DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: February 29, 2024

In the matter of:	)	
-----	)	ISCR Case No. 19-02096
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Lynch, Department Counsel
Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT
Lawrence Berger, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 20, 2021, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline E (Personal Conduct), Guideline B (Foreign Influence), and Guideline F (Financial Considerations) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On November 1, 2023, Defense Office of Hearings and Appeals Administrative Judge Marc E. Curry denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline E, the amended SOR alleged that Applicant was removed for cause by the U.S. Border Patrol Agency (BPA) for misconduct while working as a BPA agent and that, on multiple occasions in 2017, he refused to provide full and frank answers to a DoD investigator regarding the incidents at BPA and sent the investigator 16 unsolicited text messages and a voicemail message regarding the propriety of the investigation. The Judge found favorably on the

allegation concerning the incidents at BPA, but adversely on the three allegations concerning Applicant's conduct during the subsequent investigation.

Under Guideline B, the SOR alleged that Applicant maintains relationships with several citizens of Kuwait, some of whom are employed by the Kuwait government, including his wife, mother-in-law, brother-in-law, and two sisters-in-law. The Judge found adversely on the allegations regarding Applicant's wife and mother-in-law, and favorably on the allegations regarding his brother- and sisters-in-law.

Judge's Findings of Fact

Applicant, in his mid-fifties, has been married to his current wife since 2015. He served in the military from 1986 until his honorable discharge in 1990 and began working for BPA in 1992. Between 2006 and 2012, while working as a BPA agent, Applicant engaged in various misconduct that resulted in his being removed from employment on three occasions. Following his termination in December 2013, he filed a grievance, which resulted in arbitration. In June 2015, the arbitrator dismissed all but one of the charges and reduced the penalty from removal to a 30-day suspension. In 2016, Applicant was promoted to temporary supervisor for which his duties included training other agents on how to properly conduct investigations. Following his retirement from BPA in about 2018, Applicant began working for a contractor abroad and currently resides in Kuwait. His team leader reports that he has never had any reason to question Applicant's integrity or work ethic and describes Applicant as a vital part of day-to-day operations.

During his July 2017 security clearance interview, Applicant refused to provide full and frank answers to questions about the foregoing conduct.[1] He did not want to talk about the issues involving past terminations because each decision had been reversed, and he referred the agent to his attorney. Later that same month, he sent the investigator 16 unsolicited text messages, contending that the investigation had "crossed the civil liability line," and threatening litigation. Applicant explained that he sent the texts out of frustration with the process. In July 2019, Applicant was given another opportunity to cooperate with the investigation and warned that continued failure to do so would result in discontinuation of his case. In December 2019, Applicant completed an affidavit setting forth his intention to fully discuss the relevant information with the investigator; however, in January 2020, he asserted that he did not think there was any just cause to discuss his past terminations since he had been reinstated after each.

Applicant's wife is a citizen and resident of Kuwait and is employed as the head of the department for the Kuwait Ministry of Health. She became a naturalized U.S. citizen in August 2022. Applicant's mother-in-law, a citizen and resident of Kuwait, is a homemaker and Applicant sees her approximately once per week. Applicant's brother-in-law, also a citizen and resident of Kuwait, is a retired oil company executive and Applicant does not interact with him. Two of

[1] The Judge also found that, during a personal subject interview in 2002, Applicant refused to answer questions about an alleged adverse incident and acknowledged the potential harm his refusal would have on maintaining his security clearance.

s

Applicant's sisters-in-law work for Kuwait government ministries and Applicant talks with them approximately once per week.

Discussion

On appeal, Applicant challenges the Judge's analyses under Guidelines E and B and the Whole-Person Concept. In its cross-appeal, the Government argues that the Judge's Guideline B analysis pertaining to Applicant's siblings-in-law was arbitrary, capricious, and not supported by the record evidence.[2] For reasons stated below, we affirm the Judge's ultimate adverse decision.

Guideline E

The Judge concluded that the specific instances of workplace misconduct were mitigated through application of AG ¶ 17(c).[3] Noting the importance placed on cooperation with the investigative process and that the 2017 incident was not the first time Applicant refused to answer questions from an investigator, the Judge concluded that, "given the recurrent nature of this behavior, . . . none of the mitigating conditions apply, and [Applicant's] refusal to cooperate continues to pose a security concern." Decision at 10.

Applicant's arguments on appeal amount to a disagreement with the Judge's weighing of the evidence, which 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. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). For example, Applicant argues that the "record supports [his] full cooperation" with the investigator in 2017 and that he "has fully cooperated and complied with all security clearance related investigations since 2017." App. Appeal Brief at 2, 6. In support of this argument, Applicant asserts that the Government conceded Applicant's cooperation with the July 2017 interview when Department Counsel stated during his closing argument that Applicant's "first interview *[apparently referring to July, 2017]* - - and he did answer some questions the first time. He said he didn't want to, and then, he came back around and he did. We agree with that." *Id.* at 2 (citing Tr. at 146) (emphasized text added by Applicant).

The Government's closing argument does not constitute record evidence. Moreover, this excerpted portion of the transcript coupled with Applicant's added commentary is grossly misleading. Contrary to that commentary, the excerpt clearly *does not* refer to the July 2017 interview. The record is clear that Applicant participated in two interviews in conjunction with his 2017 security clearance investigation – the first on March 14, 2017, and the second on July 11, 2017. *See* Government Exhibit (GE) 4 at 4, 14. Even if Applicant's chosen excerpt was the entirety

[2] Under Guideline F, the SOR also alleged that Applicant had debts discharged under Chapter 7 Bankruptcy in 2018, that he failed to timely file Federal income tax returns for 2018 and 2019, and that he owed approximately $24,000 to the Federal Government for unpaid income taxes. The Judge found favorably for Applicant on all Guideline F allegations, for which neither party raises any claim of error on appeal.

[3] AG ¶ 17(c) – the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

of the Government's argument on the subject, there would be no question that the Government acknowledged Applicant's ultimate participation during the interview in March 2017 – *the first interview* – not the interview in July 2017.

That being said, the excerpt chosen by Applicant *does not*, in fact, represent the entirety of the Government's argument on the subject. Rather, our review of the transcript reveals that the Government acknowledged that, "[i]was like pulling teeth, but [Applicant] answered the questions" during his *first* interview in March 2017. Tr. at 147. The Government continued to argue, however, that it was during the *second* interview in July 2017, "where the investigator came up with different questions, and [Applicant] refused to answer them." *Id.* Applicant's mischaracterization of the Government's position is as troubling as it is unpersuasive.

The actual record evidence clearly reflects that Applicant refused to respond to the majority of the investigator's questions during the second interview, referred the investigator to his attorney, and even attempted to call his attorney. *See* GE 4 at 14-16. This is the interview and conduct alleged with specificity in the SOR. The Judge's finding that Applicant refused to provide full and frank answers to questions during the July 2017 clearance interview is supported by the record and his conclusion that said refusal continues to pose a security concern is reasonable in light of the record as a whole.

Guideline B

The Judge's formal findings under Guideline B were split, concluding that Applicant's relationship with his wife and mother-in-law pose security concerns, while his relationships with his brother- and sisters-in-law do not. Three of these four conclusions are challenged on appeal.

Applicant's Appeal

The Judge found disqualifying conditions AG ¶¶ 7(a) and 7(e)[4] applicable to Applicant's relationship with his wife, noting that Applicant's vulnerability to coercion is heightened because he lives in Kuwait and his wife is a senior official of a Kuwaiti government agency, which "generates a security concern too significant to overcome." Decision at 12. The Judge also concluded that Applicant's relationship with his mother-in-law remains a security concern because there is a rebuttable presumption that he has close ties of affection to her through his wife.

On appeal, Applicant does not challenge the Judge's unfavorable conclusion with respect to his mother-in-law. His sole challenge to the Judge's Guideline B analysis is to the conclusion that Applicant's relationship with his wife poses a security concern, which appears to be based largely on the facts that his wife lived in the United Kingdom for much of her childhood and

[4] AG ¶ 7(a) – 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.

AG ¶ 7(e) – shared living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

obtained U.S. citizenship in August 2022, and that the U.S. and Kuwait have a positive diplomatic relationship. App. Appeal Brief at 2, 5. These facts – all of which are reflected in the Judge's decision (*see* Decision at 7, 11) – do not command a favorable finding under Guideline B. In addition to the facts cited by Applicant, the Judge correctly considered that Applicant's wife is a senior official of a Kuwaiti government agency and that the two continue to reside in Kuwait. Here again, Applicant's argument amounts to a disagreement with the Judge's weighing of the evidence, which is not sufficient to establish error. The Judge's conclusion that Applicant's wife "generates a security concern too significant to overcome" is reasonable and sustainable. Decision at 12.

Government's Cross- Appeal

The Judge also found AG ¶ 7(a) applicable to Applicant's two sisters-in-law because of his continued contact with them. Still, without citing any applicable mitigating condition but noting that Applicant "does not like" his two sisters-in-law, the Judge concluded that "the lack of feelings or affection for these in-laws mitigates the security concern." *Id.* at 12. Finally, and again without analyzing any particular disqualifying or mitigating conditions, the Judge found that Applicant does not interact with his brother-in-law and concluded that the relationship does not pose a security concern. *Id.* at 11.

On cross-appeal, the Government contends that the Judge's favorable conclusions regarding Applicant's siblings-in-law are arbitrary, capricious, unsupported by the evidence. A judge's decision can be found to be arbitrary or capricious if it "fails to examine relevant evidence, fails to articulate a rational connection between the facts found and the choice made, fails to be based on a consideration of relevant factors, involves a clear error of judgment, fails to consider an important aspect of the case, or is so implausible as to indicate more than a mere difference of opinion." ISCR Case No. 94-0215, 1995 WL 396942 at *3 (App. Bd. Apr. 13, 1995) (citing *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)). For the reasons set forth below, we agree with the Government's arguments regarding these foreign family members.

Contact with Brother-in-Law

The Government first challenges the Judge's finding that Applicant "does not interact with his brother-in-law," arguing that it is unsupported by the record and apparently led the Judge to conclude that no disqualifying conditions applied. The Government argues instead that the evidence shows that Applicant regularly sees his brother-in-law and that such contact establishes disqualification under Guideline B, which may then afford a separate mitigation analysis.[5] Gov. Appeal Brief at 2, 7.

[5] The SOR alleged that Applicant's sisters-in-law resided in the United Kingdom; however, Applicant clarified at hearing that they actually reside in Kuwait. Tr. at 115.

s

The record reflects that Applicant's in-laws gather at the mother-in-law's home on Fridays.[6] At hearing, Applicant testified that he does not interact with the family except when he sees them – at the home approximately a half mile away from his own – "once a week just on Friday nights." Tr. at 49. He went on to testify that he "might see [the brother-in-law] once every three months if he comes over to the family gathering Fridays," but otherwise "[doesn't] really interact with him." *Id*. at 50. In his earlier 2021 security clearance application, however, Applicant disclosed seeing his brother-in-law on a monthly basis for "Friday Family Day," and seeing his sisters-in-law on a weekly basis at the same gathering. GE 2 at 56-59. Notably, Applicant did not select the "Quarterly" option as his frequency of contact with his brother-in-law, which would better comport with his hearing testimony, and which suggests that "Monthly" was more accurate.[7] In light of the foregoing evidentiary conflicts, the Judge should have explained why he found Applicant's hearing testimony more credible than his security clearance application, and his failure to do so was error. *See* ISCR Case No. 99-0435, 2000 WL 1805215 at *2 (App. Bd. Sep. 22, 2000).

The Government also challenges the Judge's reliance on Applicant's frequency of contact with the brother-in-law as a basis for determining that the relationship is not disqualifying, arguing that the "infrequency of contact with foreign family member goes to whether that connection is mitigated, not whether that connection establishes a security concern at all." Gov. Appeal Brief at 9. The Government contends that the brother-in-law presents a security concern based on his connections to the Kuwait Government, namely via his "recent retirement from a state-owned business," and the Judge erred in failing to conduct this baseline analysis. *Id.* at 8.

AG ¶ 7(a) affords disqualification based on an applicant's contact with a foreign citizen or resident "if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." As discussed above, the record is clear that Applicant has some level of regular contact with his brother-in-law. Turning to the second element of the disqualifying condition, "heightened risk" – a risk greater than the normal risk inherent in having a contact living under a foreign government – is not a high standard to meet. *See* ISCR Case No. 17-03026, 2019 WL 995681 at *3 (App. Bd. Jan. 16, 2019) (citation omitted). Here, the brother-in-law is a retired employee of a Kuwaiti-operated oil company and receives $150,000 in retirement benefits as his sole source of income. GE 2 at 56; GE 3 at 10; Tr. at 116. He therefore continues to be tied to the Kuwaiti government and Applicant's contact with him raises a *prima facie* security concern sufficient to shift the burden to Applicant to present evidence of rebuttal, extenuation, or mitigation. Based on the foregoing, we conclude that the Judge erred in declining to apply AG ¶ 7(a) to Applicant's relationship with his brother-in-law.

[6] The record also suggests that Applicant's siblings-in-law reside in their mother's home with her. *See* GE 2 at 54-60 (reflecting the same residential address for all four subject in-laws).

[7] Additionally, in his earlier 2017 security clearance interview and prior to his relocation to Kuwait, Applicant described his frequency of contact with his brother-in-law as "once or twice per month by phone." GE 4 at 10.

Ties of Affection to Siblings-in-Law

In finding that Applicant's relationship with his mother-in-law creates an unmitigated security risk, the Judge correctly noted the Appeal Board's longstanding position that there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. *See, e.g.*, ISCR Case No. 01-03120, 2002 WL 31341788 at *3 (App. Bd. Feb. 20, 2002). Based on the finding that Applicant does not care for them, however, the Judge stopped short of conducting the same analysis for Applicant's siblings-in-law. While Applicant may not be, as the Judge put it, "particularly fond of" his siblings-in-law (Decision at 7; Tr. at 116-117), such an analysis misses the point of the foregoing precedent and the analytical standard for the security risk posed by in-laws under Guideline B.

The case law regarding an applicant's ties of affections for his or her in-laws has less to do with *the applicant's* feelings towards that family, but instead contemplates the bonds of affection that the applicant's *spouse* holds for his or her immediate family members, which is then imputed to the applicant as a result of the marital relationship. This is true even though an applicant has minimal or no direct contact with the relatives. *See, e.g.*, ISCR Case No. 07-17673, 2009 WL 1281213 at *2 (App. Bd. Apr. 2, 2009) (Despite not speaking the same language and having limited direct contact with his parents-in-law, Applicant had a "legitimate, serious interest" in their welfare due to "his loving relationship with his wife."); ISCR Case No. 11-04980, 2012 WL 4766543 at *5 (App. Bd. Sep. 21, 2012) (Evidence that Applicant has little immediate contact with his foreign relatives and does not speak to them, due in part to a language barrier, "is not sufficient to rebut the presumption that he shares a sense of obligation to them through his wife.").

As noted above, Applicant and his wife attend a standing family gathering at his mother-in-law's home on Fridays, as do his sisters- and brother-in-law. This regular and frequent level of contact is indicative of the depth of Applicant's wife's affection for her family in Kuwait. That Applicant has limited "interaction" with the siblings-in-law or even that he does not like them has no bearing on *his wife's* feelings towards that family. Having established that AG ¶ 7(a) applied to Applicant's siblings-in-law, the Government persuasively argues that Applicant presented no evidence to rebut the affection demonstrated between his wife and her siblings and the Judge therefore erred in failing to impute that affection to Applicant. In light of the record in this case, we find that the Judge erred in applying AG ¶ 8(c)[8] to Applicant's siblings-in-law and concluding that they do not pose a security risk.

Conclusion

We first conclude that Applicant's appeal has not established that the Judge committed harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision under Guideline E and the Guideline B allegations regarding Applicant's wife and mother-in-law, and the ultimate adverse decision is sustainable on this record.

[8] AG ¶ 8(c) – contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

s

Turning to the Government's cross-appeal, we find that the Judge's Guideline B analysis regarding Applicant's brother- and sisters-in-law fails to articulate a rational connection between the facts found and the choice made, fails to consider important aspects of the case, and runs contrary to the weight of the record evidence. The formal findings on these two allegations are not sustainable.

Accordingly, we affirm the Judge's adverse Guideline E findings and adverse Guideline B findings for SOR ¶¶ 2.a and 2.b and reverse his favorable Guideline B findings for SOR ¶¶ 2.c and 2.d. "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." AG ¶ 2(b).

Order

The adverse decision is **AFFIRMED**.

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board

s