

KEYWORD: Guideline B; Guideline E; Guideline J

DIGEST: Applicant has close family member and a business partner in Russia. Applicant served in the Red Army. There is also substantial evidence of a false statement. Favorable decision reversed.

CASENO: 07-05686.a1

DATE: 11/12/2008

DATE: November 12, 2008

_____)	
In Re:)	
)	
-----)	ISCR Case No. 07-05686
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Department Counsel

FOR APPLICANT

Eric A. Eisen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 18, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline L (Outside Activities), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 28, 2008, after the hearing, Administrative Judge John Grattan Metz, Jr., granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred by concluding that the Government had not met its burden of production under Guideline B and whether the Judge’s adverse decision under Guideline E fails to consider an important aspect of the case. Finding error, we reverse.¹

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant was born in Russia, which was then a part of the Soviet Union. He immigrated from Russia in the early 1990s and to the U.S. a few years later. He became a U.S. citizen in the early 2000s. He and his wife have two children. Applicant has a sister who is a citizen and resident of Russia. His sister calls him “every few weeks” to check on Applicant and his family. Decision at 2.

Russia is a “nominal democracy with a mixed human rights record . . . Russia has an active and significant information collection program focusing on the U.S. As of 2005, Russia was one of the two most aggressive collectors of sensitive and protected U.S. technology and accounted for much of such targeting. However, Russia has not been demonstrated to target U.S. citizens to obtain protected information.” *Id.* at 3

Applicant answered “no” to question 17a of the security clearance application (SCA). “This answer is alleged to be false because a U.S. company co-founded by Applicant (1) had business clients in [European and Asian countries, including Russia] and (2) Applicant had business partners at this company and a second company he co-founded who were resident citizens of Russia.” *Id.* at 2.

B. Discussion

¹The Judge’s favorable decision under Guidelines L and J is not at issue in this appeal.

The Appeal Board’s review of the Judge’s findings of facts is limited to determining if they are supported by substantial evidence—“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.” Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). In evaluating the Judge’s findings, we are required to give deference to the Judge’s credibility determinations. Directive ¶ E3.1.32.1. The Board will consider the sufficiency of the Judge’s findings to the extent necessary to address the issues which Department Counsel has raised on appeal.

Whether the Record Supports the Judge’s Ultimate Conclusions

A Judge is required to “examine the relevant data and articulate 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 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). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

Once a concern arises regarding an Applicant’s security clearance eligibility, 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 presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge’s rulings or conclusions are arbitrary or capricious, the Board will review the Judge’s decision to determine whether: 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. In deciding whether the Judge’s rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

In the analysis section of his decision, the Judge stated that “the [G]overnment failed to establish a disqualification under Guideline B. Considering the country involved, Russia and the U.S. enjoy competitive foreign relations, although they cooperate on a wide variety of issues. While Russia is actively engaged in the collection of U.S. information, there is no evidence suggesting that it targets its expatriate citizens . . .” Decision at 4. Department Counsel argues that the Judge erred by concluding that the Government produced no evidence of heightened risk under section 7(a) of Guideline B. Department Counsel’s argument is persuasive. The Board notes the Judge’s findings and record evidence demonstrating that Applicant has a close family member in Russia, with whom he regularly communicates; that Applicant has a business partner who at the time of the hearing was a citizen of Russia; that Applicant served in the Red Army; and that Russia is a nation with a problematic human rights record that actively seeks U.S. intelligence. Viewed as a whole, these matters are sufficient to raise a Foreign Influence security concern.² As pointed out by Department Counsel, the Judge’s conclusions in this case have the practical effect of requiring Department Counsel to prove affirmatively that Russia specifically targets U.S. citizens in the course of its attempt to gather protected information. The language of the Directive (Guideline B) on this topic is inclusive and does not require this level of proof from Department Counsel in order to raise security concerns that shift the burden of persuasion to Applicant. The Judge’s conclusion on this matter is not sustainable.³

Department Counsel also challenges the Judge’s decision under Guideline E, arguing that the Judge erred in concluding that the evidence presented by the Government did not demonstrate a security concern. Question 17a of the SCA required an applicant to state whether he has any “foreign property, business connections, or financial interests.” Government Exhibit (GE) 1 at 10. As stated above, Applicant answered “no” to this question. The Board notes GE 2 at 6, which is a summary of Applicant’s security clearance interview. This exhibit describes Applicant as identifying a foreign national (FN) with whom he was, at the time of the interview, a partner in a business

²See Directive ¶ E2.7(a): “contact with a foreign family member . . . 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[.]” Directive ¶ E2.7(b): “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information[.]”

³The Board has remanded cases in order for the Judge to make findings of fact and conclusions regarding the current geopolitical situation in Russia. *See, e.g.*, ISCR Case No. 07-14508 at 4 (App. Bd. Oct. 22, 2008) (“The Board also notes certain events which have occurred since the close of the record and which have a bearing on this case. In August 2008 Russia attacked Georgia . . . For a discussion of official notice in DOHA proceedings, *see* ISCR Case No. 05-11292 at 2-4 (App. Bd. Apr. 12, 2007) . . . A current and accurate assessment of the “geopolitical situation” and the “security/intelligence profile of the country vis-a-vis the United states” is crucial in Guideline B cases. *See* ADP Case No. 06-14978 at 3 (App. Bd. Oct. 11, 2007); ISCR Case No. 04-02630 at 2-3 (App. Bd. May 23, 2007). In this case, Applicant has regular contact with citizens of a country that has engaged in armed conflict with a democracy friendly with the U.S. . . . This is a matter bearing on the Guideline B security concern, which requires consideration of the nature of the foreign country.”) In light of Board’s disposition of the case under consideration here, however, no point would be served in remanding it for additional findings on these matters.

venture involving software development. The Board also notes Applicant's response to the SOR, and the Judge's findings of fact, concerning another company founded by Applicant and which has foreign clients in Europe, Asia, and Russia. The names of these clients suggest that they are companies engaged in business activities. GE 3, Answers to Interrogatories, at 4. Under the facts of this case, Applicant's SOR response and the other record evidence described above; Applicant's apparent command of English,⁴ his formal education, and business experience; and the clarity of the question at issue here constitute substantial evidence of a false statement concerning foreign business connections, which raises security concerns under Guideline E.⁵ The Judge's conclusion that the Government had not presented security concerns under Guideline E is not sustainable on this record.

Furthermore, the Judge's conclusion that Applicant did not willfully falsify his SCA is not sustainable in light of the contrary evidence in the record. The Board pays special attention to GE 2 at 6, in which Applicant explained why he left FN's name off his SCA. "This contact is not reported on his security form because it is a business relationship, and when he was required to fill out the form for the [interview], he did not want information to be conflicting from original security paperwork." Although this comment is not elsewhere elaborated upon, it does raise a reasonable impression that Applicant acted with deceptive intent in answering relevant questions. Additionally, this comment does not appear consistent with Applicant's testimony at the hearing to the effect that he left FN's name off the SCA because, although a Russian citizen, FN resides in the U.S.⁶ Tr. at 106-7. The Judge's decision does not address this apparent contradiction, nor does he assess Applicant's credibility in light of it. Therefore, the Judge has failed to consider an important aspect of the case.

The record as a whole does not support a conclusion that Applicant has met his burden of persuasion in light of the *Egan* standard. Therefore, the Judge's ultimate decision is not sustainable.

⁴Applicant testified that, from an early age, he perfected his English by reading widely in American literature, including the works of James Fenimore Cooper, Jack London, and Theodore Dreiser. Tr. at 45.

⁵Directive ¶ E2.15: "conduct involving questionable judgment, lack of candor . . . can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process . . ."

⁶The Judge did not permit Department Counsel to question Applicant as to what kind of information he understood Question 17a to be soliciting. The Board concludes that Applicant's understanding of the meaning of this question is relevant and a proper matter for cross-examination.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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