KEYWORD: Guideline B

DIGEST: Mere compliance with security procedures is of limited significance in Guideline B cases. Even those with good security records may experience circumstances through which they could be pressured to divulge classified information. Favorable decision reversed.

CASE NO: No. 13-01341.a1

DATE: 11/10/2014

DATE: November 10, 2014

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
David F. Hayes, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 19, 2014, 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 July 23, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Thomas M. Crean 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 issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse the Judge's decision.

The Judge's Findings of Fact

Applicant served in the Reserves of the U.S. military for two years and later on active duty. Both of his grandfathers served in the U.S. military, as did his brother. Applicant's father was also in the military and was killed in the line of duty. His family members (other than his wife) are all citizens and residents of the U.S.

After leaving active duty Applicant went to work for a Defense contractor. In that capacity, he performed duty at a remote location in Israel in 2008. While he was in that country, he and other members of his team were under surveillance by Israeli intelligence and law enforcement personnel. For example, surveillance equipment was placed in their hotel rooms and their rooms were searched when they were not present. The hotel staff was inquisitive about their duties, and Applicant stated that the staff was seeking intelligence information. Moreover, when going through Israeli customs, Applicant and his team were subjected to searches of their persons and their luggage. Their computers and phones were taken from them and searched. Applicant reported all contacts with Israelis and other foreign nationals. "Applicant was never approached, threatened, pressured, or put under duress to cooperate with foreign government officials, foreign intelligence services, or security forces." Decision at 4.

Applicant's wife is an Israeli citizen. He met her in 2010. She fulfilled her military obligation by serving in the Israeli Defense Forces (IDF) for several years.[1] Applicant's wife has done all that she can do to apply for U.S. citizenship until such time as she and Applicant permanently reside in the U.S.

Applicant's parents-in-law were born in another middle eastern country, moving to Israel when they were children. His father-in-law retired from the IDF after a 24 year career and receives a pension. His mother-in-law served in the IDF for two years. Applicant has followed his company's guidance regarding what he can say to his wife's parents about his job. Applicant's wife speaks with her mother weekly by phone and with her father once or twice a month. Applicant does not speak with them because they do not speak English and he does not know Hebrew.

Applicant's siblings-in-law are either serving in the IDF reserves or have already fulfilled their military obligations. One of them is a senior official of an Israeli company that provides communication and data-link services for various governmental agencies, including defense, homeland security, and law enforcement. The senior management team of this company is managed by former IDF officers.

Applicant enjoys an excellent reputation among colleagues and supervisors for the quality of his work performance. He is considered a detail-oriented person who is security conscious.

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[1]Department Counsel's brief notes Applicant's testimony that his wife's military duties were probably related to intelligence.

Israel and the U.S. are bound by cultural ties and by strategic interests. Some persons have been convicted for conducting espionage against the U.S. on behalf of Israel. Israel is considered one of the most active collectors of U.S. economic and technology information. There is no evidence that Israel engages in action against its citizens for the purpose of obtaining intelligence data. Israel takes significant measures to gain intelligence and protect against terrorist attacks.

The Judge's Analysis

The Judge concluded that Applicant's connections in Israel raised three disqualifying conditions: 7(a),[2] 7(b),[3] and 7(d).[4] He specifically found that Applicant's circumstances presented a heightened risk of foreign coercion or inducement, in view of his close family members living in a country that seeks to obtain U.S. protected information.

In concluding that Applicant had mitigated these concerns, the Judge cited to evidence of Applicant's clean security record, his strong family ties within the U.S., and to evidence that Applicant's ability to protect classified information was tested during his trip to Israel in which his hotel room was bugged and his computer searched. Applicant reported this activity to his facility security officer, who, in turn, notified the U.S. embassy, which the Judge characterized as excellent operational security practices. He also noted evidence that Applicant has little direct contact with his in-law who works in the Israeli defense industry. The Judge concluded that it is unlikely that Applicant would be placed in a position of having to choose between his obligation to the U.S. and his responsibility to his family. He concluded that Applicant's circumstances warranted favorable application of mitigating conditions 8(b)[5] and (e).[6]

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[2]Directive, Enclosure 2 ¶ 7(a): "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): "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation 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 ¶ 7(d): "sharing living quarter with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion[.]"

[5]Directive, Enclosure 2 ¶ 8(b): "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[.]"

[6]Directive, Enclosure 2 ¶ 8(e): "the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country[.]"

In the whole-person analysis, the Judge cited to Applicant's military record, and limited contacts with his Israeli in-laws, despite his wife's frequent communication with them. He stated that Applicant's ability to protect classified information had been tested in Israel and that "he easily passed all tests." Decision at 12. He cited to evidence of Applicant's deep and abiding commitment to the U.S. in support of his conclusion that Applicant had mitigated the concerns in his case.

Discussion

Once a concern arises regarding an Applicant's security clearance eligibility, 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 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, the Board 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* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's decision runs contrary to the weight of the record evidence. He cites to the Judge's findings, and to record evidence, of the following: (1) Israel is an avid collector of U.S. protected information; (2) Applicant's wife is an Israeli citizen whose career field in the IDF was related to intelligence; (3) Applicant's sibling-in-law is a reserve officer in the IDF and executive for a major Israeli defense contractor; (4) this in-law is aware of Applicant's employment and that he is applying for a clearance; (5) Applicant has been subject to surveillance while in Israel, to include covert bugging and having been photographed. Department Counsel contends that this evidence, viewed cumulatively, is of such significance that it is not mitigated by the favorable evidence that Applicant submitted in his own behalf.

Department Counsel's argument has merit. It is of particular note that Applicant's spouse is a citizen of a foreign country that actively seeks U.S. protected information. Furthermore, she served in the IDF in a position that appears to have been intelligence-related. She is not currently a U.S. citizen. *See* ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003) for the proposition that the foreign citizenship of an applicant's spouse has significance in evaluating the applicant's case for a security clearance. Additionally, Applicant's spouse is in frequent communication with a sibling who is currently a reserve officer in a foreign military and who works for a foreign defense

industry.[7] Under the facts of this case, the Decision does not explain how Applicant's compliance with security procedures in 2008 mitigates a heightened risk of foreign exploitation that arose on account of his marriage two years later. It does not impugn Applicant's conduct in any way to note that his compliance with regulations in 2008 was apparently no different from that of his fellow workers and, indeed, that his experiences were not unique among visitors to Israel generally. *See, e.g.*, Applicant's testimony that the surveillance in question was not out of the ordinary for a foreign visitor to Israel. Tr. at 73. *See also* Hearing Exhibit 1, Administrative Notice, at 1, that U.S. citizens in Israel are subject to prolonged questioning and thorough searches.

Although the Judge cited to a number of pieces of evidence in support of his favorable conclusion, the gravamen of his decision rested on Applicant's having complied with security procedures during his trip to Israel in 2008. We have stated that, in Guideline B cases, an applicant's compliance with security procedures in dangerous, high-risk circumstances in which he or she has made a significant contribution to national security is a factor that lends credibility to the applicant's claims that he or she can resist and report attempts at coercion or exploitation. *See, e.g.*, ISCR Case No. 06-25928 at 3-4 (App. Bd. Apr. 9, 2008). However, those circumstances are not present in this case. Moreover, as the Judge found, despite the surveillance to which Applicant was subjected during this trip, he was never approached, threatened, or otherwise pressured to disclose classified information. Accordingly, the record does not support a conclusion that Applicant's compliance with security procedures demonstrates that he has actually been tested in the sense that the Judge found in his analysis. We conclude that the Judge erred in the weight that he extended to this evidence.

We note other evidence cited by the Judge, such as Applicant's good security record held for a number of years, his substantial family ties within the U.S., along with his family's laudable history of service in the U.S. military, and his excellent character references. While this was evidence that the Judge was bound to consider, under the facts of this case it is not sufficient to outweigh the concerns arising from Applicant's family ties to and within Israel. Even a person with a good security record might experience circumstances through which he could be pressured to divulge classified or other protected information. *See, e.g.*, ISCR Case No. 13-00987 at (App. Bd. Aug. 14, 2014).[8] As it stands, the Judge's decision fails to consider an important aspect of the case and runs contrary to the weight of the record evidence. Accordingly, it is not sustainable.

Order

The Decision is **REVERSED**.

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[7]Applicant's surmise during the hearing that the Israeli intelligence apparatus likely has a record on him arising from his 2008 visit is also relevant. Tr. at 61.

[8]It is axiomatic that the government need not wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. ISCR Case No. 11-13626 at 3-4 (App. Bd. Nov. 7, 2013); *Adams v. Laird*, 420 F. 2d 230, 238-239 (D. C. Cir. 1969), *cert. denied* 397 U.S. 1039 (1970).

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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