

KEYWORD: Guideline E and Guideline B

DIGEST: Applicant’s association with a foreign official, his affairs with foreign women, and his loss of a company laptop computer in a foreign country raised security concerns. Although this conduct occurred over ten years prior to the hearing, the Judge concluded that Applicant had not had an opportunity in the intervening years to demonstrate rehabilitation. Adverse decision affirmed.

CASE NO: 10-02671.a1

DATE: 06/19/2012

DATE: June 19, 2012

In Re:)	
)	
-----)	ISCR Case No. 10-02671
)	
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 May 27, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 23, 2012, after the hearing, Administrative Judge Arthur E. Marshall, Jr., 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 failed to consider all of the record evidence and whether the Judge failed properly to apply the mitigating conditions. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant has held a security clearance from about 1986 through 1991 and again from about 2001 until the present. He is an engineer, working for a Defense contractor.

In early 2000, Applicant was working for a previous employer. He did not hold a security clearance. He performed his duties in Russia, though he regularly traveled back to the U.S. His duties often required him to meet with Russian officials and to socialize with them. In 2000 and 2001, Applicant frequently met with a certain official (Official) over dinner, during which the two would discuss work. At these dinners they would share a bottle of cognac. Applicant notified his employer about this person. During one visit to Applicant's apartment, Official requested a copy of written information concerning a project Applicant had worked on in the past. Applicant gave him a copy, although the information was available on the internet. Official offered Applicant \$900 in return. After some persuasion, Applicant accepted the money, and he signed a receipt for it. He reported this transaction under questioning after his return to the U.S. in 2002.

On another occasion, Official noticed two books on Applicant's shelf. Applicant told Official that they were available for purchase on the open market, but he gave Official his copies. Official gave Applicant \$500, but this time Applicant did not sign a receipt. He reported this incident to the U.S. Embassy in Moscow. In a footnote, the Judge stated that a counterintelligence official later advised Applicant that it appeared that Official was "courting" him, utilizing a technique Russians frequently employed to build allegiances.

In 2000, Applicant, who was married at the time, began an extramarital affair with a Russian national. He continued the affair after being granted a security clearance by another Government agency in 2001. He did not disclose this affair voluntarily. He eventually did so under questioning after his return to the U.S. His wife did not find out about the affair until several years after their divorce.

At some point during his stay in Russia, Applicant met two women, previously unknown to him. He took them back to his apartment. He slept in bed with one, and the other slept in another bedroom. On another day, he permitted a maintenance person to enter to conduct repairs. About a week later, he noticed that a laptop computer was missing. He used this computer to conduct official business, including monthly meetings between Russians and U.S. contacts. He is not sure whether the women took the laptop or the workman did.

On another occasion, Applicant visited a public café. He noticed that other people put their cell phones on the bar, and he did the same when going to the restroom. When he returned to the bar the cell phone was missing. Also, someone stole Applicant's wallet while he was living in Russia.

During his stay in Russia, Applicant occasionally entertained Russian nationals at his apartment while he was under the influence of alcohol and, at times, intoxicated. He had multiple sexual relationships, only some of which he reported to his superiors.

After his return to the U.S. in 2002, Applicant was debriefed by investigative officials. During this questioning, he admitted the affair and disclosed other information that he had previously withheld. In 2007, Applicant's employer suspended him without pay for three weeks because of his poor judgment regarding business and ethics procedures between 2000 and 2001.

Applicant's sister is a U.S. citizen by birth. She immigrated to Russia and became a Russian citizen. Her daughter became a Russian citizen, but she lives in the U.S. Applicant avers that his sister has multiple property interests in Russia. She visits the U.S. regularly, staying with Applicant's and her mother. Applicant sees his sister several times a year, usually at his mother's home. In March 2009, he stated that he spoke with her on the phone about twice a week when she is in the U.S. He also has periodic contact with his niece.

Applicant enjoys an excellent reputation for the quality of his work performance. There are no adverse incidents in Applicant's record subsequent to those described above.

In the Analysis, the Judge concluded that Applicant's conduct in Russia was "reckless . . . and showed very poor judgment." Decision at 10. He stated that the sexual liaisons and the circumstances of his alcohol use impugned his trustworthiness and that his sale of information for personal profit demonstrated "highly dubious judgment." *Id.* The Judge noted that this conduct occurred over ten years ago. However, he stated that, since that time, Applicant had not had an independent assignment abroad, or one with significant foreign contacts, in which to demonstrate changed behavior. Under Guideline B, the Judge noted that Applicant had regular contact with his sister and his niece. He concluded that the circumstances are such that Applicant could possibly be manipulated. In the whole-person analysis, the Judge cited to Applicant's expressions of regret and his evidence that he and his sister are currently somewhat strained in their relationship. However, the Judge concluded that Applicant's conduct, and his relationships with his sister and niece, raise significant concerns that he could be subject to manipulation. Noting that any doubt regarding an applicant's fitness for a clearance must be resolved in favor of national security, the Judge denied Applicant a clearance.

Applicant contends that the Judge did not consider all of the record evidence. Among other things, he cites to (1) the favorable testimony of two of his character witnesses; (2) evidence that Applicant did not have a clearance when he provided written information to Official; (3) evidence that Applicant was never trained in security procedures; and (4) Applicant's testimony that the stolen laptop was used only to transcribe meeting minutes. However, a Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-06975 at 2 (App. Bd. Apr. 19, 2012). Applicant has not rebutted this presumption.

In support of his appeal, Applicant has submitted other Hearing Office decisions, which he contends support his case for a security clearance. As Applicant himself acknowledges, Hearing

Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 10-00218 at 4-5 (App. Bd. Oct. 17, 2011). We give these cases due consideration as persuasive authority. However, they have significant factual differences from his own. They do not demonstrate that the Judge’s adverse findings were arbitrary, capricious, or contrary to law.

We have examined the Judge’s treatment of the pertinent mitigating conditions. The record supports a conclusion 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 Judge’s adverse 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 Judge’s adverse security clearance decision 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