

KEYWORD: Guideline B; Guideline L

DIGEST: Directive presumes a nexus or rational connection between admitted or proven circumstances under any of the Guidelines and an applicant’s eligibility for a clearance. Direct or objective evidence of nexus is not required. In the present case, Applicant’s answer to the SOR - along with his testimony, the information he provided in his security clearance applications and background interviews, and the facts administratively noticed - raise security concerns under Guideline B. Adverse decision affirmed.

CASE NO: 12-05092.a1

DATE: 03/22/2017

DATE: March 22, 2017

)	
In Re:)	
-----)	ISCR Case No. 12-05092
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alec Sauchik, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 22, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline L (Outside Activities) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 13, 2016, after the hearing, Defense

Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Judge found in favor of Applicant on the sole Guideline L allegation and on three of the four Guideline B allegations. Those favorable findings were not raised as an issue on appeal. The Judge found against Applicant on only the portion of the remaining allegation that asserted Applicant's mother-in-law is a citizen and resident of Ukraine.¹ Applicant raised the following issues on appeal: whether the Judge erred in his findings of facts and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact Concerning Issues Raised on Appeal

Applicant was born, raised, and educated in Ukraine when it was part of the former Soviet Union. In approximately 1990, he and his wife immigrated to the United States and are now U.S. citizens. He has three children who are foreign nationals, but one resides in the United States. Applicant was granted a security clearance over ten years ago. He has worked in support of the U.S. Government for nearly 20 years, including overseas assignments.

Applicant's mother-in-law is a citizen and resident of Ukraine. She lives with Applicant's sister-in-law. Each of them receives a pension from the Ukrainian government. "Applicant's wife has frequent contact (at least once a week) with her mother, and travels to Ukraine once or twice a year to visit her mother and other family members in Ukraine. Applicant and his wife have sent money to her family in Ukraine." Decision at 3.

In February 2014, the Ukrainian parliament voted to remove their president from office after he fled the country. This followed months of protests over the president's decision to postpone signing political and trade agreements with the European Union in favor of closer ties to Russia as well as his violent response to protests. Russian armed forces then intervened militarily in Crimea, which Russia occupied and purported to annex in March. Additional unrest and civilian deaths occurred when Russian protestors seeking more autonomy in eastern and southern Ukraine clashed with government forces. The Russian occupation of Crimea displaced about 18,000 Crimeans and caused numerous human rights abuses. Russia has been accused of orchestrating attacks by Ukrainian separatists. Despite attempts to cease hostilities, the government's efforts have been largely rejected and the situation in Ukraine remains precarious. Violent clashes between Russian-backed separatists and Ukrainian forces continue in eastern regions of the country. In December 2015, the State Department issued a warning to U.S. citizens to defer all travel to Crimea and eastern regions of the country. Separatist groups have threatened, detained, or kidnapped persons, including U.S. citizens, and violent clashes have caused over 9,000 deaths.

¹ After the hearing, Department Counsel submitted a motion to amend the SOR to add an allegation that Applicant's sister-in-law, brother-in-law, and stepson were citizens and residents of Ukraine. The Judge denied the motion concluding the Government did not establish good cause to amend the SOR. In doing so, however, the Judge stated that he examined the totality of Applicant's foreign connections and noted non-alleged circumstances could be considered in his mitigation and whole-persons analysis, citing ISCR Case No. 14-03497 at 3 (App. Bd. Mar. 9, 2015).

The Judge's Analysis Concerning Issues Raised on Appeal

Although Applicant has infrequent contact with his mother-in-law, his wife is close to and has frequent contact with her mother. This close relationship between Applicant's wife and her mother is imputed to him. His relationship to his mother-in-law, coupled with the facts administratively noticed, raises security concerns under disqualifying condition 7(d).²

Applicant presented a compelling case under mitigating condition 8(b)³ based on his significant ties to the United States. However, his wife's regular travel to visit her mother and extended family in Ukraine undercuts the application of that mitigating condition. Noting that conditions in Ukraine have fundamentally changed since Applicant was first granted a clearance, the Judge stated, "[o]f significant note is the State Department's current warning against travel to Ukraine, a country that is essentially in the midst of a civil war where separatist forces are backed by a hostile foreign power. This significant change puts this close familial connection in a different light, requiring a heightened level of scrutiny."⁴

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). 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 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 3-4 (App. Bd. Aug. 28, 2015).

Applicant challenges the sufficiency of the SOR allegation, asserting it only alleges his

² Directive, Enclosure 2 ¶ 7(d) states, "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion[.]"

³ 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 is so minimal, or the individual has such deep and longstanding relationships 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[.]"

⁴ Decision at 10.

mother-in-law is a citizen and resident of Ukraine and does not allege that either his or his wife's contacts with his mother-in-law create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. It is well settled that an SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every possible fact that may be relevant at the hearing. Considering the record as a whole, the Board concludes that the SOR issued to Applicant placed him on adequate notice of the allegation in question. Furthermore, a review of the hearing transcript does not leave the Board with the impression that the SOR prejudiced in any identifiable way Applicant's ability to prepare for the hearing, his ability to participate in the hearing, his ability to raise objections or make arguments on his behalf, or his ability to present evidence for the Judge to consider in the case. Given the SOR allegation against Applicant and the manner in which the hearing was conducted, Applicant was on adequate notice as to the issue of security concern. *See, e.g.*, ISCR Case No. 03-20538 at 2 (App. Bd. Jul. 5, 2006).

Applicant contends that the Judge erred in making findings about his wife's contact with her mother. Specifically, he argues "the record is entirely devoid of any evidence of the frequency of Applicant's wife's contact with her mother." Appeal Brief at 5, 6, 10, 12. However, the transcript reflects the following exchange:

[Department Counsel]: And when is the last time your wife traveled to the Ukraine?

[Applicant]: Oh, from April 23rd to May 7th this year.

[Department Counsel]: Okay. And would you say she goes once a year or how often?

[Applicant]: I would say once or twice a year, depending on the year.

[Department Counsel]: Okay. And how often would you say she has contact with her mother and sister?

[Applicant]: Every week.⁵

The Judge's findings about the contacts between Applicant's wife and her mother are based on substantial evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).⁶

Applicant also contends that the Government has the burden of establishing every element of the case, including heightened risk under the applicable disqualifying condition. When an applicant denies an allegation in the SOR, the Government must produce evidence in support of that

⁵ Tr. at 107-108.

⁶ Additionally, there is a rebuttable presumption that a person has ties of affection for, or obligation to, immediate family members of the person's spouse. *See, e.g.*, ISCR Case No. 12-00084 at 3 (App. Bd. May 22, 2014). The burden was on Applicant to rebut that presumption. Of note, Applicant's security clearance application submitted in 2011 stated that he had monthly contact with his mother-in-law. Government Exhibit 1 at 25.

allegation. Directive ¶ E3.1.14. In this case, Applicant admitted the allegation pertaining to his mother-in-law and thereby relieved the Government of its burden of production. Additionally, the Directive presumes a nexus or rational connection between admitted or proven circumstances under any of the Guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 14-02806 at 2-3 (App. Bd. Sep. 9, 2015). Direct or objective evidence of nexus is not required. *See, e.g.*, ISCR Case No. 12-00084 at 3 (App. Bd. May 22, 2014). In the present case, Applicant's answer to the SOR – along with his testimony, the information he provided in his security clearance applications and background interviews, and the facts administratively noticed – raise security concerns under disqualifying condition 7(d). The Judge was not required to make an explicit finding of nexus, and we find no error in his analysis.

Applicant further argues that the Judge erred in concluding that an individual with relatives in Ukraine faces a “very heavy burden” of persuasion in a Guideline B case. Appeal Brief at 5. In the decision, the Judge stated:

Although U.S. relations with the current Ukrainian government are good, foreign-backed forces with interests inimical to the United States operate freely in parts of Ukraine and pose a significant threat not only to Ukraine's sovereignty, but also to U.S. national security interests. In light of these circumstances, the serious security concerns that are raised by an individual with family members in a hostile foreign country are also present in the current case. Accordingly, Applicant's mitigation case must be examined through the lens of this heightened scrutiny.⁷

Given the turmoil in Ukraine as set forth in the facts administratively noticed, we find no error in the Judge applying a heightened level of scrutiny in his mitigation analysis. *See, e.g.*, ISCR Case No. 14-02563 at 4-6 (App. Bd. Aug. 28, 2015) (favorable decision reversed because the Judge did not give appropriate weight to the security situation in Ukraine). Applicant also cites to Hearing Office cases in arguing that the location of Applicant's mother-in-law in a city in the middle of the country is an important factor in assessing the security concerns in this case. However, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See, e.g.*, ISCR Case No. 14-03747 at 3 (App. Bd. Nov. 13, 2015). Applicant's arguments concerning the nature of the security threats in the city where his mother-in-law is located are not persuasive.

Applicant requests that the Appeal Board review the portion of the record pertaining to his mother-in-law *de novo*. The Board does not review a case *de novo*. The Appeal Board's review authority is limited to issues raised by an appealing party that allege the Judge committed harmful error. Directive E3.1.32. *See, e.g.*, ISCR Case No. 15-01564 at 2 (App. Bd. Jul. 8, 2016).

The balance of Applicant's arguments amount to a disagreement with the Judge's weighing of the evidence. However, such a disagreement, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

⁷ Decision at 9, n. 18.

Applicant has failed to identify any harmful error. The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. “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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan
Michael Ra’anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board