DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: February 23, 2022

In the matter of:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Nicholas T. Temple, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 10, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On November 3, 2021, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Judge Claude R. Heiny granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline D, the SOR alleged that Applicant downloaded child pornography on multiple occasions between 2006 and 2008; and, that, in about 2006, he used online chat forums to have sexual discussions with females, to include underage girls, during which he would expose his penis via webcam. Those same behaviors were cross-alleged under Guidelines J and E. In his appeal brief, Department Counsel did not challenge the Judge's findings or conclusions regarding

Guideline E. Instead, he raised the following issues: whether the Judge's conclusion that the Government failed to meet its burden of production under Guidelines D and J was arbitrary and capricious and whether the Judge's whole-person analysis was arbitrary, capricious, and contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact: The Judge's factual findings are summarized below, in pertinent part:

Applicant is in his late thirties; he married in 2014 and has three young children. He served on active duty in the military from 2001 through 2007 and in the National Guard from 2008 through 2014.

Applicant does not deny the allegations. He said that as a young, single male in his twenties, he would chat online with women whom he believed to be over 18 years old. He admitted that when he viewed adult pornography on his personal computer, he was drinking too much, but no longer has a drinking problem.

In 2010, the FBI searched Applicant's home and seized his computer.[1] Applicant believes that his computer was seized because of pirated music and because he had viewed adult pornography. He does not remember very much of the conversations he had with the agents who came to his home. He remembers that the general nature of their request was computer-related, and he gave them what they asked about. Applicant's computer was returned to him in 2013, and he was informed that no charges would be filed. At the time of the search, Applicant was a member of the National Guard. He stated that he did not inform his superiors because he was unable to provide his unit with a reason for the search.

During his security clearance interview, Applicant stated he believed the seizure of his computer was due to down-loading pirated music and downloading pornographic images. When asked if the images included pictures of children, Applicant said that he did not think so. At his hearing, Applicant denied all knowledge of these events, to include the name of the agency that searched his home and seized his computer.

Applicant has serious memory problems. He was asked at hearing if he had ever been diagnosed with any sort of memory defect, he responded:

> I swear I need to [be]cause I really can't remember the birth of my children anymore, and like I can't barely remember my marriage. I know it happened and I know where it was, but I can't give you details. I can't give you the details of my kids' birth[s]. I know I was there, but I can't—I just hate that I can't really remember stuff. (Tr. 40–41) [Decision at 3.]

Applicant also stated that "I'm almost certain I had a minor stroke but I never went to seek medical attention for it. (Tr. at 43)" Decision at 3.

[1] The FBI seized two computers, but the Judge only refers to one being seized. GE 2 at 4.

The April 2010 FBI report summarizes the interview with Applicant about his on-line activity. In 2006, at the age of 24, he started using on-line chat forums, specifically one-on-one chat rooms in which he would communicate with a woman whom he believed to be over the age of 18. Perhaps once or twice a week, the conversations would turn sexual and either he or the woman would expose intimate parts of their anatomy. Applicant stated that he preferred talking with woman ages 18 to 20. None of the women looked underage, but he never verified their ages. He said sometimes the woman would ask to see his penis, and he complied. Applicant stated he would use a screen name for a while, then delete it, and get a new one. He stated he did so because he was afraid of getting caught by law enforcement.

Applicant never solicited child pornography, never sent child pornography to another, and never intended to download child pornography. If he suspected he was talking to a minor in the chat room, he would end the chat immediately. He would never expose himself to anyone he believed was a minor.

Applicant did not recall telling the FBI he had performed searches using terms such as "13-year-old" through "17-year-old" females. He was not and is not sexually aroused by children. If any of his web searches resulted in accessing a child pornography website, he would immediately delete the download before watching it. He estimated that 10 to 15 videos may have been inadvertently downloaded in this manner before he deleted them.

Applicant made the online searches alleged between 2006 and 2008. As of April 2010, he has not made such searches, not downloaded any music or pornography from the internet, and not gone to chat rooms. When asked about the statement he provided to the FBI, Applicant responded, "[I]f they said we had that conversation, then we must have, but I don't recall the conversations that we had that long ago. (Tr. 32)" Decision at 5.

The Judge's Analysis: The Judge's analyses under Guidelines D and J, as well as his whole-person evaluation, are quoted below, in pertinent part:

Guideline D

> AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:
>
> (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted.
>
> Applicant's computer was taken by the FBI and searched for child pornography. The computer was returned to Applicant, and no adverse action was taken against Applicant. He never solicited child pornography, never sent child pornography to another, or intentionally downloaded child pornography. The search of his computer revealed he was not in possession of child pornography. The above disqualifying condition does not apply. [Decision at 6.]

Guideline J

> Applicant's computer was searched by the FBI, and when no child pornography was found, this computer was returned to him. Applicant admits that at the time, he was downloading music and adult pornography. It is not a crime to download adult pornography . . . . He stated if he suspected it was immoral or child pornography he would immediately delete it without viewing it.
>
> . . .
>
> Applicant's inadvertent possession of child pornography occurred 13 to 15 years ago. He was never charged with possession of child pornography after the FBI searched his computer, and no adverse action was taken against him because of these incidents. Since that time he has not downloaded any music or pornography. At the time, he had a drinking problem. Alcohol was a factor in the behavior, and alcohol is no longer a problem for him. His actions do not currently cast doubt on his reliability, trustworthiness, and good judgment. [Decision at 7–8.]

Whole-Person Concept

> When Applicant was in his mid-20s, 13 to 15 years ago, he was young, single, and had a drinking problem. When drinking, he would log onto chat rooms to talk with females, whom he assumed were young adults. Sometime, the talk would turn to a sexual nature, and one thing led to another where he and the woman would show intimate areas of their anatomy . . . . During this same period, he was downloading music and pornography. He believes the pornography was adult pornography and was not illict or inappropriate . . . . Had the FBI's search of his computer revealed child pornography, his computer would not have been returned to him, and he would likely have faced adverse actions. No adverse actions were ever taken against him.
>
> In the intervening 13 to 15 years, Applicant has married, became a father of three, no longer downloads music or pornography on his computer, no longer visits chat rooms, and no longer has a drinking problem. He is no longer the young, single, college student with a drinking problem. The whole – person factors mitigate in his favor . . . .
>
> Applicant exhibited some lack of recall about the specific incidents and statement he made to the FBI during its investigation. Given the passage of time, it is understandable that he may lack accurate recall at this time. Specifically, not addressed in this decision, is how Applicant's memory should be addressed in the granting of a clearance. If his memory problems were to be deemed a security concern, a separate investigation should be rendered. [Decision at 9–10.]

Discussion

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found 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 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

In deciding whether the Judge's rulings or conclusions are arbitrary and capricious, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998). This decision fails in each of these regards. We focus on the most dispositive below.

Failure to Examine Relevant Evidence

The FBI investigative report on Applicant (GE 4) contained relevant evidence—including Applicant's admissions to criminal sexual conduct—that the Judge failed to examine in his findings of fact and his analysis, to include:

The FBI initiated its investigation because it received a report that Applicant, who was 27 years old, exposed himself twice over the Internet to someone whom he believed to be under-aged. On April 12, 2010, an FBI agent and a second Federal agent interviewed Applicant in a conference room at his job site. After being advised of the purpose of the interview, Applicant made numerous admissions regarding his sexual interactions with children online and his possession of child pornography.

Applicant admitted exposing himself to females on the internet approximately twice per week and confirmed that "[q]uite a bit" of this conduct involved people under the age of 18, as age was not a deterrent to exposing himself. GE 4 at 5. It is clear from Applicant's statement that this online conduct had begun in 2006 and was still ongoing in April 2010. He admitted that he needed help, as he had tried to quit, but was unable to stop. He had a system of cycling different screen names to avoid detection by law enforcement. Applicant admitted to agents that he considered himself "a predator among minors." *Id*. Regarding his interest in child pornography, Applicant made the following statements, as summarized by the agents:

> [Applicant] said that he has searched for and downloaded child pornography with his . . . laptop computer. He said that he was curious because it was something that he has never seen before. He indicated that he has performed searches using such terms such as "13 yo" , "14 yo", '15 yo", 16 yo", "17 yo", and "Raven Riley". He said that he will type in "13 yo" and begin downloading the results, sometimes having several in que waiting to download. [Applicant] said that he prefers videos rather than photos. He said that he will download the child pornography videos while watching adult pornography in the foreground. Following the download of the child pornography he will delete it before he watches it.
>
> He said that he searched for child pornography from 2006–2008 and has since stopped doing so. He knew that downloading and child pornography was wrong he said that he did it out of curiosity. He does not masturbate to child pornography only to adult pornography while the child pornography is downloading.
>
> On some occasions he would begin to watch the child pornography that he downloaded only to immediately stop and delete the videos from his computer. He estimates that he has only downloaded 10-15 child pornography videos. He can tell the difference between a 13–14 year old and a 18–19 year old based on the younger of the two looking like little children. [Applicant] informed investigators that he stopped downloading child pornography in 2008 but is unsure what will be found on his computer. [*Id*. at 5–6.]

The Judge's recitation of facts omits virtually all the above inculpatory details; instead, he relies upon Applicant's vague and ambiguous denials at the hearing, discussed further below, to form the narrative of his findings of fact. Throughout the decision, the Judge consistently ignores the criminality of Applicant's conduct, despite the evidence to the contrary found in the FBI report. For example, despite Applicant's admissions in April 2010 that he searched for, downloaded, and intentionally possessed child pornography, the Judge found that Applicant "never intended to download child pornography." Decision at 4. Similarly, in his analysis under Guidelines D and J, the Judge states that Applicant "never . . . intentionally downloaded child pornography" and refers to Applicant's "inadvertent possession of child pornography." *Id*. at 6–7. Our review of the record convinces us that the Judge failed to examine and consider relevant evidence.

Failure to Consider Important Aspects of the Case

Additionally, the Judge neglected to consider at least two critical aspects of the case: 1) Applicant's admissions to the allegations in his response to the SOR; and 2) the full range of security concerns under Guideline D.

In his response to the SOR, Applicant admitted to all allegations, although he referenced his failure to recall details:

> I [Applicant] admit to guidelines D, J & E . . . . I will not deny that these didn't occur as all I remember and I told the investigator that an investigating body came to my house and confiscated my computers for an investigation/suspicion and to what I assumed was for downloading music and pornography from the internet. I do admit to downloading pornography but was never an intent to download illicit or inappropriate nature, if I suspected it was immoral I would delete it. I also admit to chatting with women online as I was a single male in my twenties but also with the intent to chat with someone older than eighteen. [SOR Response.]

In the decision, the Judge did not address Applicant's admissions, but rather sidestepped the issue by stating, "Applicant did not deny the allegations." Decision at 2. In doing so, the Judge did not discuss the consequences of those admissions. More specifically, he did not address what impact, if any, Applicant's qualifying statements in his SOR Response had on his admissions, whether Applicant's intent was a factor in the SOR allegations (*e.g*., does exposing one's private parts online in a chat room to strangers over the age of eighteen raise security concerns under Guideline D?), and whether Applicant's admissions were sufficient to establish the presumption of a nexus between admitted conduct under the guidelines and an applicant's security worthiness. *See, e.g.*, ISCR Case No. 12-10404 at 5 (App. Bd. Mar. 13, 2015). These were important aspects of the case that the Judge should have addressed.

Additionally, in his analysis under Guideline D, the Judge failed to address the full range of security concerns raised by Applicant's alleged conduct and chose only to address whether Applicant's alleged conduct raised security concerns under Disqualifying Condition 13(a), quoted above. At the hearing, Applicant testified that he never told his employer, his wife, or his in-laws about the FBI search. Tr. at 38-39. Yet, the Judge failed to examine whether Applicant's online sexual misconduct raised security concerns under Disqualifying Condition 13(c), sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress. Similarly, Applicant admitted to Federal agents that he needed help as he had tried to stop his online sexual behavior, but was unable to do so. GE 4 at 5. However, the Judge failed to address whether those statements raised security concerns under Disqualifying Condition 13(b), a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop. Finally, the Judge also failed to address whether Applicant's online sexual misconduct, which included exposing himself to strangers about two times a week, raised concerns under Disqualifying Condition 13(d), sexual behavior . . . that reflects lack of discretion or judgment.

In short, the Judge erred in failing to address important aspects of the case.

Failure to Articulate Explanation for Conclusions

The Judge explicitly concluded that the Government failed to meet its initial burden of production under Guideline D. Decision at 6. His analysis under Guideline J is not a model of clarity, but he appears to conclude that the Government failed to meet its initial burden there as well. *Id*. at 7. To reach those conclusions, the Judge cites repeatedly to the fact that Applicant was not arrested or charged with crimes following the seizure of his computer, from which he

infers that no child pornography was found on the computers.[2] *Id*. at 2, 7, 9. However, regardless of what was found or not found on his laptop computer, Applicant confessed in April 2010 to criminal sexual conduct with minors; his admissions alone were sufficient to establish the Government's *prima facie* case under both Guidelines D and J.

The Judge's decision to ignore or reject the FBI report and instead adopt Applicant's in-hearing version of events is particularly baffling in light of the implausibility of Applicant's testimony. At his hearing in June 2021, Applicant denied any memory whatsoever of his April 2010 interview with two Federal agents at his job site, during which he was questioned about exposing himself to strangers online and searching for child pornography. Tr. at 28–38. Such an interview with Federal agents is inarguably memorable, if not life-altering. Of note, Applicant altered his life: he testified that he stopped going to chat rooms after April 2010. But Applicant nevertheless insisted at hearing that he has no recollection of this interview and of the admissions that he made. Although Applicant did admit to a dim memory of the subsequent search of his home, even those details were elusive. He testified that he could recall only that an individual from an unknown Federal agency came to his home and that he gave this person permission to seize his computers for a "computer related" purpose. Tr. at 30. Applicant further claimed that, until he received the Government's evidence for the hearing, he believed the April 2010 search of his home was related to downloading pirated music and viewing adult pornography. Decision at 2, citing SOR Response; Tr. at 51.

Notably, Applicant never denied that he made the admissions to Federal agents. When cross-examined in detail about the interview and his numerous admissions, he instead responded time after time that he could not recall the interview and could not recall the admissions. However, Applicant contradicted his earlier admissions: he denied searching for, downloading, and viewing child pornography or exposing himself to minors online.

To buttress his claim that he couldn't remember the interview with Federal agents, Applicant explained that he had many other memory issues as well and that he believed he may have suffered a "minor stroke." Tr. at 40-41, 43. As examples, Applicant claimed that he also couldn't remember his marriage, the births of his three children, and much of his six years of military service. In cross-examination, Applicant admitted that he had never been diagnosed with any condition that might affect his memory and that he had never sought treatment for his "minor stroke" or purported memory malfunctions. *Id*.

In his findings of fact, the Judge largely adopts Applicant's in-hearing testimony and relies upon it to conclude that the Government failed to establish its *prima facie* case under Guidelines D and J. On appeal, Department Counsel argues that "the Decision fails to explain the gross discrepancy between Applicant's hearing testimony and his prior confessions to the FBI." Appeal Brief at 8. We concur. By failing to include Applicant's 2010 admissions in the decision and to then reconcile the discrepancies between those admissions and his hearing testimony, the Judge fails in his obligation to articulate a satisfactory explanation for his conclusions. Additionally,

[2] Of note, the FBI report does not reflect whether or not a forensic examination of the computers uncovered child pornography or whether the computers were returned to Applicant. GE 4.

none of the factors below, referenced either explicitly or implicitly in the decision, suffice as an explanation.

Memory Problems

The Judge finds as fact that "Applicant has seriously [sic] problems with his memory." Decision at 3. Assuming arguendo that Applicant genuinely has a memory disorder, such a disorder does not reconcile the discrepancies in a manner favorable to Applicant. Applicant admitted to criminal sexual misconduct in 2010 and denied the same misconduct in 2021. Memory loss would make his current version of events less reliable than his earlier admissions, which were made while he was still engaged in online misconduct.[3]

Failure to Prosecute

In reaching his conclusions, the Judge refers repeatedly to the fact that Applicant was not arrested or charged with crimes following the seizure of his computer, which weighed heavily in his analysis. *See* Decision at 2, 7, 9. The Directive itself highlights that a security concern may arise from "sexual behavior of a criminal nature, whether or not the individual has been prosecuted." Directive, Encl. 2, App. A ¶ 13(a). Moreover, it is well-established under Appeal Board precedent that a failure to prosecute is not tantamount to a determination of innocence and does not resolve the Government's security concerns about the underlying conduct. *See, e.g.*, ISCR Case No. 18-02018 at 3–4 (App. Bd. Nov. 4, 2021) for a lengthier discussion of this issue.

Credibility Determination

We give deference to a Judge's credibility determinations, but that deference is not unfettered. As we have previously held, when the record contains a basis to question an applicant's credibility (*e.g.*, prior admissions, inconsistent statements), the Judge should address that aspect of the record explicitly, explaining why he found the Applicant's version of events to be worthy of belief. "Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence." ISCR Case No. 15-07539 at 4 (App. Bd. Oct. 18, 2018). In this regard, the Judge failed on two levels. First, he failed to include the gravamen of the Applicant's admissions in his decision; and, second, he failed to explain why he found Applicant's vague and ambiguous in-hearing denials to be more worthy of belief than these earlier admissions. We are persuaded that the Judge merely substituted a favorable impression of Applicant's demeanor for record evidence and allowed this favorable impression to distort his findings of fact, his analysis, and his evaluation of the whole person criteria.

[3] Although the Judge finds that Applicant has a serious memory problem, he explicitly declines to address the obvious security issues that such a serious memory defect, if genuine, would raise. Instead, the Judge grants a security clearance and opines that "if his memory problems were to be deemed a security concern, a separate investigation should be rendered." Decision at 10. This statement reflects an inadequate understanding of the adjudicative process and the Judge's role. Under Directive ¶ E3.1.17, the Judge has the authority to amend the SOR on his own motion to render it in conformity with the evidence or for other good cause.

Conclusion

After considering Department Counsel's arguments in light of the entirety of the record, we conclude that the Judge failed to address important aspects of the record. Consequently, his findings of fact are not based upon substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive E3.1.32.1. The Judge failed to articulate an explanation for his conclusions and rendered a decision that runs contrary to the weight of the record evidence. The Judge's conclusions that the Government failed to establish its *prima facie* case under Guidelines D and J are arbitrary and capricious. Similarly, his whole-person analysis is arbitrary and capricious, as it is premised upon erroneous and incomplete findings of fact. The Judge's conclusions reflect a clear error of judgment and are so implausible that they cannot be ascribed to a mere difference of opinion. Accordingly, the favorable security clearance determination cannot be sustained.

Order

The Decision of the Judge is **REVERSED**.

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

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board