KEYWORD: Guideline E; Guideline M; Guideline D

DIGEST: The SOR may be amended at the hearing upon motion by either party or the Judge so as to render it in conformity with the evidence admitted or for other good cause. When amendments are made, the Administrative Judge may grant either party's request for additional time as the Judge deems appropriate. A Judge's ruling on a motion to amend is reviewed for abuse of discretion. The Judge denial of Applicant's motion as untimely was error. There is no provision in the Directive which forbids a motion to amend under the circumstances in this case, based upon its timing. Ultimately, however this error was harmless. Adverse decision affirmed.

CASENO: 06-19544.a1

DATE: 05/28/2008

DATE: May 28, 2008

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Ray T. Blank, Esq., Department Counsel

FOR APPLICANT
Mark S. Zaid, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 29, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct), Guideline M (Misuse of Information Technology Systems), and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 28, 2007, after the hearing, Administrative Judge John Grattan Metz, Jr., denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in denying Applicant's motion to amend the SOR; whether the Judge erred in concluding that Applicant had not mitigated the security concerns alleged in the SOR; and whether the Judge erred in his whole-person analysis. We also construe Applicant's appeal as alleging that the Judge was biased against Applicant. Finding no harmful error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a senior engineer employed by a Defense contractor. A graduate of a U.S. military academy, he served over 25 years as an officer, retiring as an 0-5.

Applicant has been addicted to pornography since about 1959. From 1960 to 2002 he masturbated in public places, such as his automobile, his locked office, locked bathroom stalls at work or in gas stations, hotel rooms, etc, after viewing pornography. From 1969 until 1978 he used the services of prostitutes, anywhere from 30 to 50 times. Additionally, be had extramarital affairs before and after his separation from his first wife. He has had none since his remarriage some three decades ago.

From 1977 until 2002 Applicant took time from work to visit adult bookstores and movies. He used his vacation time in doing so. From 1998 until January 2003, and again in June 2004, he used government or company-provided computers to view pornography. At the time of this use, Applicant was aware of his employers' policies against such activity.

In 1998 Applicant received a "code of conduct" letter from his employer, another government agency, for having viewed pornographic material on a government computer, while holding a security clearance. Despite this corrective action, Applicant continued to engage such conduct. In 2003, the government agency revoked his access to special compartmented information (SCI). In June 2004 Applicant again accessed pornography on a government computer, although he claimed that he did so by accident. Applicant's employer gave him a warning letter.

In 2000 Applicant sought counseling, although there was no discussion during these sessions of his pornography addiction. This counseling ended in 2001 by mutual agreement with the counselor. In addition, Applicant began attending Sexaholics Anonymous (SA) and continues to do so, although the Judge noted that the record is not clear as to how consistent his attendance has been over the years. SA has adopted the Alcoholics Anonymous model for treating addiction, including

12-step programs, sponsorship, and support meetings. In October 2003 Applicant sought additional counseling. The decision quotes the counselor as stating that Applicant was serious about being abstinent and predicting ultimate success for Applicant in this regard.

In August 2006 Applicant again sought professional counseling from a certified sexual addiction therapist. She required patients to meet with her individually, attend 12-step meetings, obtain a sponsor, and begin the 12 steps. She stated that Applicant performed better in treatment than is typical, because he acknowledged his problem. By March 2007 she decided that he no longer needed individual sessions with her and that he is at a low risk of relapse as long as he attends SA, works with his sponsor, and works his 12-step program.

Applicant last viewed pornographic material in September 2007, 16 days prior to the hearing in his case. He did so for between 30 and 90 minutes. He has visited pornographic web sites about 20 times since his last visit with his therapist in March 2007. He stated that he no longer masturbates in public places and has not taken time off form work to view pornography since 2002. Although he no longer has a sponsor, he attends SA meetings weekly and is working on several of the 12 steps.

Applicant's current employer is aware of his history with viewing pornography on government computers. His employer has placed software on his work computer to monitor his internet usage. According to these witnesses, Applicant has not been discovered viewing pornography at work since 2004, although the system is checked infrequently.

Applicant has alleged that the Judge erred in not amending the SOR pursuant to a motion at the beginning of the hearing. Applicant, in this motion, contended that certain of the Guideline D allegations did not state security concerns. He further contended that certain of the Guideline M allegations merely repeated the same concern over and over again, thereby creating the impression of a greater quantum of misconduct than was actually the case.[1] Applicant had not previously notified Department Counsel of his proposed motion. The Judge denied the motion on the grounds that it was untimely and that Applicant had already admitted the allegations in the statement of reasons. Tr. at 20.

It is clear that "[t]he SOR may be amended at the hearing . . . upon motion by . . . the applicant, so as to render it in conformity with the evidence admitted or for other good cause. When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or other good cause." Directive E3.1.17. A Judge's ruling on a motion to amend is reviewed for abuse of discretion. ISCR Case No. 04-08547 at 3 (App. Bd. Aug. 30, 2007).

[1]Applicant's claim of error appears analogous to that of an unreasonable multiplication of charges in a criminal indictment. "[T]he multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense or prejudice him as to his challenges . . ." *U.S. v. Lane*, 474 U.S. 438, 456 (1986).

Insofar as the Judge denied the motion as untimely, he committed error. As the Directive states, a motion to amend can be made at the hearing. There is no provision in the Directive which would forbid a motion to amend under the circumstances reflected in the record of this case, based upon its timing. A review of the transcript demonstrates that the motion was made in apparent good faith and not for the purpose of needless delay or to produce confusion. The Judge should have inquired as to whether Department Counsel needed a continuance to prepare to address the motion, and then he should have proceeded in accordance with the Directive.

Although Department Counsel did not concede this error in his reply to Applicant's brief, nevertheless he further argued that the Judge's ruling can be supported upon alternative grounds, specifically that a fair reading of the SOR demonstrates that Applicant's motion was without merit. Department Counsel's argument on this point is persuasive. In examining this issue, the Board will limit its attention to whether the allegations on their face state security concerns, without regard to the sufficiency of the evidence underlying them.[2]

Regarding Guideline D, Applicant argued that certain of the allegations are not, on their face, rationally related to the sexual behavior security concerns. After reviewing the language of the concern section[3] the Board disagrees with Applicant's argument. The Board has examined these allegations and concludes that, viewed as a whole, they constitute *prima facie* statements of sexual behavior security concerns contemplated by the Directive. Furthermore, the Guideline M allegations would not mislead a reasonable person as to the nature and extent of Applicant's misuse of information technology systems. Taken as a whole, the SOR satisfies the requirement of the Directive that Applicant be provided with "detailed and comprehensive" notice of DOHA's basis for the proposed denial of a clearance, facilitating rather than impeding Applicant's ability to respond to the allegations and to present his case.[4] The Board has considered Applicant's reply to the SOR, in which he admitted the facts alleged but provided explanatory comments in an effort to mitigate their effect. These comments, prepared with the assistance of counsel, do not demonstrate or imply the legal infirmities which are claimed in Applicant's motion, leading to the conclusion that he has

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[2]In his argument in support of the motion, and subsequently upon appeal, Applicant's counsel appeared to raise questions about the sufficiency of the evidence. At the time of the motion, however, no evidence had been received or admitted. Sufficiency of the evidence is a matter properly raised only after the evidence has been admitted.

[3]Directive ¶ E2.12. "Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Applicant argues, *inter alia,* that conduct such as viewing lawful pornography cannot constitute a security concern under Guideline D. The Board finds no support for this contention. Even conduct that is not illegal may, under the facts of a particular case, reflect an emotional disorder or deficiency in judgement or discretion.

[4]*See* Directive ¶ E3.1.3. *See also* ISCR Case No. 02-15383 at 2-3 (App. Bd. Jul. 29, 2003.) "An SOR is an administrative pleading that is not measured against the strict requirements of a criminal indictment. As long as an SOR places an applicant on reasonable notice of the allegations against him or her and there has been no showing that the wording of an SOR has prejudiced an applicant's ability to respond to the allegations and present evidence on his or her behalf, a security clearance case should be adjudicated on the merits of the relevant issues and not be concerned with pleading niceties."

not been impaired in his efforts to present his side of the story or otherwise receive the due process afforded by the Directive. Therefore, we conclude that the Judge's erroneous reason for his ruling on Applicant's motion is harmless error, in that it is unlikely that he would have decided the issue differently had he ruled on the substance of the motion rather than its timing.

To the extent that Applicant's brief raises a claim of bias, Applicant has failed to meet his burden of demonstrating that the Judge lacked the requisite impartiality. *See* ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008). Furthermore, a review of the entire record demonstrates that the Judge has articulated "a rational connection between the facts found" and his adverse clearance decision, both as to the pertinent mitigating conditions and the whole-person analysis.[5] *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)). Even if the Judge erred in concluding that Applicant had not mitigated the two Guideline D allegations pertaining to his SA attendance and to his counseling with the sex addiction therapist, the record is sufficient to sustain his holding that Applicant has failed to meet his burden of persuasion as to the remaining allegations. *See* Directive ¶ E3.1.15. (After the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions.) *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'") Accordingly, the Judge's adverse decision is neither arbitrary, capricious, nor contrary to law.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

[5] *See, e. g.*, Government Exhibit 5, Statement of Applicant, dated January 29, 2007, at 5. "I am confident in stating that I do not have any future intentions of viewing sexually explicit or objectionable material while using my company or government owned computer; however, I cannot state that [I] will never do it again in the future."

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board