DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: September 26, 2024

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Daniel O'Reilley, Esq., Department Counsel
Andrea M. Corrales, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 24, 2022, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline B (Foreign Influence), Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) 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 June 20, 2024, Defense Office of Hearings and Appeals Administrative Judge Philip J. Katauskas granted Applicant's security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline B and Guideline E, the SOR alleged that, for various years-long periods between 2010 and at least January 2020, Applicant provided financial support to four resident citizens of the Philippines and one resident citizen of the United Kingdom. The SOR further alleged under Guideline D that Applicant had sexual relations with one of the Philippine resident

citizens in 2007 and that, as of the SOR, his spouse was unaware of any of the foregoing information. Applicant admitted all of the allegations with explanation.

Judge's Findings of Fact

Applicant, in his mid-60s, has been married since 1991 and has two adult children. After serving for 20 years on active duty, he retired from the United States military in 2004, since which time he has worked for various defense contractors. He completed a security clearance application ("SCA") in 2019, wherein he disclosed the relationships and information alleged in the SOR.

In 2007, while working overseas for a defense contractor, Applicant met a Philippine citizen, "Alpha," in a club where she was working and the two had a brief physical relationship. Applicant testified that he and Alpha subsequently stayed friends and that she later returned to the Philippines. In about 2009, Applicant began sending Alpha monthly financial support, which increased several times, and he estimated that he had provided her approximately $40,000 as of his 2019 SCA. His support of Alpha continued until 2021 or 2022. Applicant's wife is not aware of his infidelity and was not aware of his financial support until about a year prior to the hearing.

In 2010, Applicant met another Philippine resident citizen, "Bravo," in an online game, and he later met her once or twice in person in the Philippines. He began sending her financial support in June 2011 and estimated having sent her approximately $11,000 as of his SCA. His support of Bravo continued until about 2022. Applicant met another Philippine resident citizen, "Charlie," through the same online game in 2014, although he never met her in person. He began sending her financial support that same year and estimated having sent her approximately $8,500 as of his SCA. His support of Charlie continued until January 2020.

Applicant met another Philippine resident citizen, "Delta," during a trip to the Philippines for a computer course in 2013. In 2014, he began sending her financial support, which continued for about 36 months and was estimated to total approximately $4,000. Finally, in 2010, Applicant met a resident citizen of the United Kingdom, "Echo," on a website "where one could pay for virtual sex," although they did not do that. Decision at 6. They never met in person but remained friends. Between 2012 and 2013, Applicant provided Echo approximately $3,400 in financial support.

Regarding his own finances, Applicant's mortgage was past due for approximately $61,000 as of his January 2023 credit report. He explained that he was in forbearance for almost two years due to COVID and that he was unemployed for six months and was unable to make payments. The house was scheduled to go into foreclosure, but he began making monthly payments and his January 2024 credit report reflects that the mortgage account is current.

The Judge took administrative notice of facts regarding the Philippines including, among others, that the "U.S. Department of State travel advisory for the Philippines is Level 2: Exercise Increased Caution due to crime, terrorism, civil unrest, and kidnapping" and "has also catalogued and taken notice of human rights issues in the Philippines." Decision at 7.

Discussion

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 produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions 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).

On appeal, the Government argues that the Judge's applications of the Guideline B, Guideline D, and Guideline E mitigating conditions and his analysis under the Whole-Person Concept were arbitrary, capricious, and not supported by the record 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 stated below, we reverse the Judge's decision.

Guideline D

Under Guideline D, the Government's challenge on appeal is limited to the Judge's favorable finding regarding Applicant's extramarital sexual relationship with Alpha in 2007 and his wife's ongoing ignorance of the matter.

Regarding the sexual relationship itself, the Judge found that the conduct triggered disqualification under AG ¶ 13(c) but was ultimately mitigated through AG ¶¶ 14(b) and 14(c)[1] because it happened 17 years ago and only twice, Applicant has "ceased communications with and any financial assistance to Alpha," and therefore "[a]ny basis for coercion, exploitation, or duress is speculative and has long since evaporated." Decision at 11. The Government argues that the Judge improperly focused on the age of the infidelity itself and thereby ignored "relevant facts showing Applicant's ongoing vulnerability to coercion or exploitation." Appeal Brief at 19-20. We agree.

While the passage of time since an applicant last engaged in conduct is a relevant factor that should be considered, even dated conduct can be the source of an applicant's current vulnerability to coercion or influence. *See* ISCR Case No. 02-32254, 2004 WL 1434432 at *3 (App. Bd. May 26, 2004). In his mitigation analysis, the Judge overstates the significance of the passage of time since Applicant's extramarital relationship and fails entirely to address Applicant's strong desire and efforts to hide the information from everyone, including and especially his

[1] AG ¶ 14(b) – The sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment; AG ¶ 14(c) – The behavior no longer serves as a basis for coercion, exploitation, or duress.

family.[2] Indeed, Applicant acknowledged that no one, including his wife and children, knows about his infidelity and that he has actively worked to keep it, as well as the rest of his alleged relationships with foreign nationals, secret. *See, e.g.*, Government Exhibit (GE) 2 at 11. The Judge's omission of these relevant and important facts ignores the vulnerability created by Applicant's ongoing secrecy and erodes the Judge's resulting mitigation analysis.

When the Board finds that a judge's decision is unsustainable, we must determine if the appropriate remedy is remand or reversal. The former is appropriate when the legal errors can be corrected through remand *and* there is a significant chance of reaching a different result upon correction, such as when a judge fails to consider relevant and material evidence. If the identified errors cannot be remedied on remand, the decision must be reversed. *See* ISCR Case No. 03-09053, 2006 WL 2524484 at *5 (App. Bd. Mar. 29, 2006). Such is the case when, after addressing the identified error, the Board concludes that a contrary formal finding or overall grant or denial of security clearance eligibility is the clear outcome based on the record.

Overall, the Judge's mitigation through application of AG ¶¶ 14(b) and (c) was unsupported by the record and Appeal Board precedent, and the resulting favorable Guideline D decision is unsustainable and reversed.

Guideline E

The Judge also found favorably for Applicant on the concerns cross-alleged under Guideline E, citing only "the reasons set forth under the Guideline B discussion." Decision at 12. Such an analysis – or lack thereof – fails for multiple reasons. First and more generally, the Guidelines exist as separate entities and represent distinct concerns regarding the conduct of security clearance applicants. As such, a judge *must* consider and evaluate an applicant's conduct under any and all Guidelines under which the conduct has been alleged in the SOR. *See* ISCR Case No. 01-03107, 2002 WL 32114507 at *4 (App. Bd. Aug. 27, 2002). Second and specifically with respect to Guideline E, it is well-settled that an applicant's conduct may demonstrate questionable judgment or unreliability under Guideline E even where it is insufficient for an unfavorable determination under other Guidelines. *See id*. at *3; ISCR Case No. 06-21537, 2008 WL 681971 at *4 (App. Bd. Feb. 21, 2008). The Judge's cursory dismissal of the Guideline E concerns based wholly on his conclusions under Guideline B was arbitrary, capricious, and contrary to law.

The Guideline E case presents overlapping facts and mirrored analyses with the Guideline D case – *i.e.*, whether an applicant's conduct, or concealment thereof, creates a vulnerability to exploitation or duress – which we address substantively in our Guideline D discussion and through which lens we can ascertain the merits of the Guideline E concern.[3]

[2] Curiously, the Judge also found that Applicant's wife's "unawareness of [the] conduct is not 'sexual behavior' that is a disqualifying condition under Guideline D" and is otherwise also mitigated through AG ¶¶ 14(b) and 14(c). Decision at 11-12. The Judge's focus in this regard is misplaced, as the wife's ongoing ignorance of the infidelity is not part of the sexual behavior, but rather is what creates his vulnerability to coercion or influence.

[3] *Compare* AG ¶ 16(e) ("Personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group" including, but not limited to "engaging in activities which, if known, could affect the person's personal, professional,

During his December 2019 security clearance interview, Applicant acknowledged that, despite his loyalty to the U.S., "he may be susceptible to blackmail, because he does not want his wife to find out about these women, since it would likely result in marital strife and possible divorce." GE 2 at 11. He then asserted in an undated response to the August 2022 SOR that,

> I have never told my wife or anyone else of what I was doing concerning the support of these women. As such, no one is aware of these relationships. My wife would not understand the friendships or financial support I provided. . . . I did not want my wife to find out about these women, since it would likely result in marital strife and possible divorce as she would not understand the reasoning with what I was trying to do, to better the lives of individuals who were less fortunate than I. . . . My wife did actually find out about one of [them] as I had accidently left a skype message open. She of course went through the roof and we agreed upon to have my checking account monitored to ensure this didn't happen again.

SOR Response at 6. Applicant's strong and lasting desire to maintain the secrecy of his five relationships for fear of possible negative consequences is precisely the kind of concealment contemplated for disqualification under AG ¶ 16(e). The Board has held that there is a rational connection between conduct that an applicant "does not want his wife to discover and a concern that he could be pressured to disclose classified information should this conduct come to the attention of those interested in acquiring U.S. protected information." ISCR Case No. 15-02407, 2017 WL 5560617 at *1 (App. Bd. Oct. 12, 2017). To the extent that the Judge failed to apply disqualifying condition AG ¶ 16(e), such failure was in error.

Turning to the possibility of mitigation, the only relevant condition necessarily fails. AG ¶ 17(e) affords mitigation when the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. At hearing, Applicant explained that his family was now aware generally that he had provided the financial support, but that his wife was unaware of the total amount provided. Tr. at 13, 70; Decision at 10. Beyond the financial nature of the relationships, there is no evidence that Applicant had disclosed the extent of the personal nature of his relationships with Bravo, Charlie, Delta, or Echo, such as the duration or frequency of contact, and the extent of his relationship with Alpha remained secret.[4]

Viewed in totality, the record establishes that Applicant's concealment of his relationships with all five women exposes him to an unmitigated vulnerability to exploitation, manipulation, or duress. The Judge's favorable finding under Guideline E is therefore unsustainable and reversed.[5]

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or community standing."), *with* AG ¶ 13(c) ("Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.").

[4] In his reply to the Government's appeal, Applicant asserts that his "wife has known about parts of all this for many years, but now everything has been disclosed." Reply Brief at 3. This revelation amounts to new evidence, which the Appeal Board is prohibited from considering on appeal. Directive ¶ E3.1.29.

[5] In addition to the vulnerability created by Applicant's concealment of his relationships, his underlying conduct – *i.e.*, the relationships themselves – arguably raise concerns under AG ¶ 16(d). So too does his engaging in and concealing those relationships while holding a security clearance. *See* ISCR Case No. 91-0259 at 6 (App. Bd. Oct. 7,

Guideline B

Finally, the Judge found that, from about 2010 to 2022, Applicant provided approximately $67,000 in financial support to the five individuals alleged in the SOR, and that these relationships could be "deemed 'friends' and 'foreign persons'" giving rise to partial disqualification under AG ¶¶ 7(a) and 7(b). Decision at 10. He concluded, however, that the disqualifying conditions were not fully applicable because there was no evidence that the individuals were associated with a foreign military, government, or intelligence service, nor was there evidence that Applicant's relationships created a heightened risk of foreign exploitation or a potential conflict of interest. The Judge went on to conclude that any concern created by Applicant's relationships was mitigated through application of AG ¶ 8(a)[6] because the nature of the foreign relationships made it unlikely that Applicant would be placed in a position of having to choose between those relationships and the interests of the U.S.

On appeal, the Government argues that the Judge "failed to consider the true nature and extent of Applicant's contacts and relationships with the foreign women," and challenges his failure to fully apply AG ¶¶ 7(a) and 7(b). Appeal Brief at 16. This argument is of mixed merit.

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."[7] The record is clear that Applicant had connections to and maintained long-term, regular contact with all of the individuals alleged in the SOR. The Government's argument that the contacts create a heightened risk, however, is unpersuasive. While "heightened risk" is not a high standard to meet, there is insufficient evidence that any of Applicant's contacts poses something greater than the normal risk inherent in having a contact living under a foreign government. *See* ISCR Case No. 17-03026, 2019 WL 995681 at *3 (App. Bd. Jan. 16, 2019) (citation omitted). Based on the foregoing, we find no error in the Judge declining to find that Applicant's foreign relationships create a heightened risk.

The reasonableness of the Judge's failure to apply disqualifying condition AG ¶ 7(b) poses a more complicated question. While AG ¶ 7(a) requires a judge to examine the nature and extent of the relevant contacts in terms of a heightened risk, AG ¶ 7(b) requires consideration of the nature of the relationships at stake. ISCR Case No. 08-11788, 2010 WL 3200754 at *2 (App. Bd. Jul. 28,

1992) (A clearance holder has "an obligation, at a minimum, to refrain from engaging in a conduct which places him at risk of being subject to coercion or influence."). Although we see no likely avenue of mitigation for either concern in this record, our finding that the Judge's Guideline E decision should be reversed on other grounds makes further review of these matters unnecessary.

[6] AG ¶ 8(a) – The nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.

[7] 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.

2010).[8] The Government argues that "the Judge altogether ignored the vast evidence—including the duration, frequency, and nature of Applicant's communications with these women and his significant financial support of them over years—demonstrating Applicant's strong feelings of affection and obligation towards these five foreign women." Appeal Brief at 17.

Leaning exclusively on Applicant's testimony that he had since ceased communicating with and providing financial support to the women, the Judge dismissed the applicability of AG ¶ 7(b) and found simply,

> There is no evidence that [Applicant's] financial support to his foreign friends created . . . a conflict of interest between his obligation to protect classified information and his desire to help one or more of his friends. In addition, in light of the nature of his relationships with these foreign friends, it is unlikely that he will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States.

Decision at 10. In rendering his conclusion, the Judge ignored significant record evidence regarding the full nature of Applicant's relationships including, as the Government points out, his own acknowledgment that he put the women's interests before his own family's many times. Appeal Brief at 17 (citing Tr. at 51). The Judge's summary analysis is too slight and also too generalized, as it should likely differ from one relationship to the next. We would be inclined to remand the case back to the Judge to provide a more comprehensive analysis of Applicant's relationships under AG ¶ 7(b), but such action is ultimately unnecessary due to the analyses under Guidelines E and D that warrant reversal.

The Government has met its burden on appeal of demonstrating reversible error below. Considering the record as a whole, we conclude that the Judge's findings under Guidelines E and D are arbitrary and capricious as they fail to consider important aspects of the case, fail to articulate a satisfactory explanation for material conclusions, and run contrary to the weight of the record evidence. Accordingly, the Judge's overall favorable decision is not sustainable under the *Egan* standard.

[8] AG ¶ 7(b) – Connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

See also ISCR Case No. 18-00753, 2019 WL 3308144 at *4 (App. Bd. Mar. 5, 2019) (AG ¶ 7(b) "embraces circumstances in which foreign relatives might pose a conflict of interest between an applicant's concern for these relatives and his or her duty to protect classified information.").

Order

The decision in ISCR Case No. 22-01002 is **REVERSED**.

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

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board

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