

Date: June 23, 2022

In the matter of:	)	
	)	
	)	
-----	)	ISCR Case No. 19-02554
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Brett J. O'Brien, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 13, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 14, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Candace Le'i Garcia 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's decision relied on matters not in evidence; whether Applicant was denied her due process rights under the Fifth Amendment to the U.S. Constitution; whether the Judge erred in concluding that Applicant's conduct raised security concerns; whether the Judge was biased against Applicant; whether the Judge erred by failing to consider whether Applicant was a victim of sex trafficking; whether the Judge failed to consider all of the record evidence; 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 and Analysis**

Applicant is in her late 30s. Divorced, she holds a master's degree and is working towards a doctorate. Applicant has worked for a DoD contractor since 2015, during which time she has supported contracts with another Government agency (AGA). Applicant was granted a secret clearance in 2012. In 2017, pursuant to an AGA contract, Applicant underwent two polygraph examinations, on December 7 and 13. AGA denied Applicant a clearance due to sexual behavior, criminal conduct, and personal conduct concerns.

Applicant worked as a prostitute in 2004 and from late 2006 until early 2007. She testified that she did so "from a research perspective." Decision at 4. She engaged in prostitution about 25 times. Applicant did not disclose this activity following her first polygraph, explaining that she believed that it was outside the required time frame. During the interviews preceding and following her second polygraph, Applicant disclosed this conduct. In addition to prostitution, Applicant had an affair with a married man (Man 1) beginning in 2007, which stemmed from Man 1's having answered Applicant's advertisement of her sexual services. Applicant was also married for a period of time during the course of the affair. The couple dated for seven to eight years, during which time Man 1 provided her with financial support, to include permitting her to live in an apartment located on his property at a reduced rent. Applicant and Man 1 terminated the affair after his wife discovered it.

In February 2015, Applicant joined a "sugar baby" web site through which she met a second man (Man 2). The two met for lunch, after which Man 2 gave Applicant \$100. He came to her house on a later occasion, during which they had consensual sex, and he left money outside Applicant's kitchen table before he left. Applicant disclosed this during interviews connected with her second polygraph.

In addition to these sexual encounters, Applicant failed to disclose two instances of marijuana use when she completed a security clearance application (SCA) in 2016. She did not acknowledge this failure in connection with her first polygraph examination "because she was concerned that the recency of her use would have a negative impact on her security processing." Decision 9.

The Judge concluded that Applicant's conduct raised concerns under Guideline E: Directive, Encl. 2, App. A ¶¶ 16(a) ("deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .;") (c) ("credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability . . . unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;") and (e) ("personal conduct or concealment about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.")

In evaluating Applicant's case for mitigation, the Judge cited to inconsistent statements that Applicant had made regarding her work as a prostitute, her affair, and her encounters with Man 2. She found that Applicant made no efforts to disclose her marijuana use in her 2016 SCA and that Applicant had acknowledged she had not addressed it in connection with her first polygraph due to concern that it might impair her effort to obtain a clearance.

I did not find Applicant to be candid or credible at the hearing. Her testimony was inconsistent, in contradiction of the record evidence, and not credible in light of the record evidence. Her failure to truthfully disclose her marijuana use on her 2016 SCA also weighs against any mitigation, rehabilitation, and favorable conclusions concerning her credibility. [Decision at 15.]

## **Discussion**

### Reliance upon Matters not in Evidence

Applicant contends that the Judge cited to matters contained in Government Exhibits (GE) 2 and 7. These were portions of DoD reports of investigation (ROI) that were not admissible under Directive ¶¶ E3.1.20 and 22.

Department Counsel offered GE 2 in his case in chief. This exhibit contained Applicant's written comments on the summary of a clearance interview. The Judge admitted this exhibit insofar as it included handwritten statements by Applicant in response to DOHA interrogatories, but she stated that she would give no weight to the interview summary itself. GE 7 is a summary of a clearance interview conducted in 2016. The Judge did not admit this document into evidence, but she permitted Department Counsel to use it as a basis for cross examination. The Judge cited to Applicant's answers to Department Counsel's questions, but she stated more than once that the summary itself was not evidence. References to these documents in the Decision appear to have been for the purpose of providing context for Applicant's written statement or her testimony. We find no reason to believe that the Judge relied on the contents of the interview summaries contained in GE 2 and 7 in preparing her findings and conclusions. Indeed, the Judge ruled in Applicant's favor concerning one SOR allegation for which the only evidence was contained in GE 7. We resolve this allegation adversely to Applicant.

### Constitutional Due Process

Applicant contends that the Judge erred insofar as she denied Applicant a clearance based simply upon her sex life. Applicant argues that she has a due process right under the Constitution to engage in sexual relations with whomever she desires. Applicant "did not think she did anything wrong and had nothing to hide." Appeal Brief at 9. She contends that the Government did not establish a compelling interest in examining her conduct and that the substance of security clearance decisions can, in fact, be justiciable in Federal Court.

It has long been the case that no one has a liberty or property interest in a security clearance.

Because there is a strong presumption against the issuance or continuation of a security clearance, and because the availability of a security clearance depends on an affirmative act of discretion by the granting official, “no one has a ‘right’ to a security clearance.” Where there is no right, no process is due under the Constitution. [*Dorfmont v. Brown*, 913 F.2d 1399 at 1403 (9<sup>th</sup> Cir. 1990), quoting *Department of the Navy v. Egan*, 484 U.S. 518 at 528 (1988), internal citations omitted.]

Neither *Egan* or *Dorfmont* have been modified, much less overruled. Moreover, to the extent that Applicant is challenging the constitutionality of provisions of the Directive or other guidance binding upon us, we have no jurisdiction to entertain such a challenge. Our jurisdiction is limited to those matters set forth in Directive ¶ E3.1.32. See ISCR Case No. 14-02383 at 3 (App. Bd. Jul. 21, 2015); ISCR Case No. 99-0457 at 6 (App. Bd. Jan. 3, 2001). Accordingly, we will construe Applicant’s arguments as contending that the Judge erred in concluding that her conduct raised security concerns and that the Judge was biased against Applicant.

### Security Concerns

All of the concerns raised in this case arose under Guideline E. Contrary to Applicant’s argument, the decision did not rely solely upon Applicant’s sexual behavior. The Judge also entered adverse findings regarding Applicant’s deliberate omission of her marijuana use in her 2016 SCA.<sup>1</sup> The Guideline E security concern is as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to . . . provide truthful and candid answers during national security investigative . . . processes. *The following will normally result in an unfavorable national security eligibility determination [or] security clearance action . . . refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security . . . determination.* [Directive, Encl. 2, App. A ¶ 15 (emphasis added).]

Applicant does not deny on appeal that her omissions were deliberate. Indeed, she testified that she omitted this misconduct in an effort to enhance her chances for a favorable clearance decision. Tr. at 187-188. We find no error in the Judge’s conclusion that Applicant’s false statement in her SCA raised Guideline E concerns.

Moreover, we find no reason to conclude that Applicant was denied a clearance simply due to her sexual conduct as such. To the contrary, the Judge’s adverse decision was based upon conduct by Applicant that calls into question her judgment and much of which was criminal. For

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<sup>1</sup> The Judge found against Applicant on the portion of the falsification allegation that asserts she deliberately failed to disclose her marijuana involvement on her 2016 SCA but found in favor of her on the portion that asserts she failed to disclose such involvement “while possessing a security clearance.” We find no merit in Applicant’s contention that those findings are inconsistent.

example, she engaged in prostitution services about 25 times and advised during the post-test interview following her second polygraph that the last time she accepted money for a sexual act was 2015, referring most likely to her interaction with Man 2. “After receiving the money, [Applicant] confirmed that she knew it was in exchange for sex. Therefore, she ‘spent the \$300 right away.’” Applicant Exhibit (AE) F, Decision Statement, at 4-5. Moreover, despite Applicant’s claim that she had nothing to hide in her affair with Man 1, her own evidence discloses that she felt “like a sugar baby” and “a prostitute who took advantage of a man who was willing to help me.” AE E, Post-Test Interview Summaries, at 3. This evidence betrays an awareness of guilt and describes activity that could affect Applicant’s community standing. *See* Directive, Encl. 2, App. A ¶ 16(e), *supra*. All in all, the Judge’s findings and the record evidence describe conduct that casts doubt on Applicant’s judgment, reliability, and trustworthiness. We find no error in the Judge’s conclusion that the conduct at issue in this case raised concerns under the disqualifying conditions set forth in the Analysis portion of the Decision.

### Bias

We have also considered Applicant’s due process argument as a contention that the Judge lacked the requisite impartiality. We have considered the entirety of the record, paying particular attention to the Judge’s conduct of the hearing, and find nothing therein that would likely persuade a reasonable person that she had an inflexible predisposition against Applicant. While Applicant may be disappointed over the result of the case, adverse decisions in and of themselves do not evidence bias. *See, e.g.*, ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017). Applicant has not met her heavy burden of persuasion on this matter. *See, e.g.*, ISCR Case No. 18-02867 at 3 (App. Bd. Jan. 15, 2020).

### Sex Trafficking

Applicant contends that the Judge erred by failing to address 18 U.S.C. § 2422, which criminalizes human trafficking. Applicant argues that she was, in fact, a victim of sex trafficking, in essence a crime victim, and that the Judge should have considered this matter in evaluating the extent that Applicant’s conduct raised security concerns as well as in performing a credibility determination.

Department Counsel notes that Applicant did not raise this issue at the hearing and argues that by failing to do so, Applicant has forfeited it for purposes of appeal. *See, e.g.*, ISCR Case No. 18-02158 at 3 (App. Bd. Aug. 7, 2019). We agree with Department Counsel that Applicant did not address this issue below. As a consequence, the Judge had no reason to consider it. Indeed, far from presenting herself as a trafficking victim, Applicant testified that she engaged in prostitution willingly.

[Q]: And when you decided to become a prostitute, did you do that willingly?

[A]: Yes, I did that – experimented in 2004 . . .

[Q]: And were you forced to do it?

[A]: No, I wasn’t.

[Q]: Is that something that you wanted to do?

[A]: Well, I didn't do it for a very long time. Eventually I realized like, you know what, I really don't need to do it. But I was interested and – from a research perspective basically. Tr. at 115, 117.

In addition, Applicant never suggested that her affair with Man 1 and her interactions with Man 2 were other than consensual. The Judge did not err by failing to address this matter in her analysis of the disqualifying conditions.

Regarding Applicant's argument that the Judge should have considered the issue of human trafficking in evaluating Applicant's truth and veracity, we give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. The Judge's conclusions about Applicant's credibility were founded in large measure on her inconsistent statements and other record evidence that impugned her believability. *See, e.g.*, ISCR Case No. 15-03778 at 3 (Aug. 4, 2017). Applicant's arguments are not sufficient to undermine the Judge's credibility determination. Accordingly, we conclude that Applicant forfeited the issue of human trafficking by failing to have raised it at the hearing. Moreover, even if not forfeited, this argument is not sufficient to show that the Judge committed error in her analysis of Applicant's case.

### Remaining Issues

Applicant argues that the Judge did not consider all of the record evidence. Among other things, she argues that the Judge failed to consider evidence that she had disclosed her marijuana use in later SCAs and that AGA had given her a waiver to continue working pending the outcome of her clearance adjudication. After the hearing, Applicant submitted additional documentation, including her 2020 SCA, her appeal of the 2018 AGA security clearance denial, and email traffic showing that AGA granted her an "unclass work waiver." The Judge admitted these documents as AE DD. The Judge made findings to the effect that Applicant is currently working on a project for AGA. However, a Judge cannot be expected to discuss every piece of evidence, which would be a virtual impossibility, especially in a voluminous record like this. Although the evidence contained in AE DD has some relevance, it is not so compelling that a reasonable person would likely expect a Judge to address it explicitly, given the overall weight of the record evidence. For example, that AGA apparently has given Applicant a waiver to work on unclassified projects pending the outcome of her clearance adjudication has little bearing on the question of whether the adjudication should yield a result favorable to Applicant. After considering the entirety of Applicant's appeal arguments, we conclude that she has not rebutted the presumption that the Judge considered all of the evidence in the record or demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-02872 at 3 (App. Bd. Jan. 15, 2020).

Applicant challenges the Judge's analysis of her case for mitigation. She contends, among other things, that she provided truthful information about her marijuana use in subsequent SCAs and during the course of interviews with security officials. However, we note that Applicant finally disclosed the full extent of her marijuana use only in connection with her second polygraph examination.

[Q]: And so the only reason why we know about your marijuana use is because you disclosed it in [2017]? . . .

[A]: Yes, Your Honor.

[Q]: So that was 2017. That's why we know about it?

[A]: Yes, Your Honor. Tr. at 189.

This testimony and the documentary evidence underlying it qualify the extent to which Applicant could be said to have promptly corrected her false statement before being confronted with it. Directive, Encl. 2, App. A ¶ 17(a). Although Applicant's most recent incident of security significant conduct occurred several years ago, the Judge's analysis of her case for mitigation focused to a significant degree on Applicant's lack of credibility at the hearing. As stated above, this credibility determination is consistent with the record that was before the Judge and supports her conclusion that Applicant had not met her burden of persuasion. All in all we find in Applicant's appeal arguments no reason to disturb the Judge's analysis. Contrary to Applicant's contentions, the Judge appears to have complied with the requirements of the Directive in that she evaluated Applicant's case in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 18-02925 at 3 (App. Bd. Jan. 15, 2020).

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.'" *Egan, supra*, at 528. *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: 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