

KEYWORD: Guideline B; Guideline E

DIGEST: An SOR is not held to the strict requirements of a criminal indictment. The SOR was sufficient to place Applicant on notice that his relation with his ex-wife in China was of security concern. Adverse decision affirmed.

CASENO: 14-03200.a1

DATE: 07/16/2015

DATE: July 16, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-03200
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 18, 2014, 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 Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 28, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied due process and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline E are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal. A U.S. citizen by birth, Applicant served in the U.S. military, in which he achieved the grade of E-5. He was honorably discharged in the early 2000s and has since worked as a Federal contractor in Japan for several years.

It was in that country that he met his future wife, a citizen of China who was away from home attending school. The two married in the late 2000s, and they had a child. At some point after the birth of their child, Applicant and his wife experienced marital problems. They divorced, sharing joint custody of their child. However, Applicant's now ex-wife moved to China, taking their child with her. Applicant has visited China in an effort to get the child back. Applicant has weekly contact with his ex-wife and his child over the internet.

China has an authoritarian government that is dominated by the Communist Party. China has a poor record regarding human rights. China aggressively targets sensitive and protected U.S. technology and economic intelligence. It has targeted the U.S. with active intelligence gathering programs. Chinese authorities have monitored telephone conversations, fax transmissions, e-mail, text messaging, and internet communications. Authorities have opened and censored mail, and security services routinely enter residences and offices to gain access to computers, telephones, and fax machines.

The Judge's Analysis

The Judge resolved the Guideline E allegation in Applicant's favor, as he did with most of the allegations under Guideline B. However, concerning the single allegation pertaining to Applicant's wife, the Judge concluded that the circumstances raised a concern that Applicant is subject to a heightened risk of coercion. He cited to evidence that (1) the now ex-wife has moved back to China, along with the couple's child; (2) Applicant has weekly communication with the ex-wife and child through the internet; and (3) China has a poor human rights record and actively seeks U.S. protected information.

In further concluding that Applicant has not met his burden of persuasion as to mitigation, the Judge acknowledged that Applicant is in a difficult position. However, he stated that Applicant may well have to choose between the interests of his ex-wife and those of U.S. security. "Because of Applicant's continuing ties to his ex-wife and the nature of the government of China," the Judge concluded that Applicant's mitigation evidence was "insufficient to overcome the significant security concerns generated by Applicant's ex-wife[.]" Decision at 7.

Discussion

Applicant contends that he was denied due process. He states that the SOR alleged his then

wife as a concern but not his child. He states that, had he known that the status of his child was at issue, he could have prepared his mitigation case accordingly.

An SOR is an administrative pleading that is not held to the strict requirements of a criminal indictment. An SOR does not have to allege every relevant fact that might arise at a hearing. *See, e.g.*, ISCR Case No. 11-12461 at 3 (App. Bd. Mar. 14, 2013). Moreover, conduct or circumstances not alleged in an SOR may be considered in evaluating an applicant's evidence for extenuation or mitigation. *See, e.g.*, ISCR Case No. 09-06770 at 3 (App. Bd. Nov. 8, 2010). In the case before us, the allegation stated the following: "Your spouse is a citizen of China currently residing in the United States." SOR ¶ 1.a. In responding to the SOR, Applicant admitted the allegation, adding that he and his wife had divorced and that she had returned to China. Evidence concerning his child was developed at the hearing.

Under the facts of this case, we conclude that the SOR was sufficient to place Applicant on notice that his relationship with his now ex-wife raised security concerns. The Judge's analysis of these concerns focused principally on this relationship, addressing the child as a significant reason that the ex-wife posed a heightened risk that Applicant could be subjected to duress or coercion. We conclude that the Judge's findings about the child did not raise matters beyond the scope of the SOR. Accordingly, we conclude that Applicant received adequate notice of the concerns raised in his case and that his ability to prepare a case for mitigation was not impaired. Applicant was not denied due process.¹

Applicant cites to evidence of his military service, his having held a clearance for many years without incident or concern, and to evidence of the circumstances surrounding his relationship with his ex-wife. A Judge is presumed to have considered all of the evidence in the record. Applicant's argument on appeal is not enough to rebut that presumption or to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 08-09626 at 2 (App. Bd. Aug. 5, 2009).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

¹Even if one concluded that the Judge erred by not amending the SOR to allege independent concerns about Applicant's child, Applicant has cited to no evidence that he would have presented in mitigation of those concerns. Under the circumstances, it is unlikely that amending the SOR would have led to a different result. We also note that, at the beginning of the hearing, the Judge advised Applicant that if he had "any questions or concerns at any point" to let the Judge know and he would address them. Tr. at 7. A bit later, Department Counsel stated that the security concern involving Applicant's spouse required consideration of the circumstances regarding the child. Tr. at 14. Applicant did not object or otherwise convey to the Judge a belief that this might impair his ability to present his case in mitigation. A reasonable person could conclude that Applicant forfeited this issue by failing to raise it at the appropriate time. Even *pro se* applicant's are expected to take reasonable steps to protect their rights. *See, e.g.*, ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014).

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board