DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: January 31, 2024

In the matter of:	)	
-----	)	ISCR Case No. 22-02113
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Lynch, Esq., Department Counsel
Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT
Melissa L. Watkins, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 30, 2023, 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 the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 2, 2023, after the record closed, Defense Office of Hearings and Appeals (DOHA) Judge Richard A. Cefola granted Applicant's security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline D, the SOR alleged that Applicant viewed child pornography from at least July 2018 to about August 2018. Under Guideline E, the SOR alleged that Applicant's security clearance was revoked by another government agency (AGA) in October 2019 for viewing child pornography, as alleged under Guideline D, and for failing to report his interaction with law enforcement in connection with that conduct to AGA's security office. The Judge found favorably for Applicant on both allegations. On appeal, the Government raised the following issues: whether the Judge's favorable conclusions under Guideline D and Guideline E and his whole-person

analysis are unsupported by the record evidence and thus 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 and quoted below:

Applicant is in his mid-fifties and married, with three adult children. He has been employed by the same defense contractor for about 36 years, and he held a security clearance from 2012 until it was revoked in October of 2019.

Guideline D, Sexual Behavior

From July 2018 to August 2018, "Applicant intentionally sought out and viewed child pornography." Decision at 2. As a result, law enforcement obtained a warrant and conducted a search of his house. No criminal charges resulted. Applicant's wife is aware of this issue and testified on his behalf.

In November 2021, Applicant was evaluated by a licensed psychologist who opined that he has no diagnosable conditions and concluded, in part:

> [Applicant] . . . has an excellent work history, gets along well with others and his occasional viewing of pornography in the past has not impeded his work in any way, nor has [it] directly affected his relationships or any other important life roles. There were marital challenges before and after his viewing of pornography. Pornography helped to maintain distance in his marriage, and he has taken steps to correct this problem, participating in sexaholics anonymous, obtaining a sponsor, and attending marital therapy." [*Id*. at 2-3, quoting Applicant Exhibit (AE) D at 41.]

Guideline E, Personal Conduct

In about October of 2019, Applicant's security clearance was revoked by AGA for his failure to report the interaction with law enforcement. "Applicant relied upon the advice of his criminal counsel in not reporting the search of his home." *Id*. at 3, citing Tr. at 28-31, 31-33; Government Exhibit (GE) 1.

Administrative Notice: At the Government's request, the Judge took administrative notice of the Department of Justice publication, *Citizen's Guide to U.S. Federal Law on Child Pornography*, which he summarized as follows: "Images of child pornography are not protected under the First Amendment rights, and are illegal under Federal law. Federal law prohibits the production, distribution, reception, and possession of an image of child pornography. Any violation of Federal child pornography law is a serious crime, and convicted offenders face severe statutory penalties." *Id*.

The Judge's Analysis: The Judge's substantive analysis is quoted below, in its entirety:

Guideline D, Sexual Behavior

Applicant intentionally viewed child pornography over a period of two months in 2018. His conduct is criminal and is high-risk sexual behavior that reflects a lack of discretion or judgment. It also creates a vulnerability to coercion, as discussed below under Guideline E. The evidence is sufficient to raise [two] disqualifying conditions.[1]

AG ¶ 14 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ [14 to include ¶¶ 14(b)-14(e)].[2]

. . .

Applicant is 56 years old, and the sexual behavior occurred more than two [sic] years ago. It also only lasted for two months. His wife is aware of his conduct. He has taken steps to correct this problem, participating in sexaholics anonymous, obtaining a sponsor, and attending marital therapy. Sexual Behavior is found for Applicant. [*Id*. at 4-5.]

Guideline E, Personal Conduct

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

> (e) personal conduct, or concealment of information 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:
>
> > (1) Engaging in activities which, if now, could affect the personal's personal, professional, or community standing.

[1] 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.

[2] AG ¶ 14: (b) the sexual behavior happened so long ago so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment; (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; (d) the sexual behavior is strictly private, consensual, and discreet; and (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indication the behavior is readily controllable with treatment.

Applicant knowingly viewed child pornography. His wife, who testified on his behalf, is aware of [the] conduct. The evidence is sufficient to raise this disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 [to include AG ¶¶ 17(c)-17(e)].[3]

Applicant has produced evidence of counseling and positive steps that would alleviate the risks arising from his conduct. He ceased this two-month transgression more than five years ago. It occurred during a period of marital challenges, that have been resolved. His spouse is aware of his past conduct. Personal Conduct is found for Applicant. [*Id*. at 5-6.]

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. . . . Applicant is well respected in his community and in his workplace. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. [Decision at 7 (internal citations omitted).]

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." AG ¶ 2(b). The Appeal Board may reverse a 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

[3] AG ¶ 17: (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

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 and to Consider Important Aspects of the Case

The Government argues that the Judge "failed to consider important aspects of the case—to include the severity and extent of Applicant's admitted criminal behavior, Applicant's failure to take responsibility for the extent of his behavior, the evidence indicating Applicant's ongoing vulnerability to coercion, and Applicant's overall lack of credibility." Appeal Brief at 13-14. We agree. We turn first to relevant evidence that the Judge failed to examine regarding the gravity of Applicant's conduct and Applicant's failure to accept responsibility.[4]

Letter of Revocation: In November 2019, AGA issued a letter of revocation (LOR), notifying Applicant that it had revoked his security clearance the prior month. GE 3 at 31. The LOR summarized Applicant's discussions with a polygraph examiner in July and August 2019, in which Applicant disclosed visiting websites during the summer of 2018 that contained pictures and videos of nude minor children engaging in sexual acts. In his discussion with the polygrapher, Applicant admitted the following: that he visited "sites containing sexual videos and photographs of children as young as babies to children as old as 17 between the summer of 2018 and September 2018;" that "all the children on the sites he viewed were nude and engaging in sexual activity;" that he visited the sites multiple times per week and approximated his viewing time as "roughly five hours per week;" that he kept going to the sites because of the "element of surprise;" that he was "never bored and [was] interested in discovering what was new and different on these sites;" that law enforcement came to his home in September 2018 to execute a search warrant based on his online activity; and that he advised the officers that he was the household member who "occasionally" visited the websites containing underage pornography. *Id.* at 31-32.

The LOR also stated that Applicant had a telephonic interview with a security representative on August 28, 2019, in which he "confirmed the details provided during [his] polygraph examination." *Id*. at 32. In his findings of fact and analysis, the Judge failed to reference or examine the LOR – the gravamen of the Government's case.

Subsequent Statements: The Government highlights that, since the LOR was issued in November 2019, Applicant has "repeatedly minimized his offenses and tried to explain away his viewing of child pornography as unintentional." Appeal Brief at 4. Indeed, the record reflects an

[4] The Government also raises arguments about Applicant's failure to report the interaction with law enforcement to AGA and the Judge's failure to address that issue more fully. We elect not to address those portions of the brief. First, it is unnecessary, given the gravity of the other errors identified. Second, and more important, the SOR under Guideline E alleged AGA's revocation of Applicant's clearance, not the underlying conduct of viewing child pornography and failing to report his interactions with law enforcement. Although the Judge to some extent treated the underlying conduct as alleged under Guideline E, we decline to do the same.

evolving effort by Applicant over the past three years to distance himself from his polygraph-prompted admissions.

Security Interview: In his November 2021 DoD clearance interview, Applicant asserted that he "continued to view this kind of material more out of curiosity as he never knew that it existed," that he was "trying to understand the genre," and that he had only viewed child pornography "around a dozen times." GE 3 at 7.

Response to Revocation: In December 2021, Applicant submitted via counsel a written response to AGA's revocation of his clearance. In his letter, Applicant requested four changes to the language of the LOR, as it "mischaracterize[d] the responses that he provided during his polygraph examination." *Id*. at 17. He requested to strike the phrase "as young as babies to children as old as 17," as he claimed that "the mention of sexual activity with babies is misleading and inflammatory." *Id*. Although Applicant asserted that the "content of underage individuals was not all sexual acts," he admitted that there was "some sexual content across the range of ages you mentioned." *Id*. Applicant also requested that the language "all of the children on the sites you viewed were nude and were engaged in sexual activity" be changed to "the children on the sites you viewed were nude and sometimes were engaged in sexual activity." *Id*. Additionally, Applicant sought to establish that his estimated viewing time of five hours per week included all pornography rather than solely child pornography and to strike the phrase "never bored." *Id*. at 18. He requested no other corrections or edits.

Response to AGA Questions: In April 2022, Applicant responded in writing to follow-up questions from AGA's appeal process and asserted, for the first time in the record, that he visited the websites that contained child pornography because he was "looking for naked images of *models* less than 18 years old." *Id*. at 65 (emphasis added).

Response to DOHA Interrogatories: In March 2023, Applicant responded to DOHA interrogatories and included a personal statement in which he again asserted that he was looking for "young models, even just clothed for the reasons of nostalgia." GE 4 at 2. He further stated that he "was upset and humiliated to be accused of such a heinous thing [child pornography] – it had no factual basis." *Id*.

Response to SOR: In his April 2023 Response to the SOR, Applicant denied the allegations under Guidelines D and E, asserting that any suggestion that he took steps to view child pornography intentionally was "absolutely incorrect." SOR Response at 3, 7.

Hearing Testimony: In his September 2023 hearing, Applicant again claimed that his viewing of child pornography was "not intentional" but instead "just part of browsing." Tr. at 22.

The Judge's brief recitation of facts and briefer analysis ignored all details of the polygraph, the detailed admissions that resulted, and Applicant's ongoing efforts to dilute those admissions and minimize his conduct. At best, the Judge's findings of fact are incomplete. In sum, our review of the record convinces us that the Judge failed to examine and consider relevant evidence.

Despite Applicant's repeated denials that he intentionally viewed child pornography, the Judge concluded that "Applicant intentionally viewed child pornography over a period of two months in 2018." Decision at 4. The Government argues that – given Applicant's denials – the Judge's finding that Applicant intentionally viewed child pornography is fundamentally inconsistent with his conclusion that Applicant mitigated his behavior. This argument has merit for at least two reasons. First, we have long held that rehabilitation and reform is difficult to establish if an applicant refuses to accept responsibility for his actions. *See, e.g.*, ISCR Case No. 96-0360 at 5 (App. Bd. Sep. 25, 1997). *See also* ISCR Case No. 08-05351 at 8 (App. Bd. Mar. 12, 2010) (reversing a grant in part because the judge failed to consider the applicant's refusal to accept responsibility for accessing child pornography). Here, the Judge fails to identify the particular mitigating conditions he relied upon, but he appears to rely in part on the passage of time: "Applicant is 56 years old, and the sexual behavior occurred more than two [sic] years ago." Decision at 5. As we have previously stated, "[w]hatever mitigating value attaches to the passage of time since the conduct, it is seriously diminished by Applicant's failure to acknowledge the misconduct." ISCR Case No. 08-05351 at 8. *See also* ISCR Case No. 17-01680 at 4 (App. Bd. Jul. 19, 2019) ("Applicant's reliance on the age of the misconduct is undercut by the fact that currently Applicant denies that he has viewed or possessed child pornography.").

Second, and more significantly, the Judge's conclusion that Applicant intentionally viewed child pornography over the course of two months carries with it an implicit finding that Applicant was untruthful at least three times during the security clearance process – in responding to DOHA interrogatories, in answering his SOR, and in testifying at the hearing. Applicant's contradictory versions of his child pornography viewing habits and his evolving denials raise obvious questions about his honesty throughout the security clearance process that the Judge needed to acknowledge and weigh in assessing Applicant's candor, integrity, and reliability. *See, e.g.*, ISCR Case No. 20-01450 at 8 (App. Bd. Jun. 9, 2022). The Judge erred in failing to acknowledge or address this critically important aspect of the case – Applicant's credibility – and entirely failed to articulate a rational basis for his conclusion that Applicant had nevertheless mitigated the security concerns.

The Government also challenges the Judge's apparent reliance on mitigating conditions AG ¶ 14(c) and AG ¶ 17(e).[5] In both his Guideline D and E analyses, the Judge cites to the fact that Applicant's wife is aware of his conduct. Decision at 5, 6. At hearing, Applicant admitted that he told no one about the child pornography other than his wife and children, who were present at the time of the search, the members of his Sexaholics Anonymous group, and an evaluating psychologist. Tr. at 35. He did not tell his coworkers or the supervisor who testified for him at hearing. An Assistant Scoutmaster at the time of the law enforcement search, Applicant did not tell anyone in that organization but instead simply resigned. *Id*. at 35-36. In focusing solely on his wife's awareness of Applicant's conduct, the Government argues, "the Judge erred by failing to analyze the high potential risk of Applicant being exploited by one threatening to disclose his child pornography consumption to his company, coworkers, and members or parents of his Boy Scout troop." Appeal Brief at 18. We agree and find error in the Judge's failure to consider all relevant evidence on the issue of vulnerability to coercion. Moreover, the Judge's conclusion in his Whole-

[5] AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress; AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Person analysis that "Applicant is well respected in his community and in his workplace" is plainly undermined by that fact that Applicant's community and workplace do not know about the child pornography and the resulting law enforcement interest.

Conclusion

After considering the Government's arguments in light of the entirety of the record, we conclude that the Judge failed to examine relevant evidence and to consider important aspects of the case. Consequently, his findings are incomplete, conclusory, and not based upon consideration of all relevant and material evidence. Directive ¶ 6.3. The Judge failed to articulate an explanation for his conclusions and rendered a decision that runs contrary to the weight of the record evidence. In sum, the Judge's conclusion that Applicant mitigated the Guideline D and Guideline E security concerns is arbitrary and capricious. Accordingly, the favorable security clearance determination cannot be sustained.

Order

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

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

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board