

KEYWORD: Guideline B

DIGEST: The Judge erred in limiting her analysis to the protection of U.S. intelligence information. Furthermore, the Judge used language which implies that she was not applying the clearly consistent with the national interest standard. Favorable decision remanded.

CASENO: 16-04056.a1

DATE: 09/06/2018

DATE: September 6, 2018

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In Re:)	
-----)	ISCR Case No. 16-04056
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 10, 2017, 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 May 25, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: (a) whether the Judge erred by concluding that the Government failed to establish a case of heightened risk under Guideline B; and (b) whether the Judge’s decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board remands the Judge’s favorable security clearance determination.

The Judge’s Findings of Fact

Applicant, who is 50 years old, was born in Taiwan. He grew up and obtained his undergraduate degree there. He earned graduate degrees in the United States in 1997 and 1999. His wife was born in Taiwan. They married in the United States in 2001. Both are U.S. citizens, and they have two children who were born in the United States.

Applicant admitted the SOR allegations. He has relatives who are citizens and residents of Taiwan. These include his parents who are retired, his sister and her husband who are tutors, his mother-in-law who is a retired teacher, and his sister-in-law who works for a non-profit organization. He maintains regular contact with these relatives. None know about his work or that he is applying for a security clearance. In the past, he visited his family annually in Taiwan, but more recently he travels there every other year. He has no financial interests in Taiwan. He and his wife own a home in the United States valued over \$500,000.

Applicant has a reputation for being an excellent family man and as a respected neighbor and church member. His work evaluations praise his performance. While he realizes there is a security concern arising from his relatives in Taiwan, he believes his family in the United States is a bigger influence and acknowledges that he took an oath when he became a U.S. citizen to obey the laws of the United States.

“While Taiwan is an active collector of industrial information and engages in industrial espionage, the record does not demonstrate that the government of Taiwan targets U.S. intelligence information. Further, the record does not demonstrate that it seeks to exert pressure on U.S. citizens to collect information from family members residing in country or abroad.” Decision at 3.

The Judge’s Analysis

The Government failed to establish that Applicant’s contacts with his family members in Taiwan creates a heightened risk of exploitation, inducement, manipulation, pressure, or coercion. It has not been demonstrated that Taiwan targets U.S. citizens to obtain protected information.

“Given that Taiwan generally respects the human rights of its citizens, the risk that it might seek protected information—or succeed in obtaining such information—from Applicant is low, if non-existent.” Decision at 4. Even if security concerns were established, they were mitigated. His contacts in Taiwan are routine. His parents are not involved in activities that would make it likely Applicant would have to choose between their interests and those of the United States.¹

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 national security eligibility will be resolved in favor of the national security.” Directive, Encl. 2, App A ¶ 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. 16-02322 at 3 (App. Bd. Mar. 14, 2018).

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. *Id.*

¹ In this case, the Judge chose not to have an explicit discussion of the whole-person concept. Judges have wide latitude in how they write decisions. In some cases in the past, it has been noted that a Judge is not limited to the guidelines when analyzing a case (*See, e.g.*, ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006)) and that a Judge acts properly by evaluating a case under the general factors of the Directive as well as the specific adjudicative guidelines. *See, e.g.*, ISCR Case No. 03-09445 at 3, n. 1 (App. Bd. Apr. 25, 2005).

Department Counsel challenges the Judge’s conclusion that the Government failed to present evidence of heightened risk and, thus, failed to establish disqualifying conditions under Guideline B. Disqualifying Condition 7(a) provides that “contact, regardless of method, 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” could raise a security concerns and may be disqualifying.² Guideline B also states that “[a]ssessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.”³ Consequently, the foreign contact as well as the foreign country are important factors to consider in assessing potential foreign influence security concerns. *See, e.g.*, ISCR Case No. 99-0601 at 6 (App. Bd. Jan. 30, 2001).⁴

Department Counsel contends the Judge erred in her analysis regarding Taiwan. Although the Judge found that Taiwan is an active collector of industrial information and engages in industrial espionage, she concludes that Taiwan “has not been demonstrated to target protected U.S. information.” Decision at 4. The Judge also indicated that the record does not demonstrate Taiwan targets U.S. intelligence information. This analysis is too narrow. Protected information is much broader than U.S. intelligence information. In general, the adjudicative guidelines, including Guideline B, address the protection of classified and sensitive information. Sensitive information includes non-Government information, such as a company’s proprietary information, which may have national security significance.⁵ As a general proposition, industrial espionage targets protected information. The Judge erred in limiting her analysis to the protection of U.S. intelligence information. Furthermore, the Judge used language which implies that she was not applying the clearly consistent with the national interest standard. She wrote that the risk of Taiwan seeking or obtaining information from Applicant was “low.” The Board previously remanded a case where the Judge concluded the security concerns were “manageable.” *See, e.g.*, ISCR Case No. 14-05986 at 4 (App. Bd. Oct. 14, 2016).

² Directive Encl. 2, App. A ¶ 7(a).

³ Directive Encl. 2, App. A ¶ 6.

⁴ In ISCR Case No. 99-0601 at 6, we stated:

For purpose of Guideline B, it does not matter whether an applicant is at risk because the applicant (1) may be influenced through favorable feelings toward the government or regime of the foreign nation; (2) may be influenced through favorable feelings toward the people (including the applicant’s relatives) and culture of a foreign nation; (3) may be influenced through a desire to avoid harm, or to gain benefit for, his relatives in a foreign nation; or (4) some combination or variation of such concerns.

⁵ *See, e.g.*, ISCR Case No. 14-00963 at 3 (App. Bd. Jan. 13, 2015) (affirming an unfavorable clearance decision in which an applicant’s mishandling of a company’s proprietary information was alleged under Guideline K).

In his appeal brief, Department Counsel argues the Judge applied a “heightened risk” analysis that we previously rejected.⁶ In that prior case, we stated:

The Board notes the Judge’s findings and record evidence that Applicant has close family members in Taiwan with whom she regularly communicates and visits, and that Taiwan is a country that actively collects industrial information and engages in industrial espionage. As pointed out by Department Counsel, the Judge’s conclusions in this case have the practical effect of requiring Department Counsel to prove affirmatively that a country specifically targets U.S. intelligence information and specifically targets U.S. citizens in the course of attempts to gather protected information. The language of the Directive, Guideline B, does not require this level of proof from Department Counsel in order to raise security concerns that shift the burden of persuasion to Applicant.⁷

Here, as in the prior case, the Judge erred by impermissibly shifting the burden to the Government to prove that Taiwan targeted U.S. intelligence information and U.S. citizens.

Department Counsel also argues that the presence of Applicant close family members in Taiwan creates a potential conflict of interest. However, the Judge did not address Disqualifying Condition 7(b).⁸ Based on the facts of this case, we conclude the Judge erred in failing to address that disqualifying condition.

Department Counsel further contends that the Judge’s application of Mitigating Condition 8(a)⁹ is unsupported by the record evidence and is arbitrary, capricious, and contrary to law. He describes the Judge’s analysis as “a cursory nod to the Mitigating Conditions.” Appeal Brief at 16.

The Judge based her mitigation rationale in part on her conclusion that Applicant’s relationships with his foreign family members in Taiwan were “routine.” The Judge does not define or elaborate on her use of the word “routine.” In any event, the ability to characterize an applicant’s relationships with foreign resident citizens who are immediate family relatives as “routine” does not vitiate the Government’s security concerns. Indeed, the rebuttable presumption that an applicant has ties of affection for immediate family members is based on the set of circumstances one

⁶ ISCR Case No. 08-04488 (App. Bd. Apr. 23, 2009).

⁷ *Id.* at 4.

⁸ Directive Encl. 2, App. A ¶ 7(b) states: “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology[.]”

⁹ Directive Encl. 2, App. A ¶ 8(a) states: “the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States[.]”

normally expects to exist among close relatives. *See, e.g.*, ISCR Case No 08-04488 at 5. Such circumstances include strong emotional attachments, feelings of obligation, and the maintenance of regular contact with such relatives. These are the very factors that give rise to the potential of exploitation and use of those relationships to place applicants in the position of having to choose between the interests of those individuals and the interests of the United States. The Judge's findings of fact in this case do not rebut the presumption. Thus, the Judge erroneously employed her conclusion that these contacts were "routine" as a partial basis for her ultimate ruling that Applicant satisfied his burden of overcoming the government's security concerns.

The Judge also based part of her mitigation rationale on her statement that Taiwan generally respects the human rights of its citizens. However, when evaluating the strength of Applicant's case in mitigation, the Judge omits any consideration of Taiwan as an active collector of industrial information and a user of industrial espionage techniques. Taiwan's posture in this regard is of such significance that the failure of the Judge to factor it into her analysis of the strength of Applicant's case in mitigation was error.

In light of the errors identified above, we conclude that the best course of action is to remand the case to the Judge for further processing consistent with the Directive.

Order

The Decision is **REMANDED**.

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