

KEYWORD: Guideline D; Guideline E

DIGEST: Applicant cites to a statement by the Judge that Applicant had engaged the services of prostitutes on six occasions, whereas the record only demonstrated five. This comment is found only in the Judge’s summary of the case, at the very beginning of the Decision. His findings of fact do not reference six offenses, nor does his analysis. Indeed, the Judge’s findings are consistent with the record that was before him. To the extent that the challenged statement is an error, it did not likely affect the outcome of the case. Therefore, it is harmless. Adverse decision affirmed.

CASENO: 18-00757.a1

DATE: 03/14/2019

DATE: March 14, 2019

In Re:)
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Applicant for Security Clearance)
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ISCR Case No. 18-00757

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 April 20, 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). Applicant requested a hearing. On December 7, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone 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. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant has worked for a Defense contractor since late 2015. He served on active duty in the military from 1986 until 1999 and then entered the Reserves, from which he retired as an O-5. After leaving active duty he worked for Federal contractors. He first received a security clearance in 1991 while in the military and has held jobs requiring him to have access to sensitive compartmented information (SCI).

Applicant’s security-significant conduct involved him engaging the services of prostitutes about five times—twice while in the military and three times thereafter. The last incident occurred in 2015. Several of these incidents occurred while Applicant held a clearance. During a 2015 polygraph administered by another Government agency in connection with renewal of his SCI access, Applicant admitted that he had engaged the services of prostitutes. As a consequence of these admissions, the agency revoked Applicant’s SCI access. Applicant reapplied for a clearance in 2017.¹ He had not previously disclosed his conduct with prostitutes because he had not undergone a lifestyle polygraph and because the questions on his security clearance applications inquired only about criminal conduct for which he was arrested or charged. Although Applicant has disclosed his conduct to his immediate family and to a close friend, he has not told his employer about it because he is embarrassed.

Applicant attributed his early interactions with prostitutes to his being “young and stupid.” Decision at 3. Regarding the later ones, he claimed that he had experienced periods of stress—the death of his father, a failed romantic relationship, involuntary termination from a job—that affected his judgment. Applicant self-referred to counseling and was advised to attend Sex Addicts Anonymous (SA), a twelve-step program analogous to Alcoholics Anonymous. He initially attended meetings three times a month but now does so by telephone twice a month. He has a sponsor and has served as a sponsor for others. Applicant supplied no information about his counseling, nor did he provide references from his SA sponsor or others with knowledge about his effort at recovery. He did submit information about his participation in a support group for soldiers dealing with post-

¹In his 2017 SCA, Applicant disclosed that his SCI access had been revoked by another government agency following a polygraph.

traumatic stress disorder, but he has not been diagnosed with this condition, and it is not clear how his involvement with this group affected his recovery.

The Judge's Analysis

The Judge noted that three years had passed since Applicant's last offense. However, he stated that even more years had intervened between some of his earlier incidents, thereby impairing Applicant's ability to show that his incidents were mitigated by the passage of time. The Judge concluded that the stressors that Applicant had undergone were not so unusual as to explain or justify his security significant conduct. He also noted a paucity of corroboration regarding Applicant's testimony about his counseling and SA attendance.

Discussion

Applicant's brief includes matters from outside the record. We are not permitted to consider new evidence in resolving an appeal. Directive ¶ E3.1.29. Applicant cites to a Hearing Office case in his Appeal Brief that he believes supports his effort to get a clearance. Each case must be decided on its own merits. Hearing Office decisions are not binding on other Hearing Office Judge's or on the Appeal Board. *See, e.g.*, ISCR Case No. 17-03363 at 3 (App. Bd. Nov. 29, 2018). Moreover, the favorable decision that Applicant cites was reversed on appeal. ISCR Case No. 16-03763 (App. Bd. Nov. 20, 2018).

Applicant cites to a statement by the Judge that Applicant had engaged the services of prostitutes on six occasions, whereas the record only demonstrated five. This comment is found only in the Judge's summary of the case, at the very beginning of the Decision. His findings of fact do not reference six offenses, nor does his analysis. Indeed, the Judge's findings are consistent with the record that was before him. To the extent that the challenged statement is an error, it did not likely affect the outcome of the case. Therefore, it is harmless. *See, e.g.*, ISCR Case No. 17-01181 at 4 (App. Bd. Apr. 30, 2018).

The balance of Applicant's brief is, in essence, a disagreement with the Judge's weighing of the evidence. However, an ability to argue for a different interpretation of the evidence is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.² *See, e.g.*, ISCR Case No. 17-02463 at 2 (App. Bd. Sep. 10, 2018).

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found

²Applicant states that he did not receive a copy of the transcript, "which may be a violation of due process." Appeal Brief at 1. He contends that he had to rely on memory in formulating some of his issues. He does not state, however, that he ever notified the Appeal Board or any other DOHA official about his failure to receive a transcript, and there is nothing in the record to show that he had brought this to our attention prior to submitting his Appeal Brief. As a consequence, we conclude that Applicant has forfeited any due process issue that he is raising. *See, e.g.*, ISCR Case No. 12-01906 at 2, n.1 (App. Bd. Jan. 10, 2019).

and the choice made.” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s adverse 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