

KEYWORD: Guideline B; Guideline E

DIGEST: In 2011, Applicant's long-term close contact with foreign national friends, his relationship with a female 17-year-old Chinese national, and his failure to timely file his federal income taxes triggered the applicability of Guideline E disqualifying conditions. The Judge's conclusion that no mitigating conditions applied is sustainable. The Judge concluded that essentially the same conduct was mitigated under Guideline B. These Guideline B conclusions are fundamentally at odds with the Judge's conclusions under Guideline E, where he stated that Applicant engaged in questionable recent behavior that placed him in a position of vulnerability to be exploited by foreign governments. The record evidence supports the Judge's conclusions about Applicant's foreign connections under Guideline E and does not support the contrary ultimate conclusion under Guideline B. Adverse decision affirmed.

CASENO: 10-10307.a1

DATE: 07/18/2012

DATE: July 18, 2012

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In Re:)	
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-----)	ISCR Case No. 10-10307
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Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 20, 2011, DOHA 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 Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 2, 2012, after the hearing, Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant timely appealed, and Department Counsel timely cross-appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's conclusions under Guideline E were arbitrary, capricious, or contrary to law. Department Counsel raises the following issue on appeal: whether the Judge's conclusions under Guideline B were arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 38 years old. He has never been married and has no children. He has a bachelor's and a master's degree. He served in the U.S. military from 1997 to 1999 as an enlisted man, and as an officer from 2002 to 2004. He received a medical disability discharge with severance pay. From about 1997 to 2011, Applicant traveled frequently to many foreign countries, including the People's Republic of China, Russia, Cambodia, Thailand, Malaysia, Indonesia, Singapore, Philippines, South Korea, Japan and Vietnam. Most of his travel was to visit with friends and tour the country.

Applicant used the Internet and other social media to stay in close contact with his extensive number of foreign national friends residing in the United States or in their home countries, and to establish new relationships. He would meet people online, establish a friendship with them, and then he would travel to the different foreign countries to visit them. Applicant sent nude pictures of himself over the Internet to online girlfriends in China, Thailand, and Brazil. He engaged in sexual intercourse in Thailand, the Philippines, and China with online friends. He also maintained correspondence with an Iranian national residing in the United States that he met online in 1998. Applicant had numerous foreign nationals as roommates in college. In June 2010, he had been sharing a room with a Thai citizen since March 2010.

In 2008, Applicant met online a 17-year-old resident and citizen of China. They became close friends. In early 2009, they exchanged naked pictures of themselves over the Internet. Applicant convinced her to share an apartment with him while she was attending college in the United States. In September 2009, she obtained a restraining order against Applicant, alleging that he posed a substantial likelihood of immediate danger and abuse against her. Applicant informed his facility security officer of the order filed against him. He also disclosed the order in his 2010 security clearance application (SCA).

Question 19 on Applicant's 2010 SCA asked whether he has or had close/or continuing contact with foreign nationals within the last seven years with whom he is bound by affection, influence and/or obligation. Applicant admitted his long-term contact with some foreign nationals, but claimed that he did not have a close relationship with any of them, and that he was not bound by affection, influence, or obligation to any of his foreign friends. Although Applicant did not disclose in his SCA any of his long-term relationships with foreign nationals, he provided a detailed account of most of his foreign travel and indicated that the purpose of his travel was to visit with

friends. Applicant did not disclose in his answer to Question 19 his relationship with the Chinese national. However, he provided a detailed account of his relationship with the Chinese national in his answer to Section 28 (Involvement in Non-Criminal Court Actions) of his SCA.

Elsewhere in his SCA, Applicant disclosed the following adverse information: he left a job under unfavorable circumstances, he has financial problems, he accumulated a debt to a prior employer for his personal use of a corporate credit card, and he failed to timely file his 2006 income tax return. Regarding the credit card, Applicant credibly testified that his employer allowed him to use the card to pay for combined business and personal travel expenses while attempting to get a business contract in a foreign country. Applicant agreed to reimburse the company if he was unable to get the contract. The quest failed. Applicant established a repayment plan. The company kept Applicant's last pay check (\$1,525) and wrote off the remaining \$400. In 2009, the IRS contacted Applicant about the delinquent 2006 tax return and the resulting \$1,500 tax debt. Applicant failed to resolve his tax problem after he submitted his 2010 SCA, after he was interviewed by a government investigator in June 2010, and after he answered DOHA interrogatories in 2011. He did not file his 2010 income tax return until December 2011. He filed his 2006 income tax return with his 2010 income tax return.

At his hearing, Applicant acknowledged that he acted immaturely in his relationship with the Chinese national and that emailing naked pictures of himself and receiving naked pictures of his foreign girlfriends was inappropriate behavior. He expressed remorse for his behavior. He claimed that he stopped using social media to stay in contact with his foreign friends in about 2009.

The Judge reached the following conclusions: Applicant has an extensive number of long-time friends who are foreign nationals. He maintained frequent contact with his foreign friends via online social networking. He traveled extensively to foreign countries to visit with his foreign friends, to tour the foreign countries, and to make new friends. Applicant exchanged naked pictures of himself and engaged in sexual intercourse with foreign nationals. He shared his apartment with foreign nationals and maintained frequent online contact with some of these roommates. The burden shifted to Applicant to produce evidence and prove a mitigating condition. The relationship of some of the foreign countries with the United States placed a significant burden of persuasion on Applicant to demonstrate that his travel to those countries and his relationships with his foreign national friends did not pose a security risk. Applicant has had access to classified information since 1997. Except for the SOR allegations, there was no evidence that he was involved in any prior incidents raising security concerns. He is considered to be dependable, trustworthy, honest, and with good judgment. He displayed poor judgment and placed himself in a vulnerable position through his actions. Notwithstanding, the evidence as a whole supported a determination that Applicant's ties and sense of obligation to the United States are sufficiently strong that he could be expected to resolve any conflict of interest in favor of the United States. On balance, and considering the evidence as a whole, Applicant mitigated the Guideline B security concerns.

The Government established a case for disqualification under Guideline E. Applicant admitted his continuing contact with his foreign national friends. His claim that he did not have a close relationship with any of his friends, or that he was or is not bound by affection, influence, and/or obligation is belied by the record in this case. The Judge found that Applicant did not deliberately falsify his January 2010 SCA, even though he was required by the question to disclose

relationships beyond just a mere friendship. He provided a detailed account of most of his foreign travel and indicated that the purpose of his travel was to visit with friends. He also provided a detailed account of his relationship with the Chinese national in his answer to another SCA question. Concerning the corporate credit card, Applicant's company authorized his personal use of the card for a business development venture. Thus no conduct of security significance attached. Applicant demonstrated extremely poor judgment when he befriended a 17-year-old Chinese national, exchanged naked pictures online, developed something more than a friendly relationship, entered into an agreement to share an apartment, and rented an apartment for the Chinese national and her father to occupy.

Applicant's failure to timely file his 2006 and 2010 federal income tax returns were of concern. He provided no reasonable explanation to justify his failure to timely file his 2006 income tax return. He did not file his 2006 and 2010 income tax returns until after his security clearance hearing.

Considering the evidence as a whole, Applicant's long-term close contact with foreign national friends, his relationship with the Chinese national, and his failure to timely file his federal income taxes triggered the applicability of Guideline E disqualifying conditions. No mitigating conditions applied. Applicant's questionable behavior was recent and it occurred during many years. Applicant's long-term friendship and continued contact with citizens of nations whose governments are known to conduct intelligence operations against the United States created a concern. Applicant's exchange of nude pictures and having sexual relationships with foreign nationals placed him in a position of vulnerability to be exploited by those foreign governments. Although he did not falsify his application, his failure to disclose his long-term contacts with foreign nationals raised security concerns. Applicant failed to comply with his legal obligation to timely file and pay his taxes. His late filing did not mitigate the fact that he demonstrated poor judgment and an unwillingness to comply with rules and regulations. Security concerns under Guideline E were not mitigated. Under the whole-person concept, Applicant received credit for his service to the United States, his good work for federal contractors, and his many years of holding a security clearance without incident. Nevertheless, Applicant's behavior demonstrated poor judgment and showed his unwillingness to comply with rules and regulations.

Applicant argues both that the Judge failed to discuss the applicability of Guideline E mitigating conditions and that the discussion he did engage in was inadequate. Applicant's first point lacks merit, in that the Judge clearly engaged in a discussion regarding the Guideline E mitigating conditions. After a review of the Judge's decision, the Board concludes that Applicant's

second assertion lacks merit as well. The Judge specifically listed ¶ 17(c)¹, ¶ 17(d)², and ¶ 17(e)³ as three conditions under Guideline E that could potentially mitigate the personal conduct concerns. He then went on to comment upon the recency and continuous nature of Applicant's conduct regarding foreign nationals, and noted that the conduct took place with citizens of other countries whose governments are known to conduct intelligence operations against the United States or have interests inimical to the United States, thus creating a position of vulnerability. These factors support the Judge's conclusion that ¶ 17(c) did not work to mitigate the Government's security concerns. ¶ 17(d) and ¶ 17(e) are basically concerned with steps the Applicant has taken to reduce the likelihood of future untrustworthy, unreliable behavior or vulnerability to exploitation, manipulation, or duress. While the Judge's discussion of these mitigating conditions is less explicit, he does cite Applicant's continued contact with foreign nationals and the fact that Applicant did not file his taxes until December 2011. These facts undercut the notion that Applicant has changed his behavior or taken steps to overcome doubts about his behavior. While the Judge could have discussed the applicability of ¶ 17(d) and ¶ 17(e) in more detail, decisions of Administrative Judges are not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 00-0311 at 2 (App. Bd. Mar. 8, 2001). After a review of the decision, the Board concludes that the Judge's discussion of the Guideline E mitigating conditions, though perfunctory at points, was adequate.

Applicant argues that his conduct under Guideline E was mitigated and that the Judge erred by not so concluding. He states that he no longer uses social networks for contacting foreign nationals and that he kept his employer's security officer fully apprised of his travels and foreign acquaintances. These facts, though mitigating, do not mandate an ultimate finding in Applicant's favor. To the extent that Applicant asserts that specific mitigating conditions have been met, such arguments amount to a mere disagreement with the Judge's weighing of the evidence. This is particularly true when the totality of the record evidence is considered under Guideline E. That evidence is comprised of the disparate activities of failure to file federal income taxes in a timely fashion, frequent travel to various foreign countries for personal reasons, including meeting women, and engaging in on-line social networking with multiple foreign women. This evidence provides a reasonable basis for the Judge's adverse security clearance decision.

Applicant points out that the Judge found that he had mitigated the security concerns under Guideline B but "oddly enough" he did not mitigate the exact same concerns under Guideline E. Applicant notes that this is contradictory and asserts that this bolsters his argument that the Judge's adverse security clearance decision is unsustainable. The Board concludes that the Judge's findings and conclusions under Guideline E are sustainable. We now turn our attention to the Judge's findings and conclusions under Guideline B.

¹"[T]he 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[.]"

²"[T]he individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur[.]"

³"[T]he individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress."

Department Counsel cross-appealed, also noting the apparent contradiction between the Judge's findings and conclusions under Guideline E and those under Guideline B. He argues that the Judge erred in applying the Guideline B disqualifying conditions and by finding the Guideline B security concerns mitigated. Department Counsel's position has merit.

Department Counsel argues that the Judge erred by not applying ¶ 7(i).⁴ Given Applicant's extensive and repeated travel overseas and his activities with foreign nationals while there, Department Counsel is correct in stating that this Guideline B disqualifying condition applies on its face to the facts of this case. The error is significant in that the omitted disqualifying condition speaks in terms of vulnerability, particularly when traveling abroad, and the Judge mitigated the Guideline B case ultimately by analyzing the case in terms of conflict of interest. The Judge found two Guideline B mitigating conditions, ¶ 8(a)⁵ and 8(b),⁶ applicable, and both speak in terms of conflict of interest. Applicant's frequent travel outside the U.S. and the resulting friendships and sexual relationships with foreign nationals, some of whom are citizens of countries with interests inimical to those of the United States, makes this a case largely about vulnerability to exploitation, coercion and duress. While the Judge's Guideline B analysis does not totally ignore this important aspect of the case, the mitigating conditions he applies do not speak primarily to vulnerability, and he does not adequately address the vulnerability aspect, in his mitigation analysis.

The Judge stated that, in deciding whether Applicant placed himself in a position to be exploited, he considered the form of government and relationship with the United States of the foreign countries involved, three of whom were China, Russia, and Iran. The Judge went on to say that the relationship of some of these countries with the United States places a significant burden of persuasion on Applicant to demonstrate that his travel to those countries, and his relationships with his foreign national friends do not pose a security risk, and that he is not vulnerable to manipulation. The Judge then concluded that Applicant had mitigated the Guideline B case based on his U.S. citizenship, his military service record, his unblemished security record, his reputation for dependability and honesty, and his longstanding ties and sense of obligation to the United States. While these favorable facts are matters that should be considered, the Judge does not explain how they serve to satisfy the significant burden of persuasion he placed on Applicant to demonstrate how his actions overseas and with foreign nationals were not a security risk. Moreover, the Judge does not explain how Applicant's demonstrations of poor judgment, as manifested by his distribution of naked pictures of himself to numerous girlfriends in foreign countries and his relationship with the Chinese national, relate to his conclusion that Applicant can be expected to resolve any conflict of interest in favor of the United States. The Judge's Guideline B conclusions are fundamentally at

⁴“[C]onduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government or country.”

⁵“[T]he 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.[.]”

⁶“[T]here is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest[.]”

odds with his conclusions under Guideline E, where he stated that Applicant engaged in questionable recent behavior that placed him in a position of vulnerability to be exploited by foreign governments. The record evidence supports the Judge's conclusions about Applicant's foreign connections under Guideline E and does not support the contrary ultimate conclusion under Guideline B.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant with regard to both Guidelines B and E is not sufficient to demonstrate the Judge's decision under Guideline E is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision under Guideline E, "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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board