DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: January 11, 2023

In the matter of:	)	
------	)	ISCR Case No. 20-01142
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 1, 2021, 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), Guideline J (Criminal Conduct), and Guideline B (Foreign Influence) of DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 24, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline D, the SOR alleged that from about 2014 to at least December 2018, while he held a security clearance and sensitive compartmented information (SCI) access eligibility, Applicant patronized sex workers on numerous occasions at various locations around the world, and that, on occasion, he engaged in sexual activity with persons of unknown citizenship or of known foreign citizenship. This same conduct was cross-alleged under Guidelines J, E, and B.

Applicant admitted all allegations, with explanations. The Judge found in favor of Applicant on the Guideline B allegation and against him on the allegations under Guideline D, E, and J.

Applicant raised the following issue on appeal: whether the Judge failed to properly consider all available evidence, rendering her adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is in his early thirties, single, with no children. He earned a bachelor's degree in 2014. Applicant has served honorably in the U.S. military from 2009 to the present; he currently serves in a reserve status. He worked for defense contractors from August 2015 to December 2018. Applicant has held a clearance during all times alleged in the SOR and was granted top secret/SCI access in 2015.

In March 2019, Applicant consented to a polygraph examination in the course of applying for a position with a U.S. government agency. During his pre-test interview, he disclosed numerous interactions with sex workers in the United States and overseas. Specifically, Applicant disclosed: in State X in 2014 and 2015, he solicited prostitutes in a strip club on approximately 20 occasions and engaged in sexual activity in massage parlors; in Canada in 2016, he engaged in sexual activity with prostitutes; in State Y in 2018, he paid for sex at a strip club; in a Southeast Asian country in 2018, he engaged in numerous sexual encounters in several locations; in Europe in June 2018, he went to "brothels" in two different countries and engaged in sex with several women within each brothel on seven separate occasions; and in December 2018, he returned to one of those countries, and solicited prostitutes on four separate occasions. Decision at 3.

Following these disclosures, the examiner terminated the interview. Applicant gained employment with his current employer, a defense contractor, in April 2019.

After completing his security clearance application in 2019, Applicant was interviewed by a background investigator. He confirmed the information he had provided in his polygraph pre-interview. He stated that he believed prostitution was legal in some of the countries at issue. He reported that one friend was aware of his sexual activities in Canada and another friend was aware of the trip to Europe in June 2019. He indicated that no one knew about his sexual activities abroad in March 2018 and December 2018.

Regarding his use of prostitutes in the United States, Applicant stated that he did not consider whether his conduct was illegal. The friend with whom he traveled to Europe in June 2018 was also aware that Applicant paid for sex at a strip club in State X, but otherwise no one was aware of his commercial sexual encounters in State X and State Y.

At hearing, Applicant estimated that he patronized sex workers 40 times between 2014 and December 2018 and denied any further incidences. When he patronized sex workers in State X in 2014 and 2015, he believed that his conduct was legal because the sexual activity took place in a club, which was a legal establishment. "Applicant believes that paying for sex with a dancer in a strip club is different from hiring a prostitute in a brothel in that a strip club is not an establishment

whose sole purposed is to provide sexual services to its patrons." Decision at 5. Regarding his sexual activities with sex workers abroad, Applicant did not believe that conduct was illegal because he believed prostitution to be legal in most countries other than the United States.

Applicant testified that friends and colleagues knew that he patronized sex workers abroad and that other soldiers knew about his visits to the strip club. He stated that he told his supervisor and FSO that his SOR involved prostitution, but that he did not provide details or give them a copy of the SOR. He has told his family that he engaged in prostitution. The friends and colleagues who provided character letters for him know that the SOR alleges prostitution. He has not made them aware of any details, including about the nature or extent, as he "considers it a personal matter and does not see a need to provide details." Decision at 8.

Under State X's laws, procurement of a commercial sexual activity is a misdemeanor offense, punishable by fines and imprisonment. Under State Y's law, commercial sexual activity is a misdemeanor offense for the first two offenses and a felony in the case of a third or subsequent violation.

The United States has a "zero-tolerance policy" regarding government employees and contractor personnel engaging in trafficking in persons. Decision at 6. Pursuant to an Executive Order issued in 2012, federal contractors and their employees are prohibited from engaging in trafficking-related activities, to include "the procurement of commercial sex acts." *Id.* at 6. As a member of the U.S. military, Applicant had annual training on combating trafficking in persons (CTIP) since 2011, but he denied any recollection that his training specifically mentioned not paying for sexual conduct. *Id*. at 7.

The Judge's Analysis

Guideline D

Between 2014 and December 2018, Applicant patronized sex workers in two U.S. states and four foreign countries an estimated 40 times, while holding a DoD security clearance. When he paid for sex in strip clubs in State X, he was a member of the U.S. military. When he patronized sex workers abroad in 2018, he was a member of the military and a defense-contractor employee. His patronizing of sex workers was in violation of U.S. policies and regulations and illegal in both States X and Y.

His conduct primarily establishes two disqualifying conditions under Adjudicative Guideline (AG) ¶ 13: (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted, and (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress. Additionally, Applicant exhibited a lack of judgment under AG ¶ 13(d), sexual behavior of a public nature or that reflects a lack of discretion or judgment, by engaging in conduct in massage parlors and strip clubs that could have led to his arrest. Decision at 10.

None of the mitigating conditions are sufficiently established. There is no evidence that Applicant has patronized a sex worker after December 2018, but his sexual behavior was frequent and intentional. It was in violation of U.S. policies and regulations and state laws prohibiting

solicitation of prostitution. Applicant has not had any treatment or counseling. "The extent to which he patronized sex workers . . . makes it difficult to rule out the risk of recurrence based solely on his assertion that it will not happen again." *Id*. at 11.

As of January 2020, only two friends knew about instances in which Applicant had patronized sex workers. Applicant had withheld his involvement with sex workers from his military superiors and civilian employer. He now asserts that his supervisor, his FSO, and his immediate family are aware that he engaged in prostitution, but he admits that he provided no details to them. Applicant has not adequately established that his behavior no longer serves as a basis for coercion, exploitation, or duress.

Guideline J

There is insufficient evidence to conclude that Applicant's sexual activities with prostitutes overseas were criminal in any of the four foreign countries in which it occurred. However, the evidence establishes that Applicant's sexual activities in State X and State Y were criminal. Although Applicant's contributions to his present employer and his decorated military service reflect some rehabilitation, his assertion that he thought his conduct was legal and his attempts to draw a distinction between paying for sex in a strip club and hiring a prostitute in a brothel indicate a lack of reform.

Guideline E

> Soliciting sex with prostitutes, especially with foreign sex workers abroad on numerous occasion, is information that could adversely affect Applicant's standing among his family, friends, fellow service members, and co-workers. The fact that he held a DOD TS clearance and SCI access eligibility while he was paying for sex in brothels and prostitution houses overseas is an aggravating factor.
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> Given Applicant's experience in military intelligence, he can reasonably have been expected to understand that the risk posed by paying for sex with unknown women abroad went beyond any personal health or safety considerations and made him vulnerable to exploitation, manipulation, or duress. In that regard, his repeated involvement with sex workers cannot be considered so minor as to not raise security concerns. Moreover, as previously discussed it was repeated and did not happen under unique circumstances. . . . [H]e has disclosed little of his involvement with prostitutes to those persons who matter in his personal and professional life. [*Id.* at 13–14.]

Discussion

Applicant has not challenged any of the Judge's specific findings of fact. Rather, he contends that the Judge erred in three regards: first, under Guidelines D, J, and E, she failed to apply the mitigation evidence that she considered favorably under Guideline B; second, she failed

to consider that Applicant did not recognize that his activities were prohibited or illegal; and third, she failed in her mitigation and whole-person analysis. Consequently, Applicant argues, the Judge's decision was arbitrary, capricious, and contrary to law.

We turn first to the distinction between the Judge's findings on Guideline B and Guideline D. As the Judge explained, Applicant's relations with the sex workers overseas did not present a heightened risk of foreign exploitation, pressure, or coercion, nor did they create a potential conflict of interest: his contacts were with random women in countries friendly to the United States, he knew little to nothing about their backgrounds, and he did not see them again. "The foreign influence security concerns are mitigated as Applicant is not likely to be manipulated or induced to help a foreign sex worker." *Id*. at 16. Conversely, she determined under Guideline D, J, and E that Applicant's conduct made him vulnerable because he has "not been fully forthcoming with his boss, FSO, family, and friends" and "has disclosed little of his involvement with prostitutes to those persons who matter in his personal and professional life." *Id*. at 11 and 14. Her analysis under the three guidelines clearly distinguishes the differing security concerns and is supported by the record. It is well-established that a Judge may weigh the same evidence differently under different guidelines. *See, e.g.*, ISCR Case No. 16-02483 at 2 (App. Bd. Jun. 11, 2018). Moreover, a finding of mitigation under one guideline does not compel a similar finding under another. *See, e.g.*, ISCR Case No. 13-01281 at 4 (App. Bd. Aug. 4, 2014). We also note that Guidelines D, J, and E focus more on a lack of judgment in an applicant's conduct than does Guideline B.

On appeal, Applicant reiterates that he did not know either that his conduct in State X and State Y was illegal or that his conduct overseas was in violation of the U.S. policy that prohibits federal contractors from engaging in commercial sex acts. Regarding the first claim, it has long been established that "ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 7 Pet. 404, 411 (1833); *see also Cheek v. United States*, 498 U.S. 192, 199 (1991)("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

Regarding the second claim, Applicant argues as follows: he testified at hearing that he did not recall being trained on the CTIP rule that commercial sex acts are prohibited; the Judge nevertheless "concluded that [he] was aware of the zero-tolerance policy and did it anyway"; and her determination is "an erroneous conclusion not founded in the record." Appeal Brief at 8. Reading the Judge's decision as a whole, we conclude that she did not find that Applicant knowingly violated the CTIP policy. Instead, she concluded that Applicant, while maintaining access to highly sensitive classified information, engaged in conduct that he should have recognized by virtue of training and experience as incompatible with the trust and confidence that had been reposed in him by the Government. In this regard, the Judge stated:

> [I]n light of his experience in counterintelligence and his annual training in combating human trafficking, Applicant can be expected to have known that his repeated patronizing of sex workers, both in the United States and abroad, is inconsistent with the judgment, reliability, and trustworthiness that must be demanded from individuals holding a top secret clearance with SCI access eligibility. [Decision at 16.]

The remainder of Applicant's brief is fundamentally an argument that the Judge misweighed the evidence. None of Applicant's arguments, however, are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in her whole-person analysis by considering all evidence of record in reaching her decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Applicant has 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

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