

KEYWORD: Guideline B

DIGEST: Department Counsel did not rebut the presumption that the Judge considered all of the evidence. Not all contacts between persons with clearance and foreign officials are disqualifying. Favorable decision affirmed.

CASE NO: 14-05013.a1

DATE: 09/27/2016

DATE: September 27, 2016

In Re:)	
)	
-----)	ISCR Case No. 14-05013
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 10, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On June 1, 2016, after considering the record, Administrative Judge Martin H. Mogul 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 issues on appeal: whether the Judge failed to consider important aspects of the case and whether the Judge's application of the pertinent mitigating condition was erroneous. Consistent with the following, we affirm.

Judge's Findings of Fact

Applicant is a 74-year-old retired professor from a U.S. university who has emeritus status and still maintains an campus office. He was born in the United States. His wife, child, and sister are U.S. citizens. He received his bachelor's, master's, and doctorate degrees from a U.S. university.

Applicant admitted both of the SOR allegations. The first alleged that Applicant maintains contact with an associate who is a citizen and resident of Taiwan, who is the director of a scientific institute in Taiwan, and who previously served for years as a senior official of the Taiwanese Government. Applicant wrote that he and the associate have had a purely scientific interaction. For several years at the U.S. university, they worked together on research and teaching programs. After the associate left the university, they did not have contact for years until the associate proposed that Applicant serve on a review board at the Taiwanese scientific institute. Applicant asserted, "At no time in our entire history have [the associate] and I discussed any political or social issues; nor did we discuss any of my government . . . industrial research efforts." Decision at 3.¹

The second SOR allegation asserted that Applicant agreed to serve as an advisory committee member of the Taiwanese scientific institute and traveled to Taiwan in 2013. Applicant stated that he was encouraged by his university to serve on the review board to promote cooperation and collaboration. During his visit to Taiwan of less than one week, he met with faculty and students to hear descriptions of their research and to discuss their goals and progress. He reiterated that all of his discussions were of a scientific nature.

In his Response to the FORM, Applicant noted the recitation of the facts made no mention of his assertion that, during his trip to Taiwan, he had no discussion of his Government or industry research with foreign scientists. He also provided a letter from the director of a U.S. scientific institute that stated Applicant was one of the most accomplished faculty members, has made significant contributions to national security, and it is inconceivable that he would ever do anything to jeopardize U.S. security. The director also described the Taiwanese associate as a friend of the U.S. and distinguished professor who has two children who are citizens and residents of the United States.

Taiwan has an elected democratic government. It is a leading producer of high-technology goods and engages in industrial and economic espionage. Proprietary information technology is high on the Taiwanese list of targeted information to be acquired by their agents from foreign governments and businesses.

¹ In the File of Relevant Material (FORM), Department Counsel noted that it is not the discussion of social and political issues that are the security concern in this case, but the scientific matter associated with the classified DoD projects.

Judge's Analysis

The Judge found that disqualifying conditions ¶¶ 7(a)² and 7(b)³ applied, but ¶ 8(b)⁴ mitigated those security concerns. After reiterating facts about Applicant and the Taiwanese associate, the Judge noted Applicant clearly asserted that, during his entire history with the associate and during his trip to Taiwan, no discussion was ever held about his research for Government or industry.

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). “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b). 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.

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).

² Directive, Enclosure 2 ¶ 7(a) states, “contact with a foreign family member, business or professional associate, friend, 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[.]”

³ Directive, Enclosure 2 ¶ 7(b) states, “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligations to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information[.]”

⁴ Directive, Enclosure 2 ¶ 8(b) states, “there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country was so minimal, or the individual has such a deep and longstanding relationship 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[.]”

In deciding whether the Judge's rulings or conclusions are erroneous, we 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. *See, e.g.*, ISCR Case No. 14-02563 at 2-3 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge's decision was flawed because it failed to consider important aspects of the case. His arguments focus on the high-level of the associate's governmental position, the relationship between the Taiwanese governmental agency involved and the scientific institute, and the timing of the associate's request to Applicant. Specifically, he noted that the associate left a high-level position in the Taiwanese government shortly before approaching Applicant about serving on the review board for the Taiwanese scientific institute. However, the Judge made findings about most of those matters. Department Counsel's arguments are not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-04959 at 2 (App. Bd. Apr. 6, 2016).

Noting the sparse record, Department Counsel further contends that the Judge's mitigation analysis is flawed. Specifically, Department Counsel argues that the Judge neither addressed that Taiwan is an active collector of industrial information nor discussed the associate's former high-level governmental position in Taiwan in the decision's analysis section, but merely commented that the associate had ties to the U.S. as a respected scientist. As noted above, the Judge made findings of fact about those matters, which establishes that he was cognizant of them when he conducted his mitigation analysis. In assessing Applicant's deep and longstanding relationships and loyalties in the U.S., the Judge noted that Applicant is a U.S.-born citizen; his wife, child, and sister are U.S. citizens; his education was entirely in the U.S., and he was employed at a U.S. university for about 35 years before retiring. The university developed a memorandum of understanding (MOU) with the Taiwanese scientific institute to promote cooperation and collaboration and, as part of that MOU, encouraged Applicant to serve on the review board of the foreign scientific institute. FORM Item 1 (Applicant's Answer to the SOR). The record is void of any evidence that Applicant received any compensation for his service on the review board. His trip to Taiwan was less than a week in November 2013 and his involvement with the foreign scientific institute was apparently for about one month. FORM Item 2 (Applicant's security clearance application). Applicant stated that, during his trip to Taiwan, he had no discussion with foreign scientists about his research for the U.S. government or industry. In his April 2014 background interview, Applicant stated that he received one email from the foreign associate since November 2013, and he does not have any lasting contacts with any foreign nationals. FORM Item 4 (summary of Applicant's background interview). While contacts between individuals who hold security clearances and current and former high-level foreign officials often warrant scrutiny, not all of those contacts are disqualifying.

Given the record before him, the Judge articulated a rational explanation for his favorable decision. An appealing party's disagreement with a Judge's decision is not a sufficient basis to establish that he erred. ISCR Case No. 03-21190 at 2 (App. Bd. Mar. 12, 2007). The Board

concludes that the Judge's favorable security decision is not arbitrary, capricious, or contrary to law, given the totality of the facts and circumstances of this case. See Directive ¶ E3.1.32.3.

Order

The Judge's favorable security clearance decision is AFFIRMED.

Signed: James E. Moody_____

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy_____

James F. Duffy
Administrative Judge
Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

Department Counsel raises the issue of whether the Judge's analysis adequately considered and addressed the role of Applicant's foreign contact: a man with a history as a high level official in a country that engages in espionage against the United States. I favor remanding the case for the issuance of a new decision. Such a remand would include instructions for the Judge to discuss in detail how Applicant's contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. The Judge could then address in detail to what extent and how the risk presented is mitigated by record evidence. *Compare, e.g.*, ISCR Case No. 14-03112 at 3-4 (App. Bd. Nov. 3, 2015), ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015), and ISCR Case No. 13-01341 at 5 (App. Bd. Nov. 10, 2016).

Signed: Michael Ra'an_____

Michael Ra'an
Administrative Judge
Chairperson, Appeal Board