KEYWORD: Guideline D; Guideline E

DIGEST: In his appeal brief, Applicant continues to deny he viewed or possessed illegal pornography. He essentially contends that there was insufficient evidence in the record to prove the SOR allegations that he possessed child pornography. We do not find his argument persuasive. Adverse decision affirmed.

CASENO: 18-00050.a1

DATE: 07/26/2019

DATE: July 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
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 5, 2018, 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). Department Counsel requested a hearing. On May 9, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Pamela C. Benson denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge found in favor of Applicant on one Guideline E allegation that has not been raised an as issue on appeal and is not discussed further below. Consistent with the following, we affirm the Judge's adverse decision.

The Judge's Findings of Fact

Applicant is married and has a child. He has previously worked for defense contractors and held a security clearance for a number of years. In 2015, he was arrested on a felony charge of possession of child pornography. His bond was set at $250,000. He remained in jail for three weeks until he was able to make bail. He admits being arrested and admits looking at pornography on his computer but denies ever intentionally or accidentally looking at pornographic images of minors. Before his attorneys were able to review the evidence against him, the district attorney (DA) offered to dismiss the charge conditioned upon him participating in a pretrial intervention program that included his attendance at weekly meetings of the state's sex offender group treatment program for two years and his payment of court costs. Applicant accepted the offer and the charges were dismissed. He completed the sex offender treatment program in a year and a half. He denied receiving a diagnosis during the treatment program or being required to register as a sex offender.

At the hearing, Applicant indicated that, on the day of his arrest, the police arrived at his house with a search warrant. They confiscated his home computer and other items. He also stated that he accepted the DA's offer because he wanted the matter over as quickly as possible and did not have the financial resources to fight the charge. He acknowledged that the DA did not dismiss the charge outright and that it could have been refiled if he did not meet the conditions of the pretrial intervention program.

The Judge's Analysis

"Applicant has continued to deny that the material confiscated by the police involved child pornography, despite the fact he was arrested after the police executed a search warrant at his home." Decision at 7. The Judge found Applicant's denials of viewing child pornography to be unpersuasive. Moreover, there is no evidence to support his contention that the authorities did not have grounds to pursue criminal charges against him. While he completed a year-and-a-half of treatment program and informed his wife and current employer about the circumstance of his arrest, those factors are not enough for a favorable finding.

Discussion

In his appeal brief, Applicant continues to deny he viewed or possessed illegal pornography. He essentially contends that there was insufficient evidence in the record to prove the SOR allegations that he possessed child pornography. We do not find his argument persuasive.

First, Applicant was arrested at his home after the police executed a search warrant during which they seized his computer and other items. He was charged with felony possession of child pornography, placed in jail on a $250,000 bond, and remained there for three weeks until he could make bail. Second, Applicant admits he viewed pornography on his computer. Third, at the hearing, Department Counsel offered into evidence Government Exhibit 3 that included a deposition signed by a police officer (but not sworn) that reflects Applicant "downloaded several images and videos depicting child sexual abuse" at a particular time in November 2015 and also included an unsigned Warrant Affidavit for Applicant's arrest that includes a probable cause statement using similar language. Fourth, it is fair to say that the executed search warrant would have been supported by a probable cause determination, *i.e.*, a reasonable basis for believing that evidence of a crime would be found in the place to be searched. *See, e.g.*, ISCR Case No. 17-00541at 2 (App. Bd. Feb. 28, 2018) and ISCR Case No. 08-08831 at 4 (Jan. 4, 2011). Fifth, Applicant accepted the DA's offer to dismiss the charge contingent upon him participating in a two-year sex offender treatment program and paying the court costs. Sixth, there is nothing in the record to suggest any irregularity in the processing of the case in question. *See, e.g.*, *U.S. v. Wilson*, 169 F.3d 418, 425 (7th Cir. 1999); *Honeycutt v. Ward*, 612 F.2d 36, 41 (2d Cir. 1979) (There is a strong presumption of regularity in state judicial proceedings). Viewed in its entirety, the record contains substantial evidence to establish security concerns under Guidelines D and E for the SOR allegations involving Applicant's possession of child pornography. *See, e.g.*, ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018).

In his brief, Applicant presents other arguments that lack merit. For example, he highlights in his arguments his positive character evidence, including his professional accomplishments, his past record of protecting classified information, and his service to the community. We note the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

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