

KEYWORD: Guideline B

DIGEST: The Directive is subject to general principles of statutory construction. The disqualifying and mitigating conditions are not necessarily most analogous to statutes. Rather they are examples of circumstances to assist in evaluating aspects of an applicant's case. Disqualifying conditions 7(a) and 7(b) have a significant degree of overlap and one set of circumstances may raise security concerns under both conditions. The Executive Order and the language of mitigating condition 8(b) should be interpreted as consistent with one another. The language in the first is to ensure that a clearance decision does not create a stigma of disloyalty. The second requires Judge to balance an applicant's ties within the US to his ties to a foreign person, organization or country in analyzing the extent to which an applicant might find himself in a conflict of interest. Adverse decision affirmed.

CASENO: 08-11788.a1

DATE: 07/28/2010

DATE: July 28, 2010

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In Re:)	
)	
-----)	ISCR Case No. 08-11788
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Eric J. McNeilus, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 10, 2009, 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 April 28, 2010, after the hearing, Administrative Judge Robert J. Tuidier 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 Applicant was denied due process; whether the Judge erred in his application of the pertinent mitigating conditions; and whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a senior technical planner working for a Defense contractor. He was born and raised in Pakistan, where he obtained a B.S. in electrical engineering. He moved to the U.S. in the early 1990s and obtained a M.B.A. He lived in another country for a few years, returning to the U.S. in the late 1990s.

Applicant’s wife was also born, raised, and educated in Pakistan. She and Applicant became U.S. citizens in the late 2000s. They have two children, both U.S. citizens. Applicant and his wife are citizens of the U.S., Pakistan, and another country.

Applicant has numerous relatives who are citizens and/or residents of Pakistan. His mother lives there, and he speaks with her on the telephone approximately once a week. He also has two brothers living there. He speaks with one a few times a year and another nearly once a week. Applicant also has several sisters who reside in Pakistan and one who lives in the U.S. Additionally, he has several in-laws who live in Pakistan. He owns a home in that country, valued at \$250,000. He also owns some commercial real estate there valued at about \$50,000. His net worth in the U.S. is about \$150,000.

Pakistan is a parliamentary federal republic which supported the U.S. in removing the Taliban from power in Afghanistan. However, terrorist groups such as Al-Qaeda operate within Pakistan, using the country as a safe haven for planning attacks on the U.S., India, and Europe. Pakistan has a poor human rights record.

Due Process Violation

Applicant has raised an issue of due process. Specifically, he argues that the Judge erred in concluding that two Guideline B disqualifying conditions (DC) both applied to Applicant’s case.

He argues that the Judge’s analysis renders these two conditions duplicative of each other, working to the detriment of Applicant’s case for mitigation.

The DCs in question are found at Directive, Enclosure 2 ¶¶ 7(a) and (b).¹ The security concern addressed by 7(a) is as follows:

contact with a foreign family member, business or professional associate, friend, or other person who is a citizen or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

7(b), meanwhile, addresses

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.

Applicant argues that 7(a) covers contact with family members, while (b) addresses broader relationships that may create conflicts of interest. Citing principles of statutory construction,² he argues that “the only individuals who [Applicant] has connections with in Pakistan are his own family members. If paragraph 7(b)—which expressly does not mention family members—applies to this situation, then paragraph 7(a) is rendered superfluous, an untenable result.” He further contends that, as a consequence, Applicant was burdened in making his case for mitigation. “It is entirely possible that, if potentially disqualifying condition 7(b) was not considered, [Applicant] may have met his burden of proof on mitigating the Government’s security concerns, at least with respect to disqualifying condition 7(a).”

We have considered this argument, in light of the record. While acknowledging that the Directive is subject to general principles of statutory construction, we do not conclude that the disqualifying and mitigating conditions are themselves most analogous to statutes. Rather, they are examples both of the kind of circumstances that can give rise to security concerns and of the kind that can mitigate them, to assist DOHA personnel in evaluating troubling aspects of an applicant’s case. They are not to be considered exhaustive. *See* ISCR Case No. 07-00852 at 4 (App. Bd. May 27, 2008). The Directive makes this explicit by stating that security concerns under the various

¹The Judge also concluded that disqualifying condition 7(e) applied. This condition reads as follows: “a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation[.]” Applicant’s due process argument does not extend to this provision.

²Applicant relies on *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998), to the effect that a statute should not be interpreted in such a way as to render its provisions void or superfluous. *See* DISCR Case No. 93-1050 (App. Bd. Dec. 20, 1994), applying principles of statutory construction to the Directive.

Guidelines *include* the stated disqualifying conditions, rather than *consist solely* of them. *See, e.g.*, Directive, Enclosure 2 ¶ 7.

Admittedly, the two disqualifying conditions at issue here are not identical in scope. 7(a) focuses on contacts with foreign persons that could create a heightened risk of coercion. 7(b) concerns relationships with foreign persons, organizations, governments, or countries that pose a risk of a conflict of interest. Regarding the former, a Judge can be expected to examine the nature and extent of the relevant contacts, while, with the latter, he or she would consider the nature of the relationships at stake. However, the plain language of these two provisions permits a significant degree of overlap, and the same circumstances may in fact raise concerns under both disqualifying conditions. This is especially true regarding family members, persons with whom an applicant may well have significant contact and with whom he is bound into lifelong relationships. *See, e.g.*, ISCR Case No. 07-04496 at n. 2 (App. Bd. Oct. 22, 2008), which recognized that foreign family members could raise security concerns under both of the disqualifying conditions at issue here.

Accordingly, we conclude that there is no error in the Judge's application of both disqualifying conditions 7(a) and (b). While his having done so could be expected to have affected his evaluation of the Applicant's case for mitigation, we find no reason to believe that Applicant was unfairly prejudiced in presenting his case. Even if the Judge had limited his analysis only to 7(a) and (e) (see n. 1 *supra*), Applicant's family circumstances and his economic interests in Pakistan are such that it is unlikely the Judge would have found the security concerns arising therefrom to have been mitigated. We conclude that the Judge did not apply the disqualifying conditions in such a way as to compromise the fairness of the hearing and that Applicant was not deprived of the due process rights secured by the Directive.

Applicant contends that the Judge erred in not having extended favorable application to Directive, Enclosure 2 ¶ 8(a), which sets forth a condition that can mitigate Guideline B security concerns.³ He states that there is no record evidence that his family in Pakistan knew that he was applying for a clearance; no evidence that he intended to disclose to his family that he had access to classified information; and no evidence that his family would be at risk were Applicant to have access to classified information. We have considered this argument in light of the Judge's findings and the record evidence. The Board has previously held that such factors as relatives' obscurity or the failure of foreign interests to contact those relatives in the past do not provide a meaningful measure of whether an applicant's circumstances pose a security risk. *See* ISCR Case No. 07-13696 at 5 (App. Bd. Feb. 9, 2009). Neither is the Government required to prove a threat of espionage. *See, e.g.*, ISCR Case No. 02-09907 at 7 (App. Bd. Mar. 17, 2004). Given findings and evidence that

³ "[T]he 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 U.S."

(1) Applicant has numerous relatives and in-laws⁴ in Pakistan with whom he maintains contact; (2) both Applicant and his wife are dual citizens of Pakistan and the U.S.; (3) Applicant has a substantial financial interest within Pakistan; (4) Pakistan has a problematic human rights record; and (5) terrorist groups operate within Pakistan,⁵ the Judge's conclusion that ¶ 8 (a) does not apply here is not error. Similarly, his conclusion that Applicant had not met his burden of persuasion under the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) is sustainable.⁶

Applicant contends that the Judge erred in stating that Applicant's loyalty is not an issue. He cites to Directive, Enclosure 2 ¶ 8(b)⁷ in support of his contention that loyalty is an issue and should have been made a part of the Judge's analysis. The challenged statement by the Judge is found in that part of the Decision in which the Judge summarizes the policies set forth in the Directive. The Judge quoted Section 7 of Executive Order 10865, included in the Directive at Enclosure 1. This provision states "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Applicant argues that, despite this language, ¶ 8(b) requires consideration of an Applicant's loyalty and that the Judge failed to do so.

In considering this issue, we note that provisions of the Directive should be interpreted as consistent with one another.⁸ The pertinent language in the Executive Order is to ensure that clearance decisions do not create a stigma of disloyalty. Directive, Enclosure 2 ¶ 8(b), on the other hand, requires the Judge to balance an applicant's ties *within* the U.S. to his ties to a foreign person, organization, or country in analyzing the extent to which an applicant might find himself in a conflict of interest. Accordingly, there is no conflict between the two provisions. In the case at issue here, the correct analysis would entail a balancing of Applicant's ties or obligations within the U.S. with

⁴"[I]n-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 03-26176 at 5 (App. Bd. Oct. 14, 2005).

⁵The presence of terrorist activity in a country is an important consideration in a Foreign Influence case. ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007).

⁶"The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"

⁷"[T]here 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[.]"

⁸We must assume that, in promulgating the Directive to implement Executive Order 10865, officials made a determination that the Directive and the Executive Order are compatible. ISCR Case No. 02-12199 at n. 15 (App. Bd. Oct. 7, 2004). See also *Asiana Airlines v. FAA*, 134 F.3d at 398, n. 3 *supra*; and ISCR Case No. 98-0320 at (App. Bd. Apr. 8, 1999), citing to the principle of statutory construction that different laws should be interpreted in such a manner as to give full force and effect to each, whenever practical.

his ties or obligations to his family members in Pakistan, and the record demonstrates that the Judge did so.⁹

Applicant cites some minor errors in the Judge's decision which are not reflective of the findings and conclusions as a whole. These errors are typographical in nature and thus harmless. Applicant argues that the Judge erred by not favorably applying Directive, Enclosure 2 ¶ 8(f) in his favor. Given the quantity of Applicant's holdings in Pakistan, the Judge's conclusion was reasonable. Additionally, Applicant cites to a speech by the President. The text is a prospective statement of objectives which does not address the security concerns in Applicant's case.

After reviewing the record, 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'" both as to the mitigating conditions as well as the whole-person factors. *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 Judge's adverse decision is sustainable on this record. *See Egan, supra*.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. 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

⁹“Although this mitigating condition is partially applicable, it is insufficient to overcome the foreign influence security concerns. [Applicant] has contacts and close relationships with his mother, his siblings in Pakistan, and his sister living in the United States, as well as in-laws in [third country]. They all have contacts and a close relationship with family members in Pakistan.” Decision at 10.

Administrative Judge
Member, Appeal Board