KEYWORD: Guideline D; Guideline E

DIGEST: Applicant was granted the security clearance with a warning after the investigation first closed and before the child pornography was discovered when it was reopened. In other words, additional security concerns came to light after the security clearance was granted. As we have previously stated, a prior decision to grant a security clearance to an applicant does not give the applicant any vested right or entitlement in keeping a security clearance. Adverse decision affirmed.

CASENO: 17-01680.a1

DATE: 07/19/2019

DATE: July 19, 2019

In Re:	)	
----------	)	ISCR Case No. 17-01680
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 17, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 29, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) 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 erred in his findings and conclusions and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is in his mid-50s, has worked for his current employer for about six years. He has multiple post-graduate degrees. He is retired from the military Reserves and has suffered from Post-Traumatic Stress Disorder (PTSD).

In 2007, Federal law enforcement agencies conducted an investigation that identified individuals, including some with DoD affiliations, who subscribed to known child pornography websites. As part of that investigation, Applicant's home was searched. He admitted viewing adult-content websites, but no pornographic images of minors were found. Past military orders were found.[1] He claimed someone gave him permission to have the orders but was unable to provide that individual's name. He was issued a written warning for mishandling classified information.

In late 2010, the earlier investigation was reopened because some investigative leads were insufficiently examined. In 2011, Applicant was again investigated. A laboratory had lost evidence from 2007 and inspected new material. Additionally, a mix-up led to a hard drive not belonging to Applicant being made part of the investigation. During an interview, Applicant was asked about a website he had visited and chose to end the interview. His access to classified information was suspended in 2012. Four to six questionable images were discovered on Applicant's media. Two of them "were identified as containing known child victims identified by the National Center for Missing and Exploited Children (NCMEC)." Decision at 3. Federal and local authorities declined to prosecute. In 2013, however, Applicant was issued a general officer letter of reprimand for having child pornography and unsecured classified information in his home. Soon after the reprimand became final, Applicant was transferred to the retired Reserves with the recommendation his security clearance be revoked.

Having viewed the images uncovered during the investigation, Applicant disputes that they constitute child pornography. He testified that he had never seen those images before. While some

[1] At the hearing, Applicant testified the documents were marked Secret and included an annex to an operations order. Tr. at 159.

of the images reflected nude and scantily clothed individuals, he argued none were engaged in sexual activity and, therefore, could not be deemed child pornography. He acknowledged that his reputation would be harmed if issues regarding his sexual behavior became public knowledge.

The Judge's Analysis

Law enforcement agencies linked Applicant to known child pornography websites through credit card transactions. After the investigation was reopened and he was asked about specific web-sites, Applicant quit cooperating with investigators. "What was deemed to be child pornography was found," but civilian authorities declined to prosecute. Decision at 4. The military found that Applicant's conduct was "reprehensible" and "disturbing" and issued him a formal reprimand and recommend his security clearance be revoked. His sexual behavior has become a concern for exploitation and could affect his reputation in the community.

"Applicant's continued protestation that the material at issue was not child pornography, despite the fact this is not the forum to appeal previous findings by [a law enforcement agency] and the military, makes it difficult to judge whether such behavior could recur." Decision at 5. The evidence brings into question Applicant's judgment and current reliability. He is not in treatment nor has he recently completed such a program. None of the sexual behavior mitigating conditions apply.

"Applicant admits public knowledge of the facts involved would harm his reputation." Decision at 6. Additionally, sensitive or protected information was found on his personal media in 2007. His conduct reflects poor judgment and a lack of trustworthiness. He has not established that some similar conduct will not occur in the future. Pertinent personal conduct mitigating conditions do not apply.

Discussion

Applicant's Counsel challenges some of the Judge's finding and conclusions. For example, he contends that there was evidence that the child pornography was not the property of Applicant. This claim is based on Applicant's uncorroborated testimony that another person's hard drive became mixed with his evidence at the laboratory. Tr. at 31, 33, 66-68, and 86-91. There is no mention of this supposed mix-up in the investigative reports that are in evidence. Government Exhibits 3 and 5. Moreover, when Applicant was asked at the hearing whether there was any indication that the child pornography images at issue came from the other person's hard drive, he responded, "I don't know." Tr. at 91. Applicant's Counsel also argues that Mitigating Condition 14(c) (the behavior no longer serves as a basis for coercion, exploitation, or duress) should apply because "there was never a basis for coercion, exploitation, or duress as all [his] family members and [his] close friends are privy to this information, as well as [his] previous employer when these allegation were levied." Appeal Brief at 9. Of note, the statement that **all** of Applicant's family and friends are privy to information about the alleged conduct is not supported by the evidence. Further, Applicant testified that, if negative information was published about him, it might hurt his reputation (Tr. at 141) and that no one at his current job knows about the possession of child pornography

allegation (Tr. at 142). From our review of the record, the Judge's material findings and conclusions are based on substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018).

Applicant's Counsel argues Applicant's alleged mishandling of classified material was previously adjudicated and resulted in him being granted a security clearance with a warning. To the extent that Applicant's Counsel is arguing the Government is equitably estopped from reconsidering that matter, we do not find his argument persuasive. Applicant was granted the security clearance with a warning after the investigation first closed and before the child pornography was discovered when it was reopened. In other words, additional security concerns came to light after the security clearance was granted. As we have previously stated, a prior decision to grant a security clearance to an applicant does not give the applicant any vested right or entitlement in keeping a security clearance. Nor would it preclude the Federal Government from considering at a future date whether to continue that grant or revoke it. Furthermore, the Federal Government is not equitably estopped from denying or revoking a security clearance. *See, e.g.*, ISCR Case No. 99-0519 at 15 (App. Bd. Feb. 23, 2001).

Applicant's Counsel asserts that the Judge failed to consider all of the record evidence and misapplied the mitigating conditions and whole-person concept. For example, Applicant's Counsel contends "the [Judge failed] to properly take into account [Applicant's] whole person concept, the unique circumstances associated with the 2007 and 2011 investigations, the complete lack of review of material psychological evidence, the fact that three (3) different State and Federal prosecutors declined to prosecute [Applicant] for deficient evidence, and the fact that these incidents occurred approximately twelve (12) years ago without any repeat behavior." Appeal Brief at 12-13. Of note, the Appeal Board has declined to establish a "bright-line" test regarding the concept of recency. The conclusion of the Judge that past misconduct still remains a security concern must be evaluated through careful consideration of the totality of the specific record at hand. *See, e.g.*, ISCR Case No. 99-0018 at 4 (App. Bd. Apr. 11, 2000). Applicant's reliance on the age of the misconduct is undercut by the fact that currently Applicant denies that he has viewed or possessed child pornography. When an applicant is unwilling or unable to accept responsibility for his or her own actions, such a failure is evidence that detracts from a finding of reform and rehabilitation. *See, e.g.*, ISCR Case No. 96-0360 at 5 (App. Bd. Sep. 25, 1997). Moreover, regarding the claim by Applicant's Counsel that the psychological evidence was not reviewed, we note Applicant asserted the doctor-patient privilege when Department Counsel asked him if he told his treatment providers that he was found to be in possession of child pornography. Tr. at 120-124, 144-145, and 153. In addressing Applicant's assertion of the doctor-patient privilege, the Judge noted that Applicant offered into evidence a letter from a psychiatrist discussing Applicant's mental heath diagnoses (Applicant's Exhibit (AE) L) and stated, "I can give it [AE L] the appropriate weight if there is nothing more behind it." Tr. at 123-124. We find no error in the Judge's statement that he could determine the appropriate weight that AE L should be accorded. Furthermore, a Judge is not required to discuss each and every piece of record evidence. *See, e.g.*, ISCR Case No. 12-01500 at 3 (App. Bd. Aug. 25, 2015). Overall, the arguments of Applicant's Counsel are neither enough to rebut the presumption that the Judge considered all of the record evidence nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See*,

e.g., ISCR Case No. 15-01717 at 4 (App. Bd. Jul. 3, 2017). We give due consideration to the Hearing Office case that Applicant's Counsel has cited, but it is neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.* Applicant's Counsel has failed to establish the Judge committed harmful error.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The 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, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board