KEYWORD: Guideline B; Guideline E

DIGEST: Applicant has maintained personal relationships with multiple citizens of a country known to have an aggressive espionage profile and has been in contact with a Russian agent. He has failed to report the full extent of his foreign contacts. Favorable decision reversed.

CASENO: 11-14872.a1

DATE: 07/31/2013

DATE: July 31, 2013

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Elizabeth L. Newman, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 26, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision–security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 2, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Grattan Metz, Jr., 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 issues on appeal: whether the Judge erred in concluding that Applicant's circumstances did not raise security concerns; whether the Judge's mitigation analysis was erroneous; whether the Judge erred in denying a Government motion to amend the SOR; and whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse the decision.

The Judge's Findings of Fact

The Judge found that Applicant is a consultant for a Defense contractor. He seeks to retain a security clearance he has held since 2006.

Applicant attended a U.S. university, where he met A, a citizen of Russia who was also attending the university. In the early 2000s, Applicant visited A in Russia, staying at A's residence for six weeks. Applicant and A had a mutual friend (B), who was also present during A's visit. Applicant complied with a requirement of Russian law that he obtain a visa, register as a foreign national, and carry a foreign national identification card. He met with A's family, including A's younger brother.

Applicant obtained his current job in 2005, completing his clearance application in 2006. Meanwhile A, who had completed studies at a Russian university, had returned to the U.S. to attend graduate school. A visited with B, who lived in the same area as Applicant. Subsequently, Applicant and A would get together every six months, whenever A was in town.

After finishing graduate school, A opened a travel agency. In 2009, Applicant's contacts with A became more frequent, as did his contacts with A's brother and with B's girlfriend, who was a Russian national. B had to leave the employ of another Government agency because of his relationship with his foreign girlfriend.

In 2010, Applicant attended two social functions for A's travel agency. The first was a dinner at a local restaurant. One of the persons attending the dinner was C, an employee of A's travel agency. Unknown to Applicant, C was an agent of the Russian government, engaged in clandestine espionage activities in the U.S. Applicant was introduced to C but had no conversation with him. Later that year, Applicant attended a similar social function at a local bar, at which C was also in attendance. A few months later, also in 2010, he attended a social function at B's apartment to watch a sporting match. C was present at this event as well. Applicant and C sat next to one another and talked about sports.

This was the last time Applicant ever saw C. After the sports match, C met with a person he believed to be a Russian agent, who was, in fact, a U.S. criminal investigator. The investigator told C to make "dead drop" the next day. C complied with these instructions and was promptly arrested. After being convicted, C was expelled from the U.S.

After learning about this, Applicant met with his facility security officer (FSO), discussing his contacts with A, C, and other foreign persons he had been in contact with. The FSO was unsure as to whether Applicant should report these contacts, so he recorded Applicant's information to him "out of an abundance of caution." Decision at 5. Applicant later spoke with U.S. criminal investigators, who advised him that A and Applicant's other Russian friends were "clean."[1] *Id*.

A, B's girlfriend, A's brother, and C were all from the same part of Russia, and they had gone either to the same college or to nearby colleges. A and C knew each other in college. No one tried to solicit information from Applicant.

Russia has an active, significant, recent, and ongoing collection program focusing on the U.S. As of 2005, Russia was one of the two most aggressive collectors of sensitive and protected technology. It has been the target of terrorist activity in recent years and, pursuing terrorists, engages in torture, summary executions, disappearances, and arbitrary detentions.

Applicant enjoys a good reputation for honesty and trustworthiness. Applicant's girlfriend recommends him for a clearance. She is employed by the Federal Government in a "very sensitive position." *Id*. at 6.

The Judge's Analysis

The Judge concluded that the Government's evidence did not raise Guideline B security concerns, stating that Applicant engaged in no conduct during his trips to Russia that would increase his vulnerability, nor did he engage in such conduct with his Russian friends. The Judge stated that C was not known to the other Russians as an agent nor to Applicant. Moreover, he stated that Applicant has no business or property in Russia that could form the basis for a Foreign Influence concern. The Judge specifically concluded that Applicant's contacts with his Russian friends did not create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion (See footnote 6, *infra*). Having so concluded, the Judge went on to discuss, in the alternative, Applicant's evidence for mitigation. He stated that Applicant's Russian connections were not likely to pose a conflict of interest for him, that Applicant has no business or other economic interests in Russia, and that it is unlikely that he would be placed in a position of having to choose between the interests of the U.S. and the interests of his foreign connections. He also noted evidence that Applicant is a native-born U.S. citizen whose immediate family members are also citizens of this country.

[1]Although Department Counsel does not challenge that the U.S. agent told Applicant that his friends were clean, we note that this information comes solely through Applicant's testimony and is not corroborated by other evidence.

The Judge also found that Applicant's conduct did not raise security concerns under Guideline E. He stated that, to the extent that the evidence raised concerns at all, they were adequately addressed under Guideline B. He stated that Applicant had no means of knowing that C was a Russian agent, that the Government has not shown that Applicant's compliance with Russian law during his visit there bore any indicia of a security concern, and that his having foreign friends from Russia did not impugn his judgement absent a showing that he knew or should have known that any of them were agents of a foreign government. The Judge concluded that, given that Applicant's circumstances did not raise security concerns under Guideline E, there was no reason to perform a mitigation analysis.

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 erred in concluding that Applicant's circumstances did not raise disqualifying concerns under Guidelines B and E. We find this argument persuasive. The Judge stated that the conduct alleged under Guideline E was "fully addressed by the disqualifying and mitigating conditions of Guideline B." Decision at 11. This statement by the Judge is not totally consistent with his conclusion that no Guideline B concerns were raised and with his merely hypothetical application of the mitigating conditions under that Guideline. More to the point, however, conduct can be alleged under both Guidelines and given independent weight under each. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). We note that the Guideline B concern addresses foreign contacts that indicate possibly divided loyalties or a susceptibility to foreign pressure, or coercion.[2] Guideline E, on the other hand, focuses

[2]Directive, Enclosure 2 ¶ 6: "Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign

on conduct that may reflect a deficiency in judgement.[3] Contact with foreign nationals can raise concerns under both of these Guidelines, depending on the evidence. *See, e.g.*, ISCR Case No. 10-10307 (App. Bd. Jul. 18, 2012).

We note the Judge's findings and record evidence of the following:

A is a Russian national. He attended college in the U.S., where be became friends with Applicant, a fellow student.

After college, A returned to Russia and pursued further education in that country. He came to know C, a Russian national, while attending college in Russia.

Applicant visited with A in Russia, during which visit he appeared before a magistrate in order to obtain a foreign I.D. card. (Applicant's testimony that this was a standard requirement of Russian law was not corroborated by other evidence.)

Applicant obtained a security clearance after beginning work for a Defense contractor.

A returned to the U.S. on a student visa, remaining behind after completing graduate school to operate a travel agency. The agency was owned by A, A's Russian girlfriend, and "a third party that might have provided them capital." Tr. at 98. The identity of this third party is not contained in the record evidence.

C was an agent of the Russian government, charged with establishing contacts in the U.S. with a view toward gaining access to persons in policy-making positions.

A moved his business to another location, after which he and Applicant had more frequent contact. One of A's employees was C.

Applicant had other friends who were Russian, including the brother and girlfriend of A and the girlfriend of B, an American citizen who was a mutual friend of A.

Applicant did not advise his employer of the full extent of his foreign connections. In an affidavit he stated that his failure to have done so was "lackadaisical."[4] Applicant was aware of the reporting requirements regarding foreign connections. Moreover, he was aware that his friend B lost a job after reporting the full extent of his foreign connections.

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interest."

[3]Directive, Enclosure 2 ¶ 15: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."

[4]Government Exhibit 2 at 9. Applicant initially wrote that his failure to inform his employer of his foreign connections slipped his mind, but he later amended it to state that it was lackadaisical.

Although not employed by A's travel agency, Applicant was invited to two social functions for the agency's employees. C was present at these functions.

Applicant attended a social event at B's apartment. C was present at this event. Applicant and C sat next to each other and engaged in a conversation about sports.

After leaving the social function at B's residence, C met with someone he believed to be a Russian agent but who was, in fact, a U.S. undercover agent. On the next day, C was arrested. After pleading guilty to an offense under the U.S. Code, C was expelled from the U.S.

Subsequently, A left the U.S. and has not returned. He may have done so because his student visa had expired.

The evidence in the record is not clear as to the extent to which Applicant and A have maintained contact in the intervening years.[5]

This evidence, viewed in light of the entire record, is sufficient to raise concerns under Guideline B. That is, evidence that Applicant had extensive and long-standing foreign contacts under the auspices of which he came into repeated contact with a spy acting on behalf of a foreign power interested in acquiring U.S. protected information satisfied the Government's burden to provide substantial evidence of "a heightened risk of foreign exploitation" sufficient to raise concerns under Directive, Enclosure 2 ¶ 7(a).[6] Additionally, evidence that Applicant, who held a security clearance, established social relationships with a significant number of citizens of a country that is one of the most aggressive collectors of sensitive U.S. information sufficiently calls his judgment into question as to raise concerns under Guideline E. The Judge erred in concluding that the evidence raised no such concerns. Moreover, evidence that Applicant was dilatory in reporting his foreign contacts to his employer, evidence that Applicant has made inconsistent statements as to the extent to which he is maintaining at least some of these contacts (to include the employer of the Russian spy),[7] and a paucity of evidence concerning the third party owner of A's business undermine a plausible case for mitigation.

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[5]"And so I haven't seen him in over two years. And we have exchanged maybe an occasional email to the extent of like my business . . . on Facebook for some competition for marketing competition or something like that[.]" Tr. at 73. Compare with Applicant's response to a DOHA interrogatory that he and A exchanged emails "on a bi-weekly basis for social purposes from September 2010 - July 2012." Government Exhibit 4, Answers to Interrogatories, Updated Contact Information. This document also states that Applicant maintained in-person social contact with A's brother during the same period of time.

[6]"[C]ontact 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[.]"

[7]Although not separately alleged, these matters are relevant to evaluating Applicant's case for mitigation. *See, e.g.*, ISCR Case No. 09-08108 at 6 (App. Bd. Feb. 15, 2011).

We have previously noted (in the context of discussing the seriousness of security violations) that many Applicants in other cases are denied a clearance not for having committed a security violation but merely for having an indicator of a risk that they might do so. We were making the point that the actual violation is graver than an indicator (*e.g*. alcohol abuse or delinquent debts). In this case, Applicant's recent history has much more of security concern than an indicator. He has maintained personal relationship with multiple citizens of a country known to have an aggressive espionage profile against the United States. As a result, he has actually found himself in contact with a Russian agent (since deported). Furthermore, as stated above, he has failed to report the full extent of his foreign contacts. *Compare* ISCR Case No. 03-26888 at 2 (App. Bd. Oct 5, 2006).

The record, viewed as a whole, does not support the Judge's favorable conclusion. Any doubt regarding Applicant's circumstances must be resolved in favor of the national security. Directive, Enclosure 2 ¶ 2(b). The Judge's favorable decision is not sustainable under the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (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.'") In light of this conclusion, we need not address the remaining issues which the Government has raised.

Order

The Decision is **REVERSED**.

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
Administrative Judge
Member, Appeal Board