KEYWORD: Guideline D; Guideline J; Guideline E

DIGEST: Applicant contends that the Judge erred in concluding that she engaged in a form of prostitution. She emphasizes that the prostitution citation was dismissed for lack of evidence. She argues "the evidence suggests that she never engaged in the exchange of money for sex as the money was for dates and massages. Any sexual behavior engaged in by the [Applicant] was strictly consensual and a decision made regardless of any money exchanging hands." In challenging the Judge's conclusion that Applicant engaged in prostitution, we note that Applicant has not disputed any of the Judge's specific findings of fact supporting that conclusion. Furthermore, the dismissal of a charge or citation does not establish innocence and does not preclude a Judge from concluding the offense was committed based on his or her examination of the evidence. Considering the evidence as a whole, the Board concludes that the Judge's challenged conclusion is sustainable. Adverse decision affirmed.

CASENO: 17-00810.a1

DATE: 09/26/2019

DATE: September 26, 2019

In Re:	)	
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	)	
	)	
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 August 22, 2018, DoD issued a superseding statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive).[1] Applicant requested a hearing. On July 19, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey 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 conclusion about Applicant's conduct and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's found in favor of Applicant on all of the Guideline F allegations and one Guideline E allegation. Those favorable findings are not at issue on appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is in her early 40s, is employed by a defense contractor overseas. She served in the military for about four years and received an honorable discharge. She is divorced with teenage children. She has earned an associate's degree.

The Judge found against Applicant on related SOR allegations. These asserted that Applicant was cited for prostitution and operating a business without a licence in 2017, that she engaged in sex with strangers she met on websites, that her website posted she charged certain amounts of money for specific periods of time, and that one man she met online paid her $80 following sex. In responding to the SOR, Applicant denied those allegations. The Judge made the following findings:

> For about one year from 2016 to 2017, Applicant's semi-nude photographs and contact information were placed on a dating or escort website. (Tr. 60-63, 68-70; GE 5) Her time was available for $80 for 30 minutes and $150 for 60 minutes. (Tr. 61-63) She offered conversation, warmth, massage, dance, and a special event to her customers. (Tr. 61-62, 74) In April 2018, the Department of Justice (DOJ) issued a press release indicating the website Applicant was using to solicit customers was

[1] DoD initially issued the SOR on April 16, 2018.

seized, as it was "the dominant marketplace for illicit commercial sex, a place where sex traffickers frequently advertised children and adults alike." (Tr. 77; GE 9).

On March 11, 2017, the police stopped a vehicle that had just left Applicant's residence. (GE 4) The driver was a soldier at a nearby military installation. The driver said he had just paid Applicant $80 for sex. He said he also paid her $150 for sex on March 8, 2017. (OPM ROI at 17). The police went to Applicant's residence and asked for the money the witness paid her, and she provided four $20 bills. *Id.* Applicant told the police that she was not engaging in prostitution. The police interviewed another witness who was a soldier at a nearby military installation, and he said he paid for sex about four times at Applicant's residence. *Id.* (police report) Applicant's lawyer said she was unable to locate the two witnesses cited in the police report to challenge their credibility. (Tr. 45-46) When Applicant was questioned by the police, she "was concerned about the charges of prostitution as it would affect her security clearance." (GE 4)

Applicant had difficulty estimating how many people paid her for her time; however, she estimated "at least see[ing] 40 or more." (Tr. 64-66) She estimated that she had sex with about 20 men. (Tr. 66-67) She was vague about how many of them paid after having sex with her. (Tr. 67-68) Some of the customers may have asked her for drugs; however, she always refused to give them drugs. (Tr. 88) Applicant did not have anyone to protect her if the date with her customers became violent. (Tr. 87)

Applicant consistently denied that she engaged in prostitution. (Tr. 43, 47-48) She denied that there was a direct relationship between the payment of funds and the sexual activity. (Tr. 82; SR; GE 2) The purpose of the semi-nudity on her website was to encourage men to call her to go out with her. (Tr. 70) After the first date, some men continued their relationships with her and continued to pay her, and some did not pay her. (Tr. 71, 82) As for whether she was soliciting prostitution, Applicant explained, in an advertisement a girl holding a soda may be wearing a bikini, "but that doesn't mean she's a prostitute." (Tr. 93) Applicant held a security clearance in the 2016 to 2017 time period when her website advertised her time to customers. (Tr. 75) [Decision at 5-6.]

Applicant's prostitution charge was dismissed for lack of evidence. After receiving her citation, she stopped seeing customers from the website. Applicant believes her former husband was vindictive and called the police alleging she was engaged in prostitution. In 2016, she earned about $5,000 from her website activity that she did not declare on her Federal income tax return. She did not report her arrest to her facility security officer until after her background interview.

The Judge's Analysis

"Each time [Applicant] engaged in sexual activity and received payment afterwards at this hourly rate from her customers, she committed a form of the prostitution offense." Decision at 11. None of the mitigating conditions under Guidelines D, J, and E fully apply. Her multiple misdemeanor-level prostitution offenses are relatively recent. She has refused to admit she engaged in conduct that constituted prostitution.

Discussion

In her appeal brief, Applicant contends that the Judge erred in concluding that she engaged in a form of prostitution. She emphasizes that the prostitution citation was dismissed for lack of evidence. She argues "the evidence suggests that she never engaged in the exchange of money for sex as the money was for dates and massages. Any sexual behavior engaged in by the [Applicant] was strictly consensual and a decision made regardless of any money exchanging hands." Appeal Brief at 11. In challenging the Judge's conclusion that Applicant engaged in prostitution, we note that Applicant has not disputed any of the Judge's specific findings of fact supporting that conclusion.[2] Furthermore, the dismissal of a charge or citation does not establish innocence and does not preclude a Judge from concluding the offense was committed based on his or her examination of the evidence. *See, e.g.*, ISCR Case No. 03-21761 at 5 (App. Bd. Nov. 28, 2005). Considering the evidence as a whole, the Board concludes that the Judge's challenged conclusion is based on substantial evidence and constitutes a reasonable characterization or inference that can be drawn from the evidence. The Judge's challenged conclusion is sustainable. *See, e.g.* ISCR Case No. 16-02640 at 3 (App. Bd. Jul. 2, 2018).

Applicant also contends that the Judge failed to consider all of the record evidence and misapplied the mitigating conditions and whole-person concept. She argues, for example, that two years have passed since her conduct at issue and that she took responsibility by admitting that she presented herself in a poor manner. Applicant's arguments 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. 17-02488 at 3 (App. Bd. Aug. 30, 2018). We give due consideration to the Hearing Office cases that Applicant's Counsel has cited, but they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.* at 3-4. 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."

[2] Applicant does note that the Judge incorrectly indicated she was arrested for prostitution when she was only issued a citation for that alleged conduct. We conclude this error was harmless.

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