



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ADP Case No. 14-06533
)
Applicant for Public Trust Position)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

10/31/2017

Decision

MURPHY, Braden M., Administrative Judge:

Applicant mitigated the trustworthiness concerns about his family connections to India under Guideline B, foreign influence. Applicant's eligibility for access to sensitive information is granted.

Statement of the Case

On April 1, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under foreign influence. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR on April 20, 2015, and requested a decision on the written record, in lieu of a hearing. On December 29, 2016, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents

identified as Items 1 through 5, as well as Administrative Notice (AN) documents I through XI. Applicant received the FORM on January 17, 2017. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not respond to the FORM and did not object to the Government's evidence. The SOR and the answer (Items 1 & 2) are the pleadings in the case, and the "SOR transmittal letter" (Item 3) is a procedural document not offered for substantive purposes. Items 4, 5 and 6 are admitted into evidence without objection. The case was assigned to me on October 1, 2017.

On October 18, 2017, I e-mailed the parties and re-opened the record to allow Applicant the opportunity to submit updated information about his family and property in India.¹ On October 27, 2017, Applicant submitted updated information, which is marked as Applicant's Exhibit (AE) A and admitted without objection.

On December 10, 2016, the Director of National Intelligence issued Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG). These AGs apply to all adjudicative decisions issued on or after June 8, 2017.² Any changes resulting from the issuance of new AGs did not affect my decision in this case.

Request for Administrative Notice

With the FORM, Department Counsel submitted a written request that I take administrative notice of certain facts about India. Without objection, I have taken administrative notice of certain facts that are supported by source documents from official U.S. Government publications. Those facts are summarized in the Findings of Fact, below.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a through 1.d, concerning his family and property in India, with brief comments. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 49 years old. He was born in India in 1968. He earned a bachelor's degree in India in 1993. He and his wife, who was also born in India, were married there in 1998. They immigrated to the United States in 1999. They have lived in the United States ever since. They both became United States citizens in August 2013. Their two children, ages 16 and 12, were both born in the United States. (Item 4)

Applicant has worked as a systems administrator for a defense contractor in the health industry since March 2007. He held a similar position for an earlier employer from

¹ Hearing Exhibit (HE) I.

² The June 2017 AGs are available at <http://ogc.osd.mil/doha/DIRECTIVE%202017.pdf>.

2000 to 2007. In connection with his current position, he submitted an application for a public trust position in September 2013, shortly after becoming a U.S. citizen. (Item 4)

In the SOR, the Government alleged potential trustworthiness concerns due to Applicant's connections with India, specifically his mother (age 67) and sister (age 43) (SOR ¶¶ 1.a and 1.b), his wife's parents, ages 82 and 67 (SOR ¶ 1.c) and a house he owns there, valued at about \$50,000. (SOR ¶ 1.d)

Applicant's mother and sister live in India. He maintains weekly contact with them, and visits India every two years. His mother also visits him in the United States, and has stayed with him for extended periods. Applicant's in-laws live in India as well. His father-in-law owns a farm. None of these family members have any connection with the Indian government. Applicant's mother and sister live in the family home, which Applicant inherited on his father's death. He plans to sell the home when they are no longer living there. He indicated that he could not be influenced due to his ownership of this property. (Items 4, 5; AE A)

Applicant telecommutes from his home. He visits his company's headquarters, in another state, every two months. Applicant and his wife own homes in both locations. He estimates that they have a combined value of about \$840,000. Their other assets include stocks, bank accounts, and a company 401(k) account, with a combined value of about \$250,000. Applicant and his wife are active volunteers in their local community. (AE A)

Republic of India

I have taken administrative notice of the following relevant facts about the Republic of India:³

- India is a multi-party, federal, parliamentary democracy, with a bicameral parliament. The president is the head of state, and the prime minister is the head of the government. Recent elections, which were regarded by observers to have been conducted freely and fairly, included more than 551 million participants.⁴
- The 2000 and 2008 Annual Reports to Congress on Foreign Economic Collection and Industrial Espionage identified India as being involved in economic collection and industrial espionage. As of 2015, India

³ Unless otherwise noted, the administrative notice facts about India are all taken from AN I – XI.

⁴ See <https://www.state.gov/documents/organization/265748.pdf> (U.S. State Department 2016 Human Rights Report for India). This report, along with the 2016 State Department Country Report on Terrorism (cited below in footnote 5), was published in 2017, before this case was assigned to me for a decision. Both reports postdate the previous versions, cited in the FORM. I take administrative notice of certain more recent facts referenced in them consistent with my obligation to make assessments based on timely information in cases involving foreign influence.

remains on the Office of U.S. Trade Representative's Priority Watch List, based on its history of trademark counterfeiting and copyright piracy, and a recognized concern about counterfeit pharmaceuticals being produced in India and shipped to the United States.

- A June 2016 summary from the U.S. Department of Justice's details several recent criminal cases involving export and embargo enforcement, economic espionage, and theft of trade secrets, involving either the government of India or companies and individuals in India.
- Counterterrorism cooperation between India and the United States continued to increase in 2016, with both sides committing to deepen bilateral engagement against the full spectrum of terrorism threats. Indian leadership expressed resolve to redouble efforts, in cooperation with the United States and with other like-minded countries, to bring to justice the perpetrators of terrorism. India and the United States pledged to strengthen cooperation against terrorist threats from groups including al-Qa'ida, ISIS, Jaish-e-Mohammad, and Lashkar e-Tayyiba. India continued to experience terrorist and insurgent activities. Anti-Western terrorist groups active in India, some of which are on the U.S. government's list of foreign terrorist organizations, include Islamist extremist groups such as Jaish-e-Mohammed, and Lashker-e Tayyiba.⁵
- As of 2016, the most significant human rights problems involved police and security force abuses, including extrajudicial killings, torture, and rape: corruption remained widespread and contributed to ineffective responses to crimes, including those against women, children, and members of scheduled castes or tribes, and societal violence based on gender, religious affiliation, and caste or tribe. Other human rights problems included disappearances, hazardous prison conditions, arbitrary arrest and detention, and lengthy pretrial detention. A lack of accountability for misconduct at all levels of government persisted, contributing to widespread impunity.⁶

Policies

It is well established that no one has a right to a security clearance (or access to sensitive information, as is the case here).⁷ As the Supreme Court noted in *Department*

⁵ See <https://www.state.gov/j/ct/rls/crt/2016/272233.htm#INDIA> (U.S. State Department 2016 Country Report on Terrorism for India).

⁶ See U.S. State Department 2016 Human Rights Report for India.

⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

of the Navy v. Egan, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”⁸

The adjudicative guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the trustworthiness concern regarding foreign influence:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a

⁸ 484 U.S. at 531.

way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a trustworthiness concern and may be disqualifying. I have considered all of them and the following are potentially applicable:

(a) contact, regardless of method, 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;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology;

(e) shared living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion; and

(f) substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to possible, future exploitation, inducement, manipulation, pressure, or coercion.

AG ¶¶ 7(a) and 7(e) both require evidence of a “heightened risk.” The “heightened risk” required to raise these disqualifying conditions is a relatively low standard. It denotes a risk greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The totality of Applicant’s family ties to a foreign country as well as each individual family tie must be considered.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding [sensitive] information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.”⁹

⁹ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Application of Guideline B is not a comment on an applicant's patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved one, such as a family member.¹⁰ Family relationships can involve matters of influence or obligation.¹¹ Therefore, Applicant's family ties and property ownership raise trustworthiness concerns that he has the burden of persuasion to mitigate.¹²

Applicant's mother, sister and in-laws are citizens and residents of India. His contact with these family members, either through himself or through his wife, coupled with India's human rights issues, the threat of terrorism there, and India's history of economic collection and industrial espionage, create a "heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." It also creates a potential conflict of interest. AG ¶¶ 7(a), 7(b) and 7(e) are raised by the evidence. Applicant's property interest in his family's home in India is sufficient to raise AG ¶ 7(f).

I have analyzed the facts and considered all of the mitigating conditions under AG ¶ 8 and conclude the following are potentially applicable:

(a) the 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 United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(f) the value or routine nature of the foreign business, financial or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate or pressure the individual.

Applicant and his wife came to the United States in 1999, and have lived here ever since. Their two children were born here. Applicant has worked in the United States for many years, and has worked for his current employer since 2007. He and his

¹⁰ ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

¹¹ ISCR Case No. 02-04786 at 4 (App. Bd. Jun. 27, 2003).

¹² ISCR Case No. 99-0532 at 7 (App. Bd. Dec. 15, 2000) (When an applicant's ties in a foreign country raise a *prima facie* concern, the applicant is required to present evidence of rebuttal, extenuation, or mitigation sufficient to carry his burden of persuasion that it is "clearly consistent with the national interest" to grant or continue a [determination of public trust] on his behalf).

wife own two homes in the United States, and have several hundred thousand dollars in assets here. Applicant and his family are firmly rooted in the United States personally, professionally, and financially.

Applicant remains close to his family in India, is in frequent contact with them, and visits regularly, every other year. He owns the family home in India, but intends to sell it once his family no longer needs it. Its value pales in comparison to Applicant's assets in the United States.

I conclude that the trustworthiness concerns under AG ¶¶ 7(a), 7(b) and 7(e), as raised by Applicant's relationships with his mother, sister and in-laws, are mitigated under AG ¶¶ 8(a) and 8(b). I conclude that the trustworthiness concerns under AG ¶ 7(f) are mitigated under AG ¶ 8(f).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of public trust by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(a), the ultimate determination of whether to grant eligibility for a security clearance or trustworthiness determination must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline B in my whole-person analysis. After carefully weighing the evidence, both favorable and unfavorable, and considering the whole-person factors set forth in AG ¶ 2(d), I find that Applicant mitigated the heightened concerns raised by his family and financial connections to India. The record evidence leaves me without questions or doubts as to his eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising under Guideline B, foreign influence.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraphs 1.a-1.d: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national security interests of the United States to grant Applicant's eligibility for access to sensitive information. Eligibility for access to sensitive information is granted.

Braden M. Murphy
Administrative Judge