DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: September 11, 2024

In the matter of:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
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 April 12, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive (SEAD) 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 10, 2024, Defense Office of Hearings and Appeals Administrative Judge Pamela C. Benson denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline B, the SOR alleged two concerns: that Applicant's wife was a citizen of China and that he believed her to be a spy for China (SOR ¶ 1.a); and that his parents-in-law are citizens and residents of China (SOR ¶ 1.b). Under Guideline E, the SOR alleged that Applicant suspected his then-girlfriend of being a Chinese spy in 2018 and reported those suspicions to authorities but nevertheless married her in 2019 and fathered a child with her. At the Government's request, the Judge took administrative notice of certain facts relating to China that were summarized in a Government submission and supported by Government issuances and

publications. The Judge found favorably to Applicant on the Guideline B concern involving his in-laws and adversely on the other allegations. On appeal, Applicant argues that the Judge's decision is arbitrary and capricious. Consistent with the following, we affirm.

Judge's Findings of Fact: The Judge's findings of fact are summarized below.

Applicant is in his early forties, with two bachelor's degrees and a master's degree. He has been employed almost continuously by various federal contractors since 2010, has held high-level security clearances, and has received five patents. In July 2019, Applicant married a Chinese citizen, but they separated a year later and divorced in September 2022. Applicant and his ex-wife share custody of their four-year-old son.

Applicant met D, a Chinese national, in February 2018, when she contacted him from a dating website and asked who his employer was. They began dating and, on their second date, D told Applicant that she was in the United States illegally. Applicant, who held a Top Secret/SCI security clearance, reported this information to his facility security officer (FSO), who advised Applicant that he would likely lose his job if he maintained a relationship with an illegal alien. When Applicant told D that he could not date her because of her illegal status, she told Applicant that she had been joking and showed him a permanent resident card.

Applicant and D continued to date, but Applicant thought some of her behavior was strange and potentially "red flags" of security concern, to include: that the first question she asked him was about his employer; that she initially claimed to be in the country illegally; that she later "tested" him by asking him to fix a software issue on her computer; that she may have investigated his background; and that, while intoxicated on one occasion, D told him that her business model was to steal technology and sell it to the Chinese government. Applicant reported these red flags to his FSO and ultimately to the FBI.

In about October 2018, FBI agents showed up unannounced at Applicant's place of employment. Applicant agreed to work with the agents and met with them on about four occasions over the next two months, during which he reported approximately 40 red flags, including: D tried to recruit him to work as a software engineer for China; he saw pictures of D on her phone wearing military fatigues; D had been a member of the Chinese military; D used different dates of birth on her Chinese passport and on her U.S. driver's license; she attempted to log into his cell phone; and she sent him emails with attachments that had the Trojan virus, which could have potentially stolen his data, monitored his keystrokes, and enabled the use of his computer's microphone and camera.

Although Applicant did not recall filling out any sponsorship documents for D, the FBI agents informed him that he was listed as D's sponsor on documents that D filed to obtain citizenship. The FBI agents told Applicant that he should break ties with D but never confirmed whether they believed D was a Chinese spy. In December 2018, Applicant ended the relationship with D, moved to another state, and started a new job with a different company.

From December 2018 to March 2019, Applicant had no communication with D. In about April 2019, D contacted Applicant and told him that she missed him, that she wanted to work on their relationship, and that she wanted to have a baby with him. Applicant testified that, in light of

this turn of events, he no longer suspected that D was a Chinese spy because the FBI agents had previously told him that a spy would never have a baby with their intended target.

In April 2019, Applicant traveled to visit D without advising either the FBI agents or his new employer's FSO about the renewed contact with D and his plans to see her. D became pregnant during this visit. In May 2019, she moved in with Applicant, which he reported to his FSO, and in June 2019 they were married. Although Applicant reported to his FSO that D had moved in with him, he did not mention either his suspicions that she may be a Chinese spy or that he had worked with FBI agents concerning these suspicions at his previous employment.

In August 2019, two months after they married, Applicant reported to his FSO that he believed his wife was a Chinese spy due to her "solicitation" and asking specific questions about his work. FBI agents came to his place of employment to discuss these concerns and subsequently barred Applicant's entry to his designated workspace. Shortly thereafter, the federal contractor terminated Applicant's employment and he remained unemployed for one year.

In January 2020, Applicant's son was born. Applicant and his wife lived together until July 2020, when he decided to separate. He did not have any contact with D or his son for about nine months. In about April 2021, after D sent Applicant a text that said she was going to harm their child, Applicant picked up his son and maintained sole custody for approximately eight months. As of January 2022, they share custody of their son, who spends six months with one parent and then six months with the other. Applicant believes D has remarried but does not know whether she is now a naturalized U.S. citizen. He admitted that he was initially apprehensive that D may try to return to China with his son and reported his concern to the Department of State (DOS), but he has received assurances that DOS has a system in place to prevent this type of situation.

In April 2021, when Applicant started working for his current employer, he reported to his FSO and fully disclosed his relationship with his ex-wife. In May 2021, FBI agents from his current state of residence, as well as other government agents, met with Applicant for a period of approximately three days discussing details about his relationship with D. An FBI agent informed Applicant that D was in the process of being deported in about early 2019 and most likely called him and asked him to father a child with her in order to remain in the United States. The FSO established a "threat mitigation plan," and stated that Applicant is fully compliant with this plan. After meeting with the FBI and other government agents, Applicant has reported to the FSO any concerns about his communications with D and her attempts to elicit information from him. Applicant last met with government agents approximately one year ago.

In Applicant's April 2023 response to interrogatories, he noted that D has attempted unsuccessfully to elicit information from him by using their son as leverage. She solicited his thoughts about geopolitical current events and told him that, if he would provide this information, she would not ask the court for child support.

Applicant's current FSO testified at the hearing and recommended Applicant be granted a DoD security clearance because he self-reported his concerns about D and is fully compliant with the threat mitigation plan. In addition, a retired flag officer stated that Applicant functions as the

federal contractor's authority in his field of expertise. If Applicant were to leave the company, the company would lose a critical share of its cutting-edge knowledge in that field.

Judge's Analysis. The Judge's analysis is quoted below:

> **Guideline B: Foreign Influence**
>
> Applicant has continuing relationships with D, a foreign national, and their young son. Due to these relationships, D has leverage over Applicant which could create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion under AG ¶ 7(a).[1] Applicant has held longstanding concerns that D is a Chinese spy. That relationship, combined with factual information about China and its relationship with the United States, and the record evidence as a whole, also require application of AG ¶¶ 7(c), 7(d), 7(g) and 7(h).[2]
>
> . . .
>
> I considered the totality of Applicant's ties to China and the adversarial relationship China has with the United States. Because of that adversarial relationship, Applicant has a "very heavy burden" of persuasion as to mitigation. In foreign influence cases, the nature of the foreign government and its intelligence-gathering history are important considerations.
>
> I have carefully considered the fact that Applicant, D, and their son reside in the United States. . . . Applicant's relationship with D and his son . . . cannot be considered casual, and his communications with them are continuing and consistent. Although Applicant's sense of loyalty to the United States and his ties in this country are significant, that information is not sufficient to outweigh the heightened risk of coercion presented by a Chinese national Applicant married, divorced, and who he believed to be a Chinese spy. During the hearing, Applicant stated that he may have exaggerated the facts and now sees there is a logical and reasonable explanation for D's behaviors that does not cause concerns for national security.
>
> The Administrative Notice documents report that China's intelligence services frequently seek to exploit Chinese citizens who can use their insider access to steal secrets. Applicant was initially very diligent in reporting information that

[1] 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.

[2] AG ¶ 7: (c) Failure to report or fully disclose, when required, association with a foreign person, group, government, or country; (d) counterintelligence information, whether classified or unclassified, that indicates the individual's access to classified information or eligibility for a sensitive position may involve unacceptable risk to national security; (g) unauthorized association with a suspected or known agent, associate, or employer of a foreign intelligence; and (h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion.

could impact national security, but he used extremely poor judgment and disregarded reporting requirements in about April 2021. He received a communication from D, she said she wanted to have his baby, and he made immediate plans to meet with her. He should have reported to the FBI agents he had previously worked with about D's conversation and his plans to visit her. If he had, he may have discovered she was currently in the process of deportation and having his baby was most likely her plan to remain in the United States. In addition, he did not report to his current FSO, as required, that he was meeting with a Chinese national because "it didn't occur" to him. . . . There are too many troubling behaviors in the record to dismiss D as a threat to national security. I find there remains a conflict of interest because D has leverage with their son, and Applicant should never be placed into a position where he has to choose between his son and the protection of U.S. classified information. Applicant has not met his "very heavy burden" of persuasion, and the foreign influence security concerns are not mitigated. [Decision at 8–9 (internal citations omitted).]

Guideline E: Personal Conduct

Applicant married a Chinese national who he believed to be a Chinese spy. China's intelligence services frequently seek to use or exploit Chinese citizens who can use their insider access to steal secrets. In about April 2019, Applicant failed to report adverse information about the Chinese national to the FBI and his current FSO, which showed poor judgment and an unwillingness to comply with rules and regulations.

. . .

Applicant has a child with D, a woman whom he believed, up until the hearing was conducted, was a Chinese spy. According to Applicant, D has used his son as leverage to elicit information from him in the past, and I find it likely she will continue to use his son as leverage in the future. He is regarded as an expert in a specific field, and China and the U.S. are actively involved in this highly technological advancement and pursuit. I find Applicant to be an upstanding and loyal American, however, he used extremely poor judgment in this scenario, and has placed himself in a compromising position. Applicant was compliant with required adverse information reporting until approximately April 2019. Following his termination from employment and subsequent divorce, he has purportedly corrected his shortcomings and is now motivated to report all foreign national contacts through the use of a threat mitigation plan. However, his current prevention of such problems in the future does not preclude careful consideration of his security worthiness in light of his recent poor decision-making and irresponsible behavior. Protection of our nation's secrets remains paramount. Based on the evidence in the record, I find that personal conduct security concerns are not mitigated. [*Id*. at 10–11.]

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). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. 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).

Applicant's appeal challenges the Judge's factual findings and argues that the conclusions she drew from them are arbitrary and capricious. When an administrative judge's factual findings are challenged, the Board must determine whether the findings of fact are supported by 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 and whether the judge's findings reflect a reasonable interpretation of the record evidence as a whole. Directive ¶ E3.1.32.1; ISCR Case No. 02-12199 at 2–3 (App Bd. Aug. 8, 2005). A judge's decision can be found to be arbitrary or capricious if "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." ISCR Case No. 97-0184 at 5, n.3 (App. Bd. Jun. 16, 1998) (citing *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

We turn first to the issue central to Applicant's appeal—whether the Judge erred in finding that he was required to report his April 2019 renewed contact with D and his subsequent visit to see her. As Applicant highlights, the Judge's finding on this specific issue was dispositive in her decision, weighing heavily in her analysis under Guideline B, Guideline E, and the Whole Person Concept. Throughout his appeal, Applicant argues that contrary to the Judge's finding he was not required to report this renewed contact in April 2019 and his subsequent visit.

First, Applicant cites to the reporting requirements issued by the Office of the Director of National Intelligence (ODNI) in SEAD 3 *Reporting Requirements for Personnel with Access to Classified Information or Who Hold a Sensitive Position* (effective June 12, 2017). Specifically, Applicant focuses on the reporting requirements for "Continuing association with known foreign nationals that involve bonds of affection, personal obligation, or intimate contact; or any contact with a foreign national that involves the exchange of personal information." SEAD 3 ¶ F.2.b.2. As Applicant highlights, **"[f]ollowing initial reporting**, updates regarding continuing unofficial association with known foreign nationals shall occur only if and when there is a **significant change** in the nature of the contact." Appeal Brief (AB) at 3, quoting SEAD 3 ¶ F.2.b.2 *(emphasis in AB).*

Applicant's arguments in this regard are two-fold. He argues first that the relationship was not "continuing" when Applicant met with D in April 2019, as he had earlier ended the

relationship, and that it did not become a "continuing" relationship until D moved in with him in May 2019, at which point Applicant reported. Alternatively, Applicant argues that because he had previously "reported D to the company in San Diego in 2018, applicant had no obligation to re-report at the instance the judge cites in 2019 as reporting is only required after a significant change has occurred, but having a single meeting with D is not a significant change." AB at 3. He further states it "was only when they met for the second time and D moved in with Applicant was there a significant change, that met the threshold for reporting, which is precisely when Applicant reported D to the company, as required." *Id*.

These arguments fail for multiple reasons. First, assuming arguendo that Applicant was not in a continuing relationship with D when she contacted him in April 2019, he was nevertheless required to report that she reached out and that they intended to meet because ODNI requires reporting of any contact "with a known or suspected foreign intelligence entity." SEAD 3 ¶ F.2.b.1. Second, Applicant argues that, because he "reported D to the company in San Diego in 2018," he was not obligated to "re-report." AB at 3. Here, as throughout his brief, Applicant uses the term "the company" when referring not to an employer but rather to the FBI. Said differently, Applicant conflates the two in order to argue that his report to the FBI in 2018 absolved him of any responsibility to inform his new employer regarding D. This is confusing, misleading, and incorrect. Regardless of whether he had cooperated with FBI agents in California in 2018, the FBI was not his employer and not his "company." His initial reports to his defense contractor employer in California in 2018 in no way discharged his obligation to inform his new employer in Virginia as soon as D reached out in April 2019 and asked to renew their relationship.

We are not persuaded by any of Applicant's arguments on this issue. It was wholly reasonable for the Judge to find that Applicant was required to report to his current FSO in April 2019 that D had reached out to him to renew their relationship, that she had discussed having a child with him, and that he had agreed to meet with her. Given the fact that Applicant terminated the relationship in December 2018 at an FBI agent's recommendation, it was inarguably a "significant change" in the nature of their relationship for him to fly cross-country to meet with D and to resume intimate relations, with the result that D became pregnant. We conclude that the Judge's findings in this regard—that Applicant was required to report his renewed contact with D in April 2019 and failed to do so—are amply supported in the record and reflect a reasonable interpretation of the evidence.

The remainder of Applicant's brief argues issues that are less consequential to the Judge's decision. For example, Applicant asserts that the Judge's decision was arbitrary and capricious because she stated that he "disregarded reporting requirements in about April 2021" when he in fact was compliant with reporting requirements at that time. AB at 7–8, quoting Decision at 9. Reading this sentence in context, it is abundantly clear that the Judge was referring to April 2019, which she references throughout her decision as a pivotal date, and that she simply mistyped the year in this particular sentence. Contrary to Applicant's argument, this was a harmless error, as it in no way affected the outcome of the case. *E.g.*, ISCR Case No. 99-0500 at 2 (App. Bd. May 19, 2000) (a mere typographical error in a judge's decision does not warrant remand or reversal). In another example, Applicant takes issue with the Judge's finding that "Applicant married a Chinese national who he believed to be a Chinese spy." Decision at 10. He argues:

> The judge makes a factual error in asserting that applicant believed D was a spy when he married her. . . . The judge says "During his July 19, 2022 background interview, Applicant told the investigator that in the back of his mind, however, he still thought there was a possibility that D was a spy." Applicant, being a logician reasoned that there are two possibilities, either she is a spy or she isn't. This same logic holds for all people. Because an individual is either a spy or they aren't. The same thing could be said about the judge, the prosecution, and more generally anyone at all. As one is either a spy or they are not. . . . As such the judge makes a factual error here by conflating a logical possibility that someone could be a spy with the belief that someone is a spy. [AB at 5.]

This is a difficult argument to follow, but the record evidence is—in contrast—quite clear. From the early weeks of their relationship, Applicant suspected that D may be a spy for China, to such an extent that he reported concerns to his FSO on multiple occasions, reported her to the FBI, enumerated at least 40 "red flags," terminated the relationship, and, after reuniting and marrying, again reported his suspicions. While the Judge may have more accurately described Applicant as *suspecting*, rather than *believing,* that D was a spy, any possible error in this regard was harmless, as it would have no effect on her analysis or decision. This contention amounts to a matter of semantics. *See* ISCR Case No. 19-02816 at 2 (App. Bd. Feb. 10, 2021).

Additionally, Applicant argues that the Judge failed to consider relevant evidence and important aspects of the case. For example, he asserts that his relationship with D "was and is advantageous to the national security" as he "was able to identify a great many sources and methods which applicant has reported for the past 5 years, benefiting the national security." AB at 2. This assertion is not supported by record evidence and is, in fact, contradicted by Applicant's own argument that his suspicions may have been misplaced, that there were "green flags" as well as red flags, and that his ex-wife may not have been a spy after all. AB at 6–7. To some extent, Applicant is arguing in his brief for an alternative weighing of the evidence. Disagreement with the Judge's weighing of the evidence or an ability to argue for a different interpretation of the evidence is not sufficient to conclude that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *E.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

We have considered all of Applicant's arguments and conclude that none is sufficient to rebut the presumption that the Judge considered all of the evidence in the record, nor are they enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. The record supports a conclusion that the Judge examined the relevant data and articulated 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*, 463 U.S. at 43 (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.'" *Egan*, 484 U.S. at 528. "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b).

ORDER

The decision in ISCR Case No. 23-00544 is **AFFIRMED**.

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

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

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