



**DEPARTMENT OF DEFENSE**  
**DEFENSE LEGAL SERVICES AGENCY**  
**DEFENSE OFFICE OF HEARINGS AND APPEALS**  
**APPEAL BOARD**  
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Date: August 10, 2022

In the matter of:	)	
	)	
-----	)	ISCR Case No. 19-03072
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Brittany D. Forrester, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 4, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline I (Psychological Conditions); Guideline F (Financial Considerations); Guideline H (Drug Involvement and Substance Misuse); and Guideline E (Personal Conduct) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 12, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Judge found in favor of Applicant on one of three Guideline I allegations and two of three Guideline E allegations. Those favorable findings were not raised as an issue on appeal. 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.

## Summary of the Judge's Findings of Fact and Analysis

### Background

Applicant, who is in his late fifties, has been working for a defense contractor since the late 1980s. Married in 2014 and divorced in 2017, Applicant and his ex-wife engaged in “an alternative sexual lifestyle.” Decision at 6. He was granted a security clearance in the late 1980s. His security clearance was suspended in 2017, “stem[ing] from his behavior during his [marital] separation and eventual divorce.” *Id.*

The Judge found against Applicant on two Guideline I allegations, five Guideline F allegations, one Guideline H allegation, and one Guideline E allegation. These guidelines are addressed separately below. Since the remaining Guideline E allegation merely cross-alleges the Guideline I allegations, they are addressed together.

### Guidelines I & E

A formal diagnosis is not required to establish security concerns under Guideline I. Since 2009, Applicant has been treated for Attention Deficient Hyperactivity Disorder (ADHD). His current physician, who has treated him for about six years, believes he is stable.

However, Applicant's behavior does warrant consideration under this guideline absent any particular diagnosis. Between May 2016 and June 2017, Applicant shared details of his then estranged Wife's private and consensual sexual activities and her romantic relationship with her new partner with numerous government agencies and on the internet. He also disseminated sexually explicit photographs of her to third parties and published them online. He also accused another federal contracting employee and a flag officer of retaliation for publicly outing individuals involved in an alternative sexual lifestyle community. The record contains a sample of these writings, consisting of more than 300 pages. In the 2019 psychological evaluation, the psychologist attributes Applicant's behavior to the emotional distress he experienced after this Wife left the marriage. The poor judgment and lack of discretion Applicant demonstrated was not the result of any particular mental health condition. [Decision at 19-20.]

Nonetheless, Applicant's behavior raises “concerns about his judgment, discretion, and mental stability.” Decision at 1.

### Guideline F

The SOR alleged that Applicant failed to file his Federal and state income tax returns for 2010-2018 as required. As of the close of the record, Applicant provided documentation that he filed his Federal income tax returns for 2010-2015, 2017, and 2018 beyond the deadlines. A number of those returns were filed late by over two years. He did not provide proof that he filed his 2016 Federal income tax return. Applicant provided proof that he filed his state income tax returns for 2010-2018. For 2010 to 2015, his state returns were generally filed late by over two

years. His proof of filing state returns for 2016-2018 consisted of state tax documents showing he received refunds for those years. Applicant attributed his tax filing deficiencies to receiving advice from a tax professional that he had three years to file the returns to claim the refunds and believing he was entitled to refunds for each year. In this regard, the Judge concluded, “It is unlikely that a tax professional advised Applicant that receiving a refund changed his filing obligations under state and federal law.” Decision at 18.

### Guideline H

The SOR alleged that Applicant used marijuana with varying frequency from 2010 to 2015 while holding a security clearance. In a 2018 security clearance application, he disclosed that he used marijuana “maybe 3 times total over the past seven years.” Decision at 5, quoting from GE 1 at 47. He also disclosed he used it while holding a security clearance. When questioned at the hearing about his history of marijuana use, he provided evasive answers. He stated the number of times he used marijuana “could also be zero[,]” but also acknowledged he tried marijuana while holding a security clearance. Decision at 6, citing Tr. at 77-79. Applicant indicated that he had no intent to use marijuana in the future, submitted a signed statement of intent to that effect, stated he no longer associates with people who use illegal drugs, and provided the results of a negative drug test. Noting that Applicant provided conflicting information about the circumstances of his drug use, the Judge concluded Applicant’s promise to abstain from illegal drugs use in the future lacks credibility. While some mitigating conditions partially apply, he did not mitigate the security concerns.

### Whole-Person Analysis

Applicant’s behavior demonstrates an:

inability to recognize personal and professional boundaries as well as a profound lack of discretion. In his anger and emotional distress, Applicant abandoned this principle to such an extent that he cast doubt on his ongoing security worthiness. He showed disrespect for the personal privacy of others, invading it whenever he felt justified. He handled his own private information and that of others with such reckless disregard that he raised serious concerns that he would handle and safeguard classified information in the same manner. This negative whole-person assessment is not mitigated by his years of having access to classified information without incident, or the favorable character information in the record. Applicant’s actions demonstrated that he lacks good judgment, reliability, and trustworthiness required of those granted access to classified information. [Decision at 21.]

### **Discussion**

On appeal, Applicant does not challenge any of the Judge’s specific findings of fact. Rather, he contends the Judge did not consider all of the evidence, misapplied the mitigating conditions, misweighed the evidence, and erred in her whole-person assessment. Regarding these challenges, it merits noting that the weighing of evidence is a matter within the special province of the Judge. *See, e.g.*, ISCR Case No. 18-00857 at 4 (App. Bd. May 8, 2019). Furthermore, there

is a rebuttable presumption that the Judge considered all of the record evidence, and the appealing party has a heavy burden when trying to rebut that presumption. *See, e.g.*, ISCR Case No. 18-00110 at 5 (App. Bd. Mar. 31, 2020). The standard used to review challenges to the Judge’s analysis—including the application of the guidelines, the weighing of the evidence, or the drawing of conclusions—is whether those determinations are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32. The “arbitrary and capricious” standard is highly deferential. *See, e.g., AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000).

In his brief, Applicant argues the Judge erred in concluding “the record does not contain any information to mitigate the concerns raised by [Applicant’s] behavior.” Appeal Brief at 7, quoting from Decision at 20 (Judge’s analysis). In reviewing a challenged word, phrase, or sentence in a Judge’s decision, the Board does not examine it in isolation. Rather, we consider such challenges in light of the decision in its entirety. *See, e.g.*, ISCR Case No. 18-02181 at 5 (App. Bd. Aug. 19, 2019). In this case, the Judge’s decision contains 13 pages of findings of fact. In those findings, the Judge discusses the mitigating evidence that Applicant presented, much of which pertained to the Guideline I and E allegations. This evidence included Applicant’s explanations for why he engaged in the alleged conduct, descriptions of corroborating documentation, a letter from his treating psychiatrist that indicated he was “stable” (Applicant’s Exhibit (AE) A), and a favorable psychological evaluation conducted by a licensed clinical social worker in 2021 (AE H and Z). Furthermore, regarding the Government’s psychological evaluation, the Judge found that, while the psychologist indicated Applicant’s behavior demonstrated poor judgment, she also noted the psychologist ultimately concluded “in the future, it is questionable whether this individual’s emotional distress will continue to impair his judgment as it has done in the relatively recent past.” Decision at 13, quoting from Government Exhibit 2. Based on our review of the record, we interpret the Judge’s challenged comment not to mean that Applicant did not submit any mitigating evidence regarding the Guideline I and E allegations, but rather to denote the evidence he submitted was insufficient to mitigate the alleged security concerns. We find no reason to disturb the Judge’s adverse findings under Guidelines I and E.

Applicant takes issue with the Judge’s conclusion that aspects of his testimony were not credible. We are required to give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. Applicant has not established any reason for the Board not to give such deference in this case. Applicant’s brief also highlights various aspects of the mitigating evidence, such as the passage of time since the alleged conduct, and argues the Judge erred in concluding the security concerns were not mitigated. As the Board has noted in the past, 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. 15-00650 at 2 (App. Bd. Jun. 27, 2016). In short, none of Applicant’s arguments are sufficient to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge’s analysis of the evidence contravened the requirements of the Directive.

Applicant failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. “The general standard is that a clearance may be granted only when ‘clearly consistent with 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 national security.”

**Order**

The decision is **AFFIRMED**.

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

Signed: Jennifer I. Goldstein  
Jennifer I. Goldstein  
Administrative Judge  
Member, Appeal Board

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