

KEYWORD: Guideline K; Guideline E; Guideline B

DIGEST: Totality of record evidence demonstrates that Applicant's failure to list his Russian associate was knowing and willful. Furthermore, Applicant failed to mitigate the Guideline B security concerns in his name. Adverse decision affirmed.

CASENO: 06-26489.a1

DATE: 07/16/2009

DATE: July 16, 2009

In Re:)	
)	
-----)	ISCR Case No. 06-26489
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Diana J. Veilleux, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 22, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information), Guideline E (Personal Conduct), and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 31, 2009, after the hearing, Administrative Judge Joan Caton Anthony 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 the Judge's findings of fact are

supported by substantial record evidence; whether the Judge erred in her evidentiary rulings; whether the Judge failed to properly apply the mitigating conditions; and whether the Judge's whole-person analysis was arbitrary, capricious, or contrary to law.¹ Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a researcher, investigator, and program manager for a government contractor. He holds a Ph.D. in engineering. In the mid-1990s, Applicant met a woman, whom the Judge identified as "Z," a citizen of Russia, who resided in a third country and was employed as a member of a university faculty. In early 2005, Applicant and Z began a romantic relationship. He made three personal trips to the third country to visit Z.

In April 2005, Applicant's employer briefed him on his duty to report foreign contacts, due to Applicant's eligibility for special access. This briefing informed Applicant that he "must report all close and continuing relationships with foreign nationals." Decision at 3. Although advised of this requirement, Applicant did not report his relationship with Z until November 2005. During their relationship, Applicant informed Z that he had access to classified information. In 2006 Applicant and Z married.

Z is a dual citizen of Russia and the third country, as are her two daughters. She received her education in Russia. Her father and mother are residents and citizens of Russia. Both receive government pensions. Z also has a half-sister who is a citizen and resident of Russia. Z speaks with her parents weekly and with her sister approximately once every six months. She sends money to her parents on a monthly basis.

At least since 1997, Russia has targeted U.S. technologies and has sought to obtain protected information through industrial espionage. The Russian Federal Security Service operates outside Russia by targeting national security and environmental researchers. The Russian government conducts electronics surveillance, including the monitoring of internet and e-mail traffic.

After reviewing the record, the Board concludes that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. *See* Directive ¶ E3.1.32.1. (Substantial evidence is "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.") Applicant states that the Judge erred in concluding that he had intentionally failed to report his contacts with Z. The Board notes the testimony of the security officer for Applicant's employer. This person stated that she had briefed Applicant of his reporting requirements in April 2005, several months before he complied. Tr. at 38-41. This witness's testimony, along with other record evidence, *e.g.*, Applicant's prior compliance with foreign contact reporting requirements (Tr. at 138), support a conclusion that his failure to report his relationship with Z was knowing and willful. The Judge's conclusion, therefore, is sustainable. In support of his appeal, Applicant points to decisions by the Hearing Office, which he argues support his request for a favorable determination. The Board gives due consideration to these cases. However, each case "must be decided upon its own merits." Directive ¶ E2.2.3. Moreover, Hearing Office

¹The Judge's favorable finding under subparagraph 2(b), Guideline E, is not at issue in this appeal.

decisions are binding neither on other Hearing Office Judges nor on the Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). The Board finds no basis to disturb the Judge’s evidentiary rulings. *See* ISCR Case No. 03-08813 at 5 (App. Bd. Nov. 15, 2005) (The Board will examine a Judge’s evidentiary rulings to determine if they are consistent with Executive Order 10865 and with the Directive and to determine if they are arbitrary, capricious, or contrary to law.).

After reviewing the record, the Board concludes 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,’” both as to the mitigating conditions and the whole-person factors. *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 Judge’s decision that “it is not clearly consistent with national security to grant Applicant eligibility for a security clearance” is sustainable on this record. Decision at 12. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’”).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin
Jean E. Smallin
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