

KEYWORD: Guideline B; Guideline F

DIGEST: Applicant’s contacts with Russia, to include his having previously been married to a Russian national whom he suspected of involvement with organized crime, and his four bankruptcy actions undermine the Judge’s favorable security clearance decision. Given the record evidence of security concern, Applicant’s evidence was insufficient to meet his burden of persuasion as to mitigation. Favorable decision reversed.

CASE NO: 09-06831.a1

DATE: 03/08/2011

DATE: March 8, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-06831
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 15, 2010, 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 F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 26, 2010, after the hearing, Administrative Judge Noreen A. Lynch granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's analysis of the mitigating conditions under Guideline B and Guideline F was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is a 56-year-old employee of a Defense contractor. He has a Master's degree. He served in the U.S. military from 1978 until 2000.

Applicant married in 1983. His wife became ill soon after their marriage. She died in 1994. Applicant and his first wife had a daughter. Applicant incurred medical and other expenses, for example for child care during his deployments.

In 1995, Applicant traveled to Russia. He visited a Russian woman (Spouse 2) whom he had met through a dating service located in the U.S. He and Spouse 2, a Russian citizen, married in 1995. He sponsored her and her son to come to the U.S. They had a daughter together. Spouse 2 mismanaged the family money, opening accounts without his knowledge. After a contentious proceeding, they divorced in 2003. Spouse 2 is now a U.S. citizen and lives in the U.S.

In 2003, Applicant visited Russia four times, "looking for 'romance' and to visit a friend who lived there." Decision at 2. In 2004 he met a woman who became his third wife (Spouse 3). He visited Russia six times in 2004 and four times in 2005 to visit her. They married in 2005. His wife became a naturalized citizen and lives with him.

Applicant's parents-in-law are citizens and residents of Russia. Applicant's wife e-mails them infrequently. Applicant and his wife visited them in 2006, 2008, and 2009.

Applicant enjoys a good reputation for his job performance, honesty, and loyalty. "Applicant testified credibly that as a U.S. citizen, he would not jeopardize the United States." Decision at 3.

Russia and China have been the most aggressive collectors of sensitive and protected United States technology and account for the majority of targeting. Russia has been a leader in industrial espionage against the U.S. since 1997. Russian espionage specializes in military technology, as well as gas and oil industry technical expertise.

Russia and the U.S. cooperate on counter terrorism, reducing their respective strategic arsenals, and stemming the proliferation of weapons of mass destruction.

Applicant was discharged in Chapter 7 bankruptcy in 1987, 1995, and 2004. He attributed the latest of these, in part, to expenses incurred during his divorce from his wife, who mismanaged the family finances and incurred large debts without Applicant's knowledge. He filed for Chapter 13 bankruptcy protection in 2010. Four of the SOR debts are either discharged or included in the Chapter 13 bankruptcy petition. Applicant experienced unemployment from October 2006 until June 2007 and again from May to November of 2008. He currently earns about \$83,000 a year and has a pension from the military of around \$45,000 a year. He also receives \$1,000 a month from the

VA due to a disability.

Discussion

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).

Department Counsel argues that the Judge’s favorable decision offers an explanation that runs contrary to the weight of the record evidence and fails to consider important aspects of the case. This argument is persuasive. We note the Judge’s findings and record evidence of the following:

Applicant’s in-laws are citizens and residents of Russia. In-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse. ISCR Case No. 03-26176 at 5 (App. Bd. Oct. 14, 2005).

Applicant met his second and third wives, both Russian citizens, through a dating service. Government Exhibit (GE) 10, Answers to Interrogatories, contains a summary of Applicant’s

security clearance interview. It states: “[Applicant] was reluctant to disclose information regarding how he met [Spouse 2], but after repeated questioning he volunteered that he met her in approximately 01/1995 through an international dating service. [Applicant] could not recall the dating service due to a ‘hazy memory’ and would not be able to find this information because he did not maintain any record of it.”

GE 5, a law enforcement record, contains information Applicant provided to a law enforcement agency regarding his concerns that Spouse 2 was involved with organized crime. The document does not implicate Applicant himself in criminal activity.

Spouse 2 became a U.S. citizen in 2001. She and Applicant separated in 2003.

Concerning Spouse 3, the interview summary states: “In approximately 02/2003, [Applicant] met another Russian woman [Spouse 3] through an online international dating service . . . [Applicant] appeared reluctant to disclose how [he] met [Spouse 3]. He was also unable to recall the name of the dating service and would be unable to obtain the name due to a hazy memory.” Applicant’s reluctance to discuss how he met Spouses 2 and 3 was not alleged as a security concern. However, that reluctance, viewed in light of GE 5, underscores the risky nature of Applicant’s conduct, thereby impugning his judgment and reliability.

In Guideline B cases, the nature of the foreign government involved, the intelligence gathering history of that government, and the presence of terrorist activity are important considerations that provide context for the other record evidence and must be brought to bear on the Judge’s ultimate conclusions in the case. The country’s human rights record is also an important consideration. *See, e.g.*, ISCR Case No. 05-03250 at 4-5 (App. Bd. Apr. 6, 2007). The Judge found that Russia is an active collector of sensitive U.S. technology. “Russia continues to strengthen its intelligence capabilities and directs them against U.S. interests worldwide. Moscow’s intelligence effort includes espionage, technology acquisition, and covert action efforts to alter events abroad without showing its hand.” Annual Threat Assessment, Director of National Intelligence, February 2, 2010.

There have been recent allegations of electronic surveillance by Russian government officials and entry into residences and other premises without warrants. The Russian government requires that telephone and cellular companies grant the Ministry of Internal Affairs and the Federal Security Service (FSB) remote access to their clients’ databases, as well as requiring Internet service providers and telecommunication companies to allow the government to tap telephone calls and monitor information (including private e-mail communications) over the Internet. Human Rights Report: Russia, March 11, 2010.

Applicant has had ongoing financial difficulties for many years, going back to the 1980s, as evidenced by his three Chapter 7 bankruptcy discharges and his current Chapter 13 petition. The Guideline F security concern states that financial problems may indicate a lack of self control or judgment. Moreover, the Directive notes that a person who is financially overextended is at risk of engaging in illegal acts to generate funds. Directive, Enclosure 2 ¶ 18.

The Judge’s decision, viewed as a whole, is unsustainable because it fails to consider an

important aspect of the case and offers an explanation for the decision that runs contrary to the weight of the record evidence. ISCR Case No. 03-22861, *supra*, at 3. The evidence described above, and the record as a whole, do not support the Judge's favorable decision, in light of the standard set forth in *Egan, supra*, and the Directive's requirement that any doubt concerning an Applicant's access to classified information be resolved in favor of national security. Directive, Enclosure 2 ¶ 2(b). The government is not estopped from making an adverse clearance decision even though there were prior favorable adjudications. *See, e.g.*, ISCR Case No. 07-17383 at 2 (App. Bd. Feb. 12, 2009).

Order

The Judge's favorable security clearance decision is REVERSED.

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