KEYWORD: Guideline B; Guideline K; Guideline E

DIGEST: The weight of the evidence contravenes the Judge's favorable conclusions. Applicant's brother is suspected of serving as a courier for an Israeli intelligence officer (IO). There is evidence that IO called Applicant. Applicant's niece worked a high-ranking Israeli official. Also, Applicant had security significant workplace incidents. Favorable decision reversed.

CASENO: 11-12623.a1

DATE: 02/02/2015

DATE: February 2, 2015

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT
David H. Shapiro, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 26, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline B (Foreign Influence), Guideline K (Handling Protected Information), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 30, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman granted Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge's favorable decision under Guidelines B and E was unsupported by the weight of the record evidence and whether the Judge improperly required the Government to present evidence of a specific security violation under Guideline K. Consistent with the following, we reverse the decision of the Judge.

The Judge's Findings of Fact

Applicant has been employed by a Defense contractor since the early 1970s. He holds bachelor's and master's degrees and has held a security clearance during the course of his career.

Applicant was born in what is now Israel, coming to the U.S. when he was four years old. He became a U.S. citizen in the late 1950s. Married to a native-born U.S. citizen, he and his wife have four adult offspring who are native-born U.S. citizens. Several of Applicant's family members and/or in-laws live or have lived in Israel. Applicant's brother was born in Israel. He moved to the U.S. and became a citizen of this country. He married a U.S. citizen and later moved back to Israel, where he works as an accountant. Applicant's brother and his wife are dual citizens of Israel and the U.S. Although previously Applicant's contact with his brother was infrequent, he has kept in closer touch with him since the death of their father in 2013. Applicant's brother has never introduced him to Israeli officials or sought information about what Applicant does for a living.

Applicant has several nieces and nephews, some of whom are dual citizens of the U.S. and Israel, and others are Israeli citizens. Applicant has minimal contact with them. One of Applicant's nieces was an employee of the Israeli government, performing duties on behalf of a high-ranking official. Although she no longer works in this capacity, she uses her former employer as an employment references.

Applicant traveled to Israel to visit his family each year from 2004 to 2010, except in 2007. In 2009, his employer began requiring employees with security clearances to report foreign personal travel. Applicant did not report his travel in 2009, because he was not aware of the requirement. He did report his travel to that country in 2010, although the Facility Security Officer's (FSO) foreign travel record does not reflect any such report. Applicant had no explanation for the absence of the 2010 visit. He ventured that he could have reported it to his supervisor rather than the FSO.

Applicant was removed from a project in 2005, after working on it for three years. A report by Another Government Agency (AGA) stated that his removal caused Applicant to be resentful.

Applicant testified that he was removed from the project because he went over budget. He denied a statement in the AGA report that he had been counseled for this matter and stated that the removal was not a demotion.

Applicant was interviewed by AGA personnel regarding a neighbor with foreign associations. Applicant was shown a photograph of a known Israeli intelligence officer (IO) with whom his neighbor had contacts.[1] The IO was a "handler" for a U.S. Government employee convicted of a security-related offense. Applicant advised that he did not know the IO. Applicant was also asked about his brother's visits to the U.S. The agents suspected that Applicant's brother was a courier between his neighbor and the IO. Applicant stated that he was not aware of any such activity. He did say that he had transported items from the U.S. to Israel, because doing favors for others is common in Jewish culture.

AGA agents also questioned Applicant about a telephone call that he received from the IO after his brother returned to Israel. Applicant did not answer the phone, and the caller left no voicemail. There is no evidence that Applicant returned the call or had any contact with the IO. It is not clear whether the IO was attempting to call Applicant or his son.

AGA agents questioned Applicant about an incident in 2009, when a security official of Applicant's employer found Applicant in a classified laboratory with the lights turned off. He had not signed the entry log. Applicant advised that he did not recall the incident. He stated that he had physical security responsibility for the lab, and that he often shuts the door and turns out the lights as he exits. During his clearance interview, he stated that he often enters the classified lab as part of his duties. He enters by swiping his access badge. He is not required to sign in because he is on the access list. Applicant later advised his FSO that he had been questioned. The FSO filed an Adverse Information/ Suspicious Conduct report. A former colleague corroborated Applicant's testimony that current company policy does not require a person on the access list to sign a log upon entry to the classified lab. There is no evidence in the record about whether this policy was in place at the time of the incident. After the incident, a security official went into the lab and found unclassified hand sketches or doodles relating to the project on which Applicant was working. Applicant denied that he had made any sketches and that he is not a doodler. There is no reason to believe that any classified information was compromised.

This same security official checked company badge logs and concluded that Applicant's badge had been used to attempt access to areas where Applicant has no access. Applicant stated that he never tried to gain unauthorized access. However, he stated that there had been occasions when he could not gain access to a lab with his badge because access rosters that not been updated or because he could not remember which labs he was authorized to enter. He stated that sometimes he would be looking for another employee in another lab and would swipe his badge to see if he had access. If he could not gain entry he would knock on the door to see if the person was in the lab.

[1]Applicant advised AGA agents that the neighbor's wife had contacts with a wife of a person convicted of spying for Israel.

Company officials discovered a 1983 audit showing that Applicant's safe had contained two documents that were not signed out to him. It also showed that eight documents without cover sheets protecting the classified information were contained therein. Applicant testified that he had no recollection of this security audit. He stated that he was not surprised, however. When members of his staff worked beyond closing time, he would let them store their classified information in his safe.

Applicant's performance ratings show that he has achieved all of his performance objectives. These ratings contain no negative comments. He was nominated for a company award because of his contributions to his employer's mission. Applicant enjoys a good reputation for his work performance, honesty, and his seriousness about security.

Israel is a close ally of the U.S. However, it is also a major practitioner of industrial espionage against this country. There have been incidents of illegal export, actual or attempted, of dual-use technology form the U.S. to Israel. The U.S. has sometimes disagreed with Israel over its sale of sensitive technology to other countries, such as China. Israel considers U.S. citizens who also hold Israeli citizenship to be Israeli citizens for purposes of immigration.

The Judge's Analysis

The Judge concluded that Applicant's connections to his Israeli brother, as well as his sister-in-law, nieces, and nephews who were dual citizens, posed a heightened risk of foreign influence and, therefore, raised security concerns under Guideline B. However, he also concluded that Applicant's long-standing ties within the U.S. outweigh any obligation he may have to these Israeli citizens.[2] The Judge cited to evidence that Applicant had worked in the Defense industry for decades and that he is an honest employee who protects classified information. He noted that Applicant has not visited Israel since 2010 and that he and his brother "went their separate ways" 30 years ago. Decision at 15. Regarding Guideline K, the Judge concluded that the evidence did not raise concerns. He stated that there is no evidence that any security violations actually occurred and that Applicant gave credible explanations for his conduct that had raised suspicions. The Judge also concluded that the evidence did not raise concerns under Guideline E. He noted, for example, that the security incident alleged under Guideline K was cross alleged under E and, because no concerns were found under the former Guideline, neither were they under the latter. He also concluded that other Personal Conduct allegations had not been supported by substantial evidence.

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

[2]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. interests[.]"

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 persuasively argues that the Judge's favorable conclusions under Guideline B contravened the weight of the record evidence. He cites to the Judge's findings, and to record evidence, that, when taken together, undercut the Judge's analysis. For example, Department Counsel notes Applicant's niece's employment by the Israeli government, working for a high-ranking official. An applicant's ties, either directly or through a family member, to persons of high rank in a foreign government or military are of particular concern, insofar as it is foreseeable that through an association with such persons the applicant could come to the attention of those interested in acquiring U.S. protected information. *See, e.g.*, ISCR Case No. 13-00397 at 4 (App. Bd. May 22, 2014) (Applicant's father had been a high-ranking military officer in a foreign country); ISCR Case No. 11-04980 at 2 (App. Bd. Sep. 21, 2012) (Applicant's sister-in-law was married to a retired high-ranking official of the Russian army).

The most important example of evidence that undercuts the Judge's conclusions pertains to Applicant's brother, who was suspected of serving as a courier for IO and for Applicant's neighbor. This aspect of the case is significant, especially in light of evidence that IO called Applicant's telephone soon after the brother returned to Israel from a visit to the U.S. While there is no record evidence of purposeful violations of U.S. law or of his employer's security policy, Applicant's proximity to a high-ranking intelligence official of a nation that engages in industrial espionage against the U.S., viewed in light of his laxity regarding classified information in the early 1980s, the use of his badge to attempt entry to unauthorized work locations, and his suspicious conduct in the lab in 2009, raise doubts about his fitness for a clearance that are not logically mitigated simply by showing that Applicant's actual contact with his brother has, up until recently, been infrequent and that he has long-standing ties within the U.S.

Department Counsel cites to ISCR Case No. 13-01341 (App. Bd. Nov. 10, 2014) in which we held that an applicant's close familial contacts and suspicious interactions with foreign persons raised concerns that were not mitigated by the applicant's favorable evidence. In that case, the applicant had visited Israel on official business, during which time his hotel room was searched and

the hotel staff was inquisitive about his duties. Department Counsel in the case before us argues that Applicant's circumstances are more serious than those presented in ISCR Case No. 13-01341, in that they are exacerbated by evidence of his workplace incidents. Appeal Brief at 19-20. Department counsel argues that the Judge failed to address Applicant's security-significant conduct and circumstances as a cumulative whole. This argument is persuasive, in light of the Directive's requirement that "any doubt" about an applicant's fitness for a clearance be resolved in favor of national security.

We note that the Judge found Applicant to be a credible witness in his own behalf. Although we defer to a Judge's credibility determinations, that is not so for those that are unreasonable or contradicted by other evidence. *See, e.g.*, ISCR Case No. 10-080705 at 2 (App. Bd. May 14, 2012). In the case before us, Government Exhibit 7, AGA Report, discussed numerous inconsistencies between what Applicant had told the agents and information that the agents obtained from other sources. The Judge did not address these inconsistencies, thereby impairing his analysis. We conclude that the Judge's decision contravened the weight of the record evidence and did not adequately address important aspects of the case. The Judge's favorable decision under Guideline B is not sustainable, given the *Egan* standard. In light of this conclusion, we need not address Department Counsel's other arguments in detail, except to note the following: Guideline K does not require proof that a specific rule or regulation has been violated. *See, e.g.*, ISCR Case No. 11-05079 at 5 (App. Bd. Jun. 6, 2012). Moreover, Applicant's use of his badge to attempt access to unauthorized locations and his presence in the darkened, classified lab were alleged under Guideline K. Given the circumstances surrounding those incidents, described above, the Judge's favorable findings under that Guideline are not sustainable. We need not discuss the issues raised under Guideline E.

Order

The Decision is **REVERSED**.

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