

KEYWORD: Guideline B

DIGEST: In the case before us, the Judge discusses why he concluded that the security concern arising from the presence of Applicant’s in-laws in Taiwan was mitigated. In that context, he spells out in some detail the specific circumstances of Applicant’s Taiwanese in-laws. Favorable decision affirmed.

CASENO: 14-05986.a2

DATE: 05/26/2017

DATE: May 26, 2017

In Re:)
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-----) ISCR Case No. 14-05986
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Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Deputy Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 21, 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 Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 30, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. On October 14, 2016, the Appeal Board remanded the case to the Judge to correct certain identified errors. On January 19, 2017, the Judge

issued his Decision on Remand. Department Counsel appealed this Decision pursuant to the Directive.

Department Counsel raised the following issues on appeal: whether the Judge's mitigation analysis was unsupported by the record evidence and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant married his wife in Taiwan in the mid-1990s. Applicant's mother-in-law and two siblings-in-law are citizens and residents of Taiwan. Both siblings performed mandatory service in the Taiwanese military. Applicant has little contact with his Taiwanese in-laws. His wife maintains bi-monthly contact with them, which is less frequent than in the past.

Between 2003 and 2009, Applicant worked on a Government-funded program that required him to travel to the People's Republic of China (PRC). This travel was fully authorized by his employer. During one of these visits his laptop¹ was stolen from his hotel room. The laptop contained only open-source information and no classified information.

Applicant committed two security violations in 2010. He received a verbal warning for possessing "unmarked media or a DVD containing classified information." Remand Decision at 5. A month later, he failed to secure a safe containing classified information. The safe was in his supervisor's office, and Applicant mistakenly believed that the supervisor was still in the building. He received a "write-up" for this infraction and was required to receive remedial training. *Id.*

In 2013, another Government agency denied Applicant access to sensitive compartmented information and revoked his security clearance. This action was based upon Applicant's family connections in Taiwan and his travels in the PRC. It is not clear if his security infractions were also cited as a basis for the revocation.

Taiwan is a multi-party democracy. However, the PRC does not recognize Taiwan's independence, insisting instead upon "one China." *Id.* at 9. The PRC is Taiwan's largest trading partner. Taiwan is an active collector of U.S. economic and proprietary information, as is the PRC. These activities on behalf of Taiwan have resulted in criminal and civil charges. The PRC seeks to acquire intelligence through multiple sources, including through illegal means.

The Judge's Analysis

The Judge concluded that Applicant had effectively rebutted the presumption that he has ties of affection or obligation to his Taiwanese in-laws. He found that Applicant had no opportunity to develop bonds of affection for them through his wife. He stated that Applicant had "demonstrated convincingly that he has no emotional attachments, feelings of obligation, or regular or even casual

¹Applicant's hearing testimony and his submissions upon remand state that this device was not a laptop computer, but a personal data assistant (PDA). Tr. at 99; Applicant Response, dated November 8, 2016, at 6. This is a hand-held computer.

contact with his wife's relatives in Taiwan." *Id.* at 16. He found that over the years Applicant has acquired no ties or obligations to any foreign person or entity "that could possibly compromise his loyalties or commitments to the United States." *Id.* at 17. He also noted that Applicant's wife is now a naturalized U.S. citizen and that Applicant is considered highly reliable on the job. The Judge stated that Applicant has no further security infractions since 2010 and that whoever took his computer has not tried to contact him in the years since the theft. The Judge concluded that Applicant had effectively mitigated any security concerns arising from his relatives in Taiwan.

Discussion

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). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "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).

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 3 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge's decision does not address a fundamental difficulty sometimes posed by foreign in-laws. That is, while an applicant may not be close to a spouse's parents or siblings, a sense of obligation to them can arise from the *spouse's* affections and familial loyalties—concern for one's spouse may well result in a derivative concern for the spouse's family. We have long held that there is a rebuttable presumption that a person has obligations to the immediate family members of his or her spouse. *See, e.g.*, ISCR Case No. 14-03112 at 3, n.1 (App. Bd. Nov. 3, 2015). Department Counsel further argues little is known about Applicant's in-laws. In the case before us, the Judge discusses why he concluded that the security concern arising from the presence of Applicant's in-laws in Taiwan was mitigated. In that context, he spells out in some detail the specific circumstances of Applicant's Taiwanese in-laws (*e.g.*, they had served in the Taiwanese military but that service was thirty-five years ago and Applicant's inability to communicate with in-laws due to language differences, etc.).

Department Counsel argues that the Judge's whole-person analysis runs contrary to the weight of the record evidence. He argues that the analysis is essentially conclusory and does not sufficiently address the evidence viewed as a whole. However, we conclude that the Judge followed the remand instructions regarding the whole-person analysis. The Judge considered non-alleged conduct for the permitted limited purposes. To the extent any argument suggests that the Judge

should have founded an adverse decision primarily on non-alleged conduct, the Board declines to contravene the Directive ¶ 4.3.1. or Executive Order 10865, SECTION 3 (1). We find no harmful error in the Judge's analysis or conclusions.

Given the record before him, the Judge articulated a ration explanation for his favorable decision. An appealing party's disagreement with a Judge's decision is not sufficient basis to establish that the Judge erred. ISCR Case No.14-05013 at 4 (App. Bd. Sep. 27, 2016). The Board concludes that the Judge's favorable security clearance decision is not arbitrary, capricious, or contrary to law, given the record before him. *See* Directive ¶ E3.1.32.3.

Order

The Decision is **Affirmed**

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

See Dissenting Opinion

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board

Dissenting Opinion of Administrative Judge James E. Moody

I respectfully disagree with my colleagues' resolution of this case. The record, viewed as a whole, does not support a favorable whole-person analysis. A proper whole-person analysis requires a Judge to consider an applicant's circumstances in light of the evidence as a cumulative whole. It can include consideration of conduct that is not alleged in the SOR.

The Judge's comments about the paucity of evidence concerning Applicant's foreign relatives draw attention to the insufficiency of Applicant's case for mitigation. When viewed in

light of Applicant's two security infractions and evidence that he was denied a clearance by another agency based on his foreign relatives and travels, the record does not support a whole-person assessment that all doubt about Applicant's eligibility for a clearance has been resolved in favor of national security. Directive, Enclosure 2 ¶ 2(b). Department Counsel argues that the totality of the evidence weighs heavily against a favorable decision, and I find this to be persuasive. I would reverse.

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