

KEYWORD: Guideline B

DIGEST: Applicant failed to mitigate security concerns arising from his family connections to Russia, in light of Russia’s status as an aggressive collector of U.S. intelligence. Adverse decision affirmed.

CASE NO: 08-09346.a1

DATE: 03/14/2011

DATE: March 14, 2011

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In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 3, 2010, DOHA 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 January 24, 2011, after the hearing, Administrative Judge Mark E. Curry denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse clearance decision is arbitrary, capricious, or contrary to law.

In this case, the Judge made the following essential findings of fact: Applicant is a 30-year-old married man with no children. He is an honorably discharged veteran of the United States Marine Corp. He has a distinguished military record and employment history. Applicant's wife is a Russian citizen, who has been living in the United States for the last four years as a non-conditional permanent resident. His parents-in-law are dual Russian/Ukrainian citizens who live in Russia. Applicant's mother-in-law is an accountant; his father-in-law is a field grade officer in the Russian armed services. Applicant's wife's maternal grandparents are citizens and residents of Ukraine. Decision at 2-3.

Applicant's wife communicates with her parents via telephone and/or e-mail approximately once a month. Applicant does not speak Russian and his in-laws do not speak English, so their communication is limited. Applicant and his wife typically travel to Russia to visit his parents-in-law approximately once a year, and in the past his mother-in-law has traveled to the United States to visit him and his wife. *Id.* at 3.

Russia has an aggressive, ongoing intelligence collection program targeting the United States, focusing particularly on military technology and gas and oil industry expertise. In recent years, Russia's foreign policy objectives have grown increasingly inimical to United States interests. In June 2010, the U.S. Department of Justice arrested ten alleged Russian spies who had been carrying out long-term deep cover assignments in the United States. The following month, all ten defendants pleaded guilty to conspiracy to act as an agent of a foreign government within the United States and were immediately expelled. Although Russia has made some progress in respecting human rights since the breakup of the Soviet Union, significant problems remain. For example, human rights activists and journalists have been killed under mysterious circumstance over the years, and the press has at times been brutally suppressed. Russian law requires telephone and cellular companies to grant its Ministry of Internal Affairs and Federal Security Service 24-hour remote access to their client database. Also, these agencies require Internet companies to provide dedicated lines to enable tracking of private e-mail communications. *Id.*

On appeal, Applicant seeks reversal of the Judge's adverse decision under Guideline B arguing essentially that the security concerns presented by Applicant's in-laws are minimal and the evidence is sufficient to establish that those concerns have been mitigated.<sup>1</sup> Consistent with the following discussion, the Board affirms the decision of the Judge.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's

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<sup>1</sup>In support of his argument, Applicant cites to several hearing-level cases which he contends support granting him a clearance. The Board gives due consideration to these cases. However, hearing-level cases are not legally binding precedent, even if an applicant can establish close factual similarities between those cases and his. *See, e.g.*, ISCR Case No. 07-04012 at 2 (App. Bd. Apr. 9, 2008). "The adjudication process is the careful weighing of a number of variables known as the whole-person concept." Directive, Enclosure 2 ¶ 2(a). "Each case must be judged on its own merits . . ." *Id.* at ¶ 2(b).

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. 07-07635 at 4 (App. Bd. Aug. 22, 2008).

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances and considered the possible application of relevant conditions and factors. He found in favor of Applicant as to several of the SOR factual allegations. However, he reasonably explained why the evidence which the Applicant presented in mitigation was insufficient to overcome all of the government's security concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious or contrary to law. The Board concludes that the Judge examined the relevant data and articulated 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). Therefore, the Judge's unfavorable security clearance decision is sustainable.

### **Order**

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board