant's case for mitigation. *See, e.g.*, ISCR Case No. 14-03358 at 4 (App. Bd. Oct. 9, 2015). Furthermore, Department Counsel points out that Applicant did not provide proof he paid three of the alleged delinquent medical debts, which the Judge indicated had apparently aged off Applicant's credit report. As we have stated in the past, the aging off of debts from a credit report does not establish any meaningful, independent evidence as to the disposition of such debts. *See, e.g.*, ISCR Case No. 15-03907 at 2-3 (App. Bd. Aug. 2, 2018). Department Counsel further observes that Applicant failed to filed his Federal income tax returns for 2009-2012 as required. In his post-hearing submission, he provided his IRS tax transcripts that reveal his Federal tax returns for those years were not filed until May 2015.[6] The Judge did not factor Applicant's tax filing deficiencies into his mitigation analysis. Viewed in its entirety, the record evidence significantly undercuts the Judge's conclusion that Applicant mitigated the alleged financial security concerns and, more specifically, that he acted responsibly in handling his financial problems.

Department Counsel also challenges a number of the Judge's conclusions in his Guideline B analysis. At the outset, it merits noting the Judge apparently reached inconsistent conclusions regarding the application of Disqualifying Condition 7(a).[7] On the one hand, the Judge concluded:

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[5] The Chapter 7 bankruptcy trustee's final report reflects that $235,972 of Applicant's debts were discharged without payment. Applicant's Exhibit (AE) A.

[6] AE W-Z. In his security clearance application dated July, 28, 2014, Applicant responded "No" to the question that asked: "In the past seven (7) years have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?" GE 1. Department Counsel calls into questions Applicant's testimony that the IRS contacted him in October or November 2014 regarding the disallowance of his 2011-2013 business expenses. Department Counsel argues that the IRS would have no basis to talk to him about those business expenses if he had not yet filed his income tax returns for those years. Appeal Brief at 29, citing Tr. at 134-135. We also note that Applicant testified, "I always filed my taxes within the due date for the following year" and " . . . I have never not filed on time for any year that I actually had W-2 income." Tr. at 62 and 116, respectively. On cross-examination, Applicant acknowledged that he did not file his 2012 and 2013 tax returns until 2015 and he thought those delays had to do with his bankruptcy filing. Tr. at 117-118.

[7] Directive, Encl. 2, App. A ¶ 7(a) states, "contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion[.]"

> In this case, the Government established that Applicant's wife is a citizen of the PRC, residing in the U.S., her parents are resident citizens of the PRC, and these circumstances create a potential heightened risk of exploitation, inducement, manipulation, pressure, or coercion—but only because of the rebuttable presumption that Applicant has ties of affection and obligation to his wife, and to his in-laws through his wife.[8]

On the other hand, the Judge later concluded, "[t]here is nothing in the circumstances of [Applicant's in-laws] being in the PRC or in [his wife's] contacts with them, to heighten the risk that Applicant could be impelled or compelled to provide protected information to the PRC."[9] The Judge does not explain how the circumstances of the case can create a heightened risk of foreign exploitation when there is "nothing in the circumstances . . . to heighten" such a risk.[10] The Judge erred in making these contradictory conclusions.

Department Counsel persuasively challenges the Judge's conclusions that Applicant's wife's contacts with her parents are "infrequent," that Applicant "has no connections whatsoever to the PRC[,]" and Applicant's "connections are too attenuated to raise any security risks." Decision at 8.

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[8] Decision at 8. In his analysis, the Judge twice uses the term "potential heightened risk." As reflected in the previous footnote, Disqualifying Condition 7(a) does not contain the word "potential." By using the term "potential heightened risk," it is unclear whether the Judge was attempting to conclude that Disqualifying Condition 7(a) applied in some limited fashion. If that was his intention, he did not do so in a clear and understandable manner. The word "risk" is defined as "the chance of injury, damage, or loss; dangerous chance; hazard[;] . . . to expose to the chance of injury, damage, or loss[.]" Webster's New World Dictionary (3rd College Ed.)(1988) at 1159. "Risk" encompasses a "potential" outcome. Under Disqualifying Condition 7(a), "heightened risk" includes the "potential" of foreign exploitation, inducement, etc. We are unable to discern a meaningful distinction between the creation of a "potential heightened risk" or a "heightened risk," and are unsure what exactly the Judge meant by using that former term. As we said in the past, the Judge's decision must be written in a manner that allows the parties and the Board to discern what findings the Judge is making and what conclusions he or she is reaching. *See, e.g.*, ISCR Case No. 16-02536 at 5 (App. Bd. Aug. 23, 2018). If the Judge did conclude that the evidence established something short of the "heightened risk" in Disqualifying Condition 7(a), then he erred. As summarized in footnote 11 below, the evidence established a "heightened risk" under that disqualifying condition.

[9] Decision at 9. To understand this quote in its context, the full paragraph is set forth below:

> Although the U.S. and the PRC are global competitors, and the PRC is an active collector of protected U.S. information and commercial information, Applicant is not situated in a position where he is likely to be pressured. Examining Applicant's circumstances, the Government's evidence that there was a potential heightened risk of foreign, exploitation, inducement, manipulation, pressure, or coercion because of Applicant's marriage to his wife, now permanently resident in the U.S., is extremely thin. He has never met his father-in-law; he met his mother-in-law for five days, with no conversation other than that brokered by his then fiancee. Her contacts with her parents are routine and infrequent. There is nothing in the circumstances of their being in the PRC or in her contacts with them, to heighten the risk that Applicant could be impelled or compelled to provide protected information to the PRC. I find Guideline B for Applicant.

[10] A Judge is tasked with resolving apparent conflicts in the evidence. *See, e.g.*, ISCR Case No. 14-00281 at 4 (App. Bd. Dec. 30, 2014).

Of note, the Judge found that Applicant's wife communicates with her mother about once or twice a week by text and about once a month by telephone. This finding is at odds with his conclusion that Applicant's wife's contacts with her parents are "infrequent." Additionally, the record contains substantial evidence to establish the Guideline B allegations and the resultant security concerns under Disqualifying Condition 7(a).[11] As we have stated elsewhere, the Directive presumes there is a nexus or rational connection between proven circumstances under any of the guidelines and an applicant's security eligibility. Direct or objective evidence of nexus in not required. *See, e.g.*, ISCR Case No. 17-00507 at 2 (App. Bd. Jun. 13, 2018). The Judge's conclusion that Applicant's contacts to the PRC through his wife and her parents are too attenuated to raise security concerns is not sustainable.

> We also note the Judge asked the following questions in his analysis:
>
> How is the PRC to bring pressure on a retired accountant and a local government consultant, through their daughter, who has no professional background of interest to the PRC? How is the PRC expected to pressure (or even find) the daughter to pressure her to pressure Applicant to provide protected information?[12]

The practical effect of those questions is to require Department Counsel to prove affirmatively the methods the PRC uses to exploit PRC citizens or persons with family ties to the PRC. The Directive does not require the Government to prove such matters to raise Guideline B security concerns. Department Counsel need only prove controverted facts in the SOR allegations.[13] Directive ¶ E3.1.14. Once the SOR allegations are admitted or proven, the burden shifted to Applicant to mitigate the resulting security concerns. Directive ¶ E3.1.15. By asking those questions, the Judge erred in placing the burden on the Government to prove matters that the Directive does not require. Furthermore, as it happens, the Judge need only have referred back to Page 5 of his decision to find the answers to his questions. There he would read his own findings that: "The PRC has a poor record with respect to human rights, suppresses political dissent, and its practices include arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. The PRC engages

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[11] *See, e.g.*, ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018) (Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1). "Heightened risk" is not a high standard to meet. *See, e.g.*, ISCR Case No. 17-03026 at 5 (App. Bd. Jan. 16, 2019). The evidence that Applicant's wife was a citizen of the PRC; that her parents were citizens and residents of the PRC; that she became a permanent U.S. resident about seven months before the hearing; that she maintains regular contact with her mother; that her father works for the PRC Government; and that the PRC Government is an active collector of U.S. protected information, engages in espionage against the United States, and frequently seeks to exploit PRC citizens or persons with family ties to the PRC to steal state secrets sufficiently established a heightened risk of foreign exploitation, inducement, etc. under Disqualifying Condition 7(a).

[12] Decision at 8.

[13] The allegations under Guideline B were amended (SOR ¶ 2.a was modified and SOR ¶ 2.b was added) just before closing arguments were made. Applicant was not asked to admit or deny the amended SOR allegations. However, Applicant's Counsel stated, "Your Honor, I think that [the SOR amendments] accurately reflects what the evidence was in the record, so no objection." Tr. at 140-141.

in espionage against the United States and is one of the two most active collectors of U.S. economic intelligence and technology."

Based on our review of the record, we conclude that the Judge's decision failed to consider important aspects of the case and runs contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

Order

The Decision is **REVERSED**.

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