KEYWORD: Guideline D; Guideline E

DIGEST: Interrogatory questions alone are not evidence. The questions are considered for giving context to the answers, which are evidence. Applicant's inconsistent statements regarding his viewing of child pornography, and his encounters with child prostitutes undermine the Judge's favorable application of mitigating conditions. Favorable decision reversed.

CASENO: 07-18324.a1

DATE: 03/11/2011

DATE: March 11, 2011

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Tovah A. Minster, Esq., Department Counsel

FOR APPLICANT
Joseph Testan, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 27, 2009, DOHA 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 Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 28, 2010, after the hearing, Administrative Judge Wilford H. Ross granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Applicant filed a cross-appeal pursuant to Directive ¶ E3.1.28.

Department Counsel raised the following issues on appeal: whether the Judge erred in his application of the Guideline D and Guideline E mitigating conditions and whether the Judge's whole-person analysis was in error. Applicant raised the following issue on cross appeal: whether the Judge erred in admitting certain pieces of documentary evidence. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

Applicant is a 55-year-old employee of a Defense contractor. He seeks to retain his security clearance in connection with his employment.

Several of the Guideline D allegations refer to Government Exhibit (GE) 7, a Decision Letter from another Government agency denying Applicant access to classified information.[1] GE 7 was signed by a Senior Adjudication Officer, and the Judge quoted it in pertinent part:

> During your most recent security testing, you divulged information regarding your viewing pornography of underage girls around 14 to 16 years old. You mentioned you had seen some pornography of girls as young as 11 years old, which you found on foreign web sites. You admitted that, although you believe your actions are illegal, you have deliberately sought and viewed pornographic images of underage girls for several years, and you continue to do so on an average of twice weekly; you look at pornographic thumbnails of underage girls that appear interesting and download them to a temporary file in your computer. You also admitted that you actively seek and view what you believe to be rapes of 15 or 16-year-old girls (in some cases by multiple persons), and teenage females involved in sexual acts or being molested; and, you sexually gratify yourself while viewing these images. Additionally, you admitted that you have recurring rape fantasies and your greatest interest involves the rape of 12-year-old girls. You stated that during a work related overseas trip you were involved in two sexual encounters with girls you believed to be 15 or 16 years old; that it was your intention to do so prior to your trip; and, the encounters enabled you to live out part of your sexual/rape fantasies with young girls in a more permissive environment.

[1]The Judge's findings consist, in large measure, of summaries of the Government's evidence and of Applicant's denials of misconduct.

The Judge found that Applicant had denied deliberately seeking child pornography on the internet, stating instead that he had accidentally viewed such material "once or twice" several years prior to 2003. Applicant stated that he had not viewed child pornography for over six years. He offered Government officials an opportunity to examine the hard drive of his computer.

Applicant claimed that two child prostitutes approached him in Taiwan on two different nights, but he rebuffed their advances. He denied ever having had sexual intercourse with the prostitutes.

Applicant denied an allegation that he had masturbated in front of his prepubescent nephews when he was 17 years old. He stated that on one occasion 40 years prior his nephews had asked him questions about masturbation. "I simply showed them on myself."[2] Decision at 5.

Under Guideline E, the Judge found that Applicant had previously been disapproved for additional access to classified information by another Government agency. Applicant appealed the decision, but it was affirmed. He also found that Applicant's security access was denied and his clearance revoked because of information he provided the other Government agency.[3]

Applicant denied an allegation under Guideline E that he had falsified an affidavit during the course of his security clearance investigation in 2008, specifically by stating that on one occasion he had accidentally viewed "an inappropriate image," deliberately leaving out the information contained in GE 7.

The Judge found that the Government had presented no information to support an allegation that he had provided a false answer to DOHA interrogatories on October 17, 2008, by stating that he had never had an extramarital affair of any kind and had only talked to the two underage prostitutes referenced above.

The Judge found that Applicant denied two other allegations of false statements contained in interrogatories he executed on July 2, 2008. The first of these alleged that he falsely denied that he had had sexual intercourse with two underage prostitutes in Taiwan. The second alleged that he had falsely denied deliberately viewing child pornography.

Applicant enjoys a good reputation for trustworthiness, for his moral character, and his professionalism.

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[2]The Judge also found that Applicant had denied SOR allegations to the effect that (1) he became physically aroused when one of his daughter's swim team members rubbed against him and (2) when his daughter's high school friends would stay overnight at his house, he could identify which of the girls wore bras. Concerning the swim team incidents, Applicant stated that the swimmers approached him and that he should have confronted them or had the team captain talk to them about their behavior. Concerning the sleepover allegation, he stated that the young girls "flaunted their bodies as a tease. I did not make any type of move or approach them in any way." Decision at 4-5.

[3]The information in question is contained in the Judge's quotation from GE 7, above.

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). The Appeal Board may reverse the 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.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board 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 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Cross-Appeal

Applicant contends that GE 7 was not admissible under the provisions of the Directive or under the Federal Rules of Evidence. As stated above, this exhibit is a Decision Statement by another Government agency concerning the agency's clearance investigation of Applicant.[4]

[4]GE 7 was not prepared on letterhead stationary by the other agency. Applicant contends that it lacks indicia of authenticity. However, in GE 1, Security Clearance Application (SCA), Applicant states that, in 2004, he was denied access to classified information by a named Government agency. GE 7 bears a date of February 2004. GE 2, Applicant's appeal of the decision to deny him a clearance, was clearly prepared in reference to GE 7. Moreover, in GE 1, Applicant states that the denial by the other agency was "[c]urrently under appeal." Applicant's appeal of the other agency's denial was finally decided in November 2006, after the date of his SCA. Aside from this other Government agency and DOHA, there is no evidence in the record of any other agency agency denying Applicant a clearance.

Directive ¶ E3.1.20 provides that

> [o]fficial records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned, to safeguard classified information . . . An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence[.] (internal citations omitted)

We have recently held that a Clearance Decision Statement is admissible as substantive evidence under this provision of the Directive. Because a Clearance Decision Statement is not an ROI, it may be admitted without an authenticating witness. ISCR Case No. 08-06997 at 3 (App. Bd. Mar. 1, 2011). Accordingly, we conclude that the Judge did not err by admitting GE 7.

Applicant also raises an issue concerning GE 4, which contains his answers to DOHA interrogatories. He draws attention to the following statement by the Judge in the Analysis portion of the decision: "[GE] 4 . . . the DOHA interrogatories . . . are statements of fact, evidently drawn from other documents." Applicant contends that the Judge erred by considering the interrogatory questions themselves as substantive evidence. We agree with Applicant that the interrogatory questions themselves are not evidence. It is Applicant's answers to those questions that constitute evidence. As Applicant notes, the "'questions' should be considered for the limited purpose of giving context to [A]pplicant's statements in response to the interrogatories." Applicant's Cross-Appeal Brief at 5. To the extent that the Judge's comment suggests that he considered the questions themselves to be evidence, he erred. However, in his findings of fact the Judge referenced transcript testimony, Applicant's *answers* to interrogatories, and other documents properly admitted. His material findings of security concern, therefore, were based upon admissible evidence. Any error implicated by the comment quoted above is harmless.

Government's Appeal

The Judge properly concluded that the Government had met its burden of production under Guideline D. However, the Government contends that the Judge's application of the mitigating conditions was in error. She argues that the Judge's decision does not take into account significant contrary record evidence. This argument is persuasive.

The SOR alleged that Applicant had two sexual encounters in Taiwan with prostitutes he believed to be 15 or 16 years old. This allegation is supported by the final quoted sentence from GE 7, contained in the Findings section above. GE 7 is a document prepared by a Government agency

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Accordingly, the record supports a conclusion that GE 7 is the denial letter by the agency named by Applicant in GE 1. The record provides no reasonable basis to deny the authenticity of GE 7.

in the ordinary course of business. It reflects statements Applicant made during interviews connected with polygraph examinations. These statements are against his interest, which enhances their credibility.[5] Moreover, GE 8 and GE 9 are documents prepared by the same agency in response to Applicant's request for review. GE 9 states, in pertinent part, "After reviewing the information you provided in your appeal letters, as well as all information that led to the original security decision, a panel of senior officers upheld the original security decision." Federal agencies are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981). Applicant presented no evidence to demonstrate or suggest a motive for the agency to have misrepresented his statements to the interviewer and then to have twice affirmed that decision. He failed to rebut the presumption of good faith and regularity.

This allegation is further supported by GE 2, Applicant's request for a review of the other Government agency's decision to deny him a clearance. In this document, Applicant states:

> The two encounters with the girls overseas were not preplanned. They just happened! At the time they occurred, I also did not believe they were 15 or 16, they just looked that young. Since that time (January 1999), I have not had any type of a relation with anyone other than my wife.

GE 2 corroborates the pertinent language of GE 7 to the effect that Applicant engaged in sexual activity with underage girls while in a foreign country. By contrast, Applicant's presentation at the hearing, which the Judge summarized in Findings of Fact, was inconsistent with his statement in GE 2, and a reasonable person could find it to be self-serving. Applicant's interrogatory answers and hearing testimony clearly express an interest in sexual acts involving children, which tend to corroborate GE 2 and 7. Moreover, this incident bears a factual similarity to the allegations addressed in footnote 2 above. The Judge does not discuss the extent to which Applicant's evidence that he, a 55 year-old man, frequently has to ignore or rebuff sexual advances by underage girls may be lacking in credibility. The record does not support a conclusion that Applicant had mitigated security concern arising from this incident.

The SOR also alleged that Applicant had admitted to the other agency that he had sought and viewed child pornography and that he had done so on an average of twice weekly. It also alleged that he had sought and viewed pornography depicting the rape and molestation of underage girls. These allegations are supported by GE 7, which is corroborated to a certain extent by Applicant's own admission that he had actually viewed child pornography on his home computer, albeit

[5]*See, e.g.*, Rothstein, Federal Rules of Evidence, Advisory Committee's Note to Rule 804(b)(3): "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."

innocently. It is also corroborated by Applicant's testimony concerning his interest in material depicting the molestation of young females.[6]

The Judge appeared to have accepted Applicant's denial of having purposely viewed child pornography. In evaluating Applicant's credibility, the Judge stated that Applicant's testimony regarding Guideline D was consistent with his prior written statements. Decision at 9. However, as Department Counsel states in her brief, Applicant's denials actually contain significant inconsistencies. In GE 6, an affidavit by Applicant dated April 2008, he stated:

> Many years ago, I cannot recall the date, I was [learning] how to use the internet and was on a news group. These news groups are not moderated and anyone can post anything they want. I accidentally came across an inappropriate image. I immediately left the site and have never gone into any of those news groups.

However, in GE 4, his Answers to Interrogatories, he stated that:

> while browsing through what appeared to be legal . . . adult pornographic material residing on a U.S. Internet Service Provider . . . there were several occasions when I inadvertently viewed material relating to underage girls.

Applicant's testimony at the Hearing is similar. "I told them that I inadvertently viewed [child pornography] several times on the internet." Tr. at 95. Applicant's various statements are inconsistent both as to the frequency with which he viewed child pornography and as to the underlying circumstances.

Additionally, GE 4 contains the following interrogatory question:

> During an interview with another government agency in August 2003, you also stated that you viewed internet videos involving young teens engaging in sexual acts and that you masturbated to these videos. Is this information correct?

Applicant replied, "Yes. Further Explanation: the video participants appeared to be underage, but were in actuality 18 or more years in age." Applicant's admission that he sought out internet sites depicting sexual acts involving girls who appeared to be underage is not totally consistent with his statement in GE 6 that he had viewed "an inappropriate image" only once by accident. This interrogatory answer most reasonably suggests purposeful activity occurring on more than one occasion. Moreover, this answer corroborates GE 7 to a substantial degree.

Applicant's inconsistent statements undermine the Judge's favorable decision. These inconsistent statements buttress Department Counsel's argument that the Judge substituted a

[6]"Q: So, you have viewed material with respect to 18-year olds and older being molested while you sexually gratify yourself? A: Fantasy, ma'am. Role playing. Q: How do you know the girls are 18? . . . A: Estimate. Just assumption." Tr. at 115.

favorable impression of Applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 03-23504 at 6 (App. Bd. Dec. 12, 2007). Viewed as a whole, the record does not support the Judge's favorable application of the mitigating conditions to allegations that Applicant had purposely viewed child pornography.

Concerning the allegation that, as a teenager, Applicant had masturbated in front of his young nephews, the Judge appears to have extended favorable application to mitigating condition 14(a).[7] However, the record evidence of Applicant's viewing child pornography and having sex with underage prostitutes constitutes subsequent conduct of a similar nature, i.e., sexual acts involving children. The Judge's favorable application of this mitigating condition, as well as his treatment of the remaining allegations under Guideline D, are not sustainable.

Under Guideline E, the SOR alleged Applicant's having been denied a clearance by the other agency due to information he provided concerning his sexual activities. In addition, the SOR alleged false statements by Applicant. One such statement was alleged to be contained in a set of DOHA interrogatories dated October 2008. As the Judge noted, there are no interrogatories with that date contained in the file. The Judge's favorable decision regarding this allegation is sustainable.

Otherwise, the SOR alleged false statements concerning Applicant's viewing of child pornography and his sexual acts with underage prostitutes. These statements are found in GE 6, Applicant's affidavit, and GE 4, his July 2008 interrogatory answers. The Judge concluded that Applicant did not make false statements and, therefore, that the Government did not meet its burden of production:

> [W]e are faced with the situation where the alleged false statements of the Applicant are where he disagrees with factual conclusions in Government Exhibits 4 and 7. Since, as discussed above, I cannot find with any degree of confidence that the conclusions in the documents are accurate, the Applicant's denials cannot be seen as false. Decision at 10.

The Judge appears to conclude that the Government did not present substantial evidence of deliberate falsifications by Applicant, insofar as the Judge viewed the pertinent portions of GE 7 as conclusory in nature. However, the statements attributed to Applicant in GE 7 do not appear to be conclusions but, on the contrary, appear to be statements of fact, representing what Applicant said to interviewers during the course of his security clearance investigation. Applicant's alleged falsifications concern the very same activity that formed the basis of several of the Guideline D security concerns–Applicant's having viewed child pornography and having engaged in sex acts with child prostitutes. As we concluded above, these allegations are supported by the record. Indeed, the Judge's statement that he has no confidence in the reliability of the Government's evidence is not consistent with his own previous conclusion under Guideline D that the allegations were in fact founded upon substantial record evidence. Moreover, despite the Judge's

[7]Directive, Enclosure 2 ¶ 14(a): "the behavior occurred . . . during adolescence and there is no evidence of subsequent conduct of a similar nature[.]"

characterization of Applicant's denials, they are factually specific and cannot reasonably be attributed to a mere difference of opinion. For example, Applicant's statement in GE 6, that he had inadvertently come across an image of child pornography once by accident, is not a statement of opinion. Rather, it asserts purported facts. Insofar as these purported facts are not consistent with other evidence that Applicant sought out sexually provocative images of young girls on several occasions, a reasonable person could conclude that the statement in GE 6 is neither an honest mistake or difference of opinion but a deliberate falsification.

In sum, the SOR alleges under Guideline E that Applicant specifically denied allegations of sexual misconduct that were supported by record evidence. Accordingly, the Government met its burden of production under Guideline E that Applicant deliberately provided false information concerning (1) his viewing of child pornography and (2) his sexual encounters with underage prostitutes. The record, viewed as a whole, does not support a conclusion that Applicant met his burden of persuasion as to mitigation of the Guideline E security concerns. The Judge's favorable decision under Guideline E is not sustainable.

In light of the discussion above, we conclude that the Judge's decision fails to consider an important aspect of the case and offers an explanation for the decision that runs contrary to the weight of the record evidence. ISCR Case No. 03-22861, *supra*. The record does not support the Judge's treatment of the mitigating conditions or the whole-person factors. Considering the standard set forth in *Egan*, *supra*, and the Directive's requirement that any doubt concerning an Applicant's access to classified information be resolved in favor of national security,[8] the Judge's favorable security clearance decision is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

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

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

Signed: James E. Moody

[8]Directive, Enclosure 2 ¶ 2(b).

James E. Moody
Administrative Judge
Member, Appeal Board