KEYWORD: Guideline E,; Guideline B

DIGEST: Applicant's arguments do not meet his heavy burden of persuasion to rebut the presumption that a Judge is impartial and unbiased. Adverse rulings alone do not demonstrate bias. Considering Applicant's education level, his experience having served as president of a defense contractor for many years while holding a security clearance, the nature of his foreign contacts which included providing advice and support to the employees of Company AB, and the multiple nature of his SCA omissions, sufficient circumstantial evidence exists to support the Judge's conclusion that Applicant knowingly and intentionally failed to disclose his connection to Company AB. Adverse decision affirmed.

CASENO: 12-12243.a1

DATE: 01/13/2017

DATE: January 13, 2017

In Re:	)	
	)	
-----	)	ISCR Case No. 12-12243
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Sean M. Bigley, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 20, 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 E (Personal Conduct) of DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 12, 2016, after the hearing, Administrative Judge Mark Harvey denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law because it was not supported by record evidence, runs counter to the weight of the record evidence, and ignores record evidence, and whether the Judge's whole-person analysis was flawed. Consistent with the following, we affirm.

Judge's Findings of Fact

Applicant, who is 68 years old, was born in India. He received a bachelor's degree in India. In 1969, he came to the United States at age 22 on a student visa. He received a master's degree at a U.S. university. He married his current wife in 1982 and became a U.S. citizen that year. One of his two children was born in India; the other in the United States. Both children reside in the United States. Applicant's parents and his spouse's parents are deceased. His net worth is about $10 million. He has held a security clearance since the mid-1970s.

In 1980, Applicant cofounded a company (hereinafter referred to as Company A) in the United States. Company A is a defense contractor. Applicant became its president in 1995 and owns more than 90 percent of its shares of stock. Company A owns more than 90 percent of a company (hereinafter referred to as Company AB) in India. Neither Applicant nor his wife owe any shares of Company AB in their personal capacities. Company AB has about 30 employees. Company A provides salaries for the employees of Company AB. Company A's ownership of Company AB was disclosed on Standard Form (SF) 328s submitted to the U.S. Government. Applicant is the managing director and chairman of the board of Company AB. He disclosed that he spends about 30 to 45 minutes per business day on the telephone conducting business with Indian companies.

In 1997, Applicant hired a colleague, who he has known since college and who resides in India, to serve as Company AB's general manager. Company A sends items to India. Company AB assembles the items into a product that is imported in the United States. Decision at 5.[1] Company AB complies with U.S. and Indian export rules. Company AB performs contracts for the Indian military, but Applicant claimed he does not have contact with foreign government officials. The current gross income of Company AB is about $10 million, which is about half of its gross ten

[1] The Judge also found that "Company AB was not used to produce parts that go into any products that were sold to U.S. customers." Decision at 4.

years ago. Applicant receives a monthly salary of about $300 from Company AB,[2] but that salary has fluctuated over the years.

Applicant's wife was born in India. She is a permanent resident of the United States and the resident director of Company AB. She retained her Indian citizenship because Indian law requires one of the directors of an Indian company to be a citizen of India, and Applicant wanted her to serve as a director of Company AB. She does not actively participate in the operations of Companies A or AB. She has significant medical conditions, requires weekly medical treatment, and has not traveled to India in five years. Applicant indicated that, if his wife became a U.S. citizen, he would possibly have to sell Company AB.

Four or five years ago, Applicant would travel to India about three or four times a year. In the last four years, he has traveled to India once a year. Among other reasons, he goes to India "to see either current of prospective customers, who naturally [are] foreign nationals." Decision at 4. He admitted meeting with individuals who manage foreign defense companies; however, he denied meeting with "foreign defense industry experts" because the term "expert" is not defined in his security clearance application (SCA). He has not visited his sister for five years, but communicates with her once or twice every two or three months on the telephone.

In his SCA dated December 28, 2011, Applicant was asked (1) whether he has or had any close and/or continuing contact with a foreign national within the last seven years with whom he or his spouse are bound by affection, influence, common interests, and/or obligation (Section 19); (2) whether he, his spouse, or dependent children ever had any foreign financial interests (such as stocks, property, investments, bank accounts, ownership of corporate entities, corporate interests or businesses) in which he or they have direct control or direct ownership (Section 20A); and (3) whether he had in the past seven years provided advice or support to any individual associated with a foreign business or other foreign organization that you have not previously listed as a former employer (Section 20B).

In May 2012, Applicant told an Office of Personnel Management investigator that Company A owns a subsidiary in India and his spouse is the manager of that company. Company A "maintains all foreign affairs, but he personally does not have any foreign financial interests." Decision at 6, citing GE 2. Applicant did not tell the investigator that he was the managing director and chairman of the board of Company AB or that he received income from that company. In responding to interrogatories, he noted that he meet with foreign customers when he travels to India.

Applicant stated that, when he completed the SCA, he responded as an individual and not as an employee of Companies A and AB. He separated his role as an employee in those companies from his role as a private person and interpreted the question about foreign business interests as

[2] In responding to interrogatories, Applicant stated that he received a monthly salary of about $3,700 from Company AB and his annual salary from it was about $44,400. Government Exhibit (GE) 2.

asking whether he or his spouse had any interested in foreign companies unrelated to Company A.

India is a democracy with a population of 1.2 billion people. It is one of the most persistently targeted countries by insurgents and terrorist groups. The State Department has reported on significant human rights problems in India. In the past, a National Counterintelligence Center survey named India one of the most active collectors of U.S. economic and proprietary information. In recent years, several criminal cases dealing with economic espionage, theft of trade secrets, and embargo-related criminal prosecutions involved the Indian government as well as private companies and individuals associated with India.

Judge's Analysis

Although Applicant has deep and longstanding relationships in the United States, he has substantial property interests in India that could subject him to a heightened risk of foreign influence or exploitation. Applicant's relationships with residents of India create a concern about Applicant's obligation to protect sensitive information and his desire to protect his financial interests in India, noting terrorist could exert pressure on his relatives living in India or threaten his property interests in India. The Judge concluded that Applicant's contacts with business and foreign government officials is unclear, that he has not met his burden of showing those contacts are minimal, and that he failed to fully meet his burden of showing there is little likelihood his foreign connections could create a risk of foreign influence or exploitation.

Applicant has infrequent contacts with his sister who is a citizen and resident of India. He is not close to her and has much stronger contacts with family members living in the United States. Judge concluded the SOR allegation regarding Applicant's sister was mitigated.

Applicant was well aware that he had substantial interests in Company AB in India. The Judge determined Applicant's statement that he did not need to disclose his interest in Company AB because his control of that company was as a professional and employee of Company A was not an honest, reasonable, or valid basis for not disclosing the requested information. The Judge concluded that Applicant knowingly and intentionally chose not to disclose his connections with Company AB. No mitigating condition applied to Applicant's falsifications.

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).

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).

In the appeal brief, Applicant twice raised the issue that the Judge was possibly biased. The first instance concerned the Judge asking Applicant why his wife has not become a U.S. citizen "now that it doesn't seem like she can do anything." Applicant contends the "do anything" comment referred to her poor health and the fact she could no longer travel to India. Claiming the record well established that she needed to retain her Indian citizenship to serve as a director of Company AB, Applicant questions whether the Judge's remark was indicative of an unwarranted bias against his wife because she was a longtime resident of the U.S., but remained a Indian citizen. Appeal Brief at 11. The second instance concerned Applicant's claim that the Judge's pronouncements about his honesty and motives were aggressive and hostile and raised "the specter of possible bias." Appeal Brief at 22. Bias involves partiality for or against a party, predisposition to decide a case or issue with regard to the merits, or other indicia of a lack of impartiality. *See, e.g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009). Applicant points to nothing in particular in the Judge's handling of the case that would cause a reasonable person to question his impartiality. In short, Applicant's arguments do not meet his heavy burden of persuasion to rebut the presumption that a Judge is impartial and unbiased. *See, e.g.*, ISCR Case No. 12-09545 at 3 (App. Bd. Dec. 21, 2015). *See, e.g.*, Bixler v. Foster 596 F.3d 751 at 762 (10th Cir. 2010) for the proposition that adverse rulings alone do not demonstrate bias.

Applicant makes various arguments challenging the adverse findings that he falsified his responses to three questions on his SCA. In general, he claims he answered these questions from the perspective of his personal, rather than his business, capacity, which influenced his interpretation of the questions. On the other hand, Department Counsel argues that Applicant is advocating for a strained interpretation of the questions that are not supported by the questions themselves. Reply Brief at 13. We find Department Counsel's argument persuasive.

Regarding his response to Section 19, Applicant contends that he misinterpreted the language in the question that asked whether he had "close and/or continuing contact with a foreign national . . . with whom [he], or [his] spouse . . . are bound by affection, influence, common interests, and/or obligation." He claims it was not unreasonable for him to conclude that question did not apply to his intermittent contacts with foreign business associates and clients because it does not use the words "business" or professional" as other questions in the SCA, but instead used the words "close and/or continuing" and "affection" that can easily be interpreted as referring to personal or family relationships. As for his response to Section 20B, Applicant concedes he answered the question incorrectly, but contends the words "advice" and "support" in that question are not meant to apply to every business conversation, such as exchanges promoting the business, and those words caused him to misinterpret the question. Appeal Brief at 21. Citing ISCR Case No. 03-09483 at 3-4 (App. Bd. Nov. 17, 2004) for the proposition that an incorrect answer to a question in a SCA does not prove a falsification, Applicant claims he did not deliberately intend to falsify responses in his SCA. However, Applicant understood that he had to disclose his ownership in the foreign company at issue when he completed his SF 328, Certificate Pertaining to Foreign Interests, and the SCA questions at issue here clearly and reasonably extend to the same interests as the SF 328. Considering Applicant's education level, his experience having served as president of a defense contractor for many years while holding a security clearance, the nature of his foreign contacts which included providing advice and support to the employees of Company AB,[3] and the multiple nature of his SCA omissions, sufficient circumstantial evidence exists to support the Judge's conclusion that Applicant knowingly and intentionally failed to disclose his connection to Company AB. *See, e.g.*, ISCR 06-21972 at 3 (App. Bd. Nov. 6, 2009) ("It is not mere speculation for a Judge to make a finding of fact about an applicant's state of mind based on circumstantial evidence.") and ISCR Case No 14-00978 at 3 (App. Bd. June 16, 2016)("The multiple nature of Applicant's omissions support a finding that they were deliberate.").

Applicant further contends he correctly answered in the negative the question in Section 20A that asked whether he ever had any foreign financial interests in which he had "direct control or direct ownership." Applicant asserts that the Judge found "[h]e controlled Company A and Company A controlled Company AB" (Decision at 15), which only establishes indirect control over Company AB.[4] He also argues that the titles "Managing Director" and "Chairman of the Board" of Company AB, without more evidence, does not establish direct control. Applicant's arguments are not persuasive. The Judge was not required to ignore or give an empty meaning to the record evidence concerning Applicant's positions at Company AB and, in the absence of evidence to the contrary, could apply the ordinary meaning and common usage associated with those titles.[5]

[3] In October 2015, Applicant visited Company AB to resolve employee unrest. Tr. at 75.

[4] Applicant also answered "No" to the question in Section 20A of his SCA that asked whether he or his spouse ever had any foreign financial interests that someone else controlled on his behalf.

[5] AE C and D (SF-328s dated April 2002 and October 2006) state that the Managing Director of Company AB is the equivalent to being president of a U.S. company. Similar to the approach used by courts in interpreting statutes, the words used in the titles should be construed according to their common and approved usage. *See, e.g., Algrant v. Evergreen Valley Nurseries*, 126 F.3d 178, 188 (3rd Cir. 1997).

Additionally, Applicant testified that he could sell or shutdown the operations of Company AB, which established the he had direct control of that company. Tr. at 76 and 80. We find no error in the Judge's conclusion that Applicant deliberately falsified his response to the question in Section 20A of the SCA.

Applicant makes a number of arguments challenging the Judge's Guideline B findings and analysis. For instance, Applicant argues that Company AB does not present a security concern from a foreign influence standpoint because it is a faltering subsidiary, was formed using minimal capital, has never paid dividends, and has never made much money. On the other hand, the Judge correctly found Company AB had a current gross income of about $10 million, previously had a gross income of about $20 million, and performed contracts for the Indian military. Many of Applicant's arguments essentially amount to a dispute over the amount of weight the Judge gave specific evidence. It is well established that a party's disagreement with the Judge's weighing of the evidence, 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).

Applicant argues the Judge erred in taking administrative notice of facts concerning India because he considered evidence excluded in an evidentiary ruling. At the hearing, Applicant objected to the Judge taking administrative notice of "secondary hearsay" and "speculation" in the Government's administrative notice request. In the decision, the Judge ruled, "[e]vidence that is secondary hearsay and speculation is not admitted. For example, speculation about India being ranked as a higher threat to commit industrial espionage than other countries is given no weight whatsoever." Decision at 2. In his findings about India, however, the Judge stated, "At one point in time, India was specifically named as one of the most active collectors of U.S. economic and proprietary information in a National Counterintelligence Center survey of nearly one dozen Fortunate 500 companies." Decision at 7. Except for the National Counterintelligence Center survey, no other document in the administrative notice request named India as an active collector of U.S. economic information or ranked it against other countries. From our reading of the record, we agree that the Judge erred by considering evidence that he excluded. This error, however, was harmless because: (a) the Judge would have likely reached the same decision because there was other evidence -- such as U.S. prosecutions of export control violations and similar crimes that involve the Indian government[6] as well as the risk of terrorism and human rights abuses in India -- that sufficiently supported the Judge's finding and conclusions regarding India and (b) the Judge's ultimate adverse decision was sustainable under Guideline E as discussed above. *See, e.g.*, ISCR Case No. 08-07528 at 2 (Dec. 29, 2009).

[6]S In Applicant Exhibit J (an email entitled, Objections to Request for Administrative Notice), Applicant's prior counsel stated:

> For example, . . . an FBI report lists several cases of illegal exports to India. These are facts in this document and [are] admissible. Similarly, the DoJ report beginning at pdf page 20 is a list of facts listed in the report, and contains, at 23-24 the most damning evidence against India, that in 2008, the Indian Government was involved in obtaining military technology illegally.

The Judge found against Applicant on SOR ¶ 1.e that alleged Applicant had ongoing contacts with foreign government officials. Applicant acknowledges that he met with low-level Indian officials to register Company AB in the late 1980s, but argues that there is no evidence that Applicant has contacts, ongoing or otherwise, with foreign government officials. In the decision, the Judge found that Applicant traveled to India to meet with current or prospective customers and also specifically stated, "Company AB performs contacts for the Indian military; . . . does 'not have contact with foreign government officials.'" (Tr. 78; SOR response ¶ 1.e) In the same paragraph, "[Applicant] said, 'I do not have ongoing contacts with foreign government officials.' (SOR response ¶ 1.e)" Decision at 5. In his analysis, the Judge stated, "Applicant has contacts with foreign government officials, and he has foreign business contacts" and "[t]he amount of contacts Applicant has with foreign government officials . . . in India is unclear", but provided no further explanation regarding the basis for his conclusion that Applicant had ongoing contact with foreign government officials. Decision at 10 and 14. While presumably the Judge relied on an inference arising from the facts that Applicant had contacts with his customers and that one of his customers was the Indian government in making the adverse finding under SOR ¶ 1.e, Applicant contends the Judge's conclusion runs counter to the record evidence. Even if an error occurred in the making of that adverse finding, we find it was harmless in that it is not likely to have affected the outcome of the decision given the security concerns that arise from Applicant's other extensive foreign business contacts and interests and the sustainable adverse findings under Guideline E discussed above. *Id.*

The Judge concluded that Applicant's relationships with residents of India creates a concern about his obligation to protect sensitive information and technology and his desire to protect his financial interest in India. In this regard, Applicant argues the record does not support a conclusion that he has any family members in India that present security concerns. He noted that the Judge found in favor of him on the allegation that his sister is a resident and citizen of India because he has infrequent contact with her. He also points out that his only other family member residing in India was his wife's sister, but noted the record contain no information about "who she is, what she does, what her circumstances are, or anything about the nature of the relationship between [her] and [him]." Appeal Brief at 10. Additionally, Applicant argues that his wife's Indian citizenship and her position as resident director of Company AB present no security concerns because she no longer travels to Indian and performs no duties for the company. Of note, the Judge stated in a single sentence that a terrorist or government official could exert pressure on his relatives living in India, which is probably error. Decision at 11. However, even if so, that error is harmless. *Id*. Otherwise, Applicant is essentially advocating a piecemeal examination of the evidence, which the Appeal Board has rejected as an approach for analyzing the evidence. *See, e.g.*, ISCR Case. No. 03-22563 at 4 (App. Bd. Mar. 8, 2006). When viewed as a whole, the record evidence supports the Judge's conclusion that Applicant's foreign business contacts and interests created foreign influence security concerns that were not mitigated.

Additionally, Applicant argues that the Government has not demonstrated a nexus between his foreign interests and any concern that he could be influences to act contrary to the interests of the United States. The Government, however, is not required to prove affirmatively that a country targets U.S. citizens to establish security concerns under the foreign influence guideline. ISCR Case

No. 11-06925 at 4 (App. Bd. Dec. 13, 2013). There is a presumptive nexus between admitted and proven circumstances under any of the guidelines and an applicant's eligibility for a clearance. ISCR Case No. 14-05251 at 3 (App. Bd. Oct. 5, 2015). Applicant's brief provides no reason to rebut the presumption of nexus.

Applicant further asserts that the Judge did not discuss crucial facts in the decision. As examples, Applicant cited to his contributions to U.S. national security as a defense contractor and indicated that no one has ever questioned his handling of classified information. The Judge made findings about many of the matters raised in the appeal brief. Applicant has failed to rebut the presumption that the Judge considered all the evidence in the record. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). We also find unpersuasive Applicant's argument that the Judge's whole-person analysis is flawed primarily because it was a repetition of his earlier findings and conclusions. By considering the totality of the evidence in reaching his decision, the Judge's whole-person analysis complies with the requirements of Directive ¶ 6.3. *See, e.g.*, ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

The Judge examined the relevant evidence 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