

Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On March 16, 2009, after considering the record, Administrative Judge LeRoy F. Foreman denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge's findings of fact are supported by substantial record evidence and whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. Finding no harmful error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a web developer for a federal contractor. He has never held a security clearance.

When he was 21 years old, Applicant began chatting on the internet with a female whom he believed to be 17 or 18 years old. The on-line conversations became sexually explicit, and soon they agreed to meet at the girl's home. During the meeting, Applicant discovered that the girl was 13 years old. Nevertheless, he had sexual intercourse with her in her bedroom. Subsequently, they chatted on line about once a month. They met at a high school football game, walked to a nearby wooded area, and had sexual intercourse once again. The girl's mother discovered the contents of Applicant's on-line chats and reported Applicant to the sheriff. Applicant was arrested and charged with "committing a lewd and lascivious act in the presence of a child under the age of 16." This was a felony offense. Applicant pled *nolo contendere* to this charge and was found guilty. The court sentenced him to 3 years probation, two years of community control, and a fine. Applicant was also required to register as a sex offender. He will remain on the sex offender list until 2024. Sex offenders who prey on children are "sexual predators," they present an "extreme threat to the public safety," and are "extremely likely to repeat their offenses."¹

The Board concludes that the Judge's material findings of security concern are supported by substantial record evidence. See Directive ¶ E3.1.32.1. (Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.")² In support of his appeal Applicant has submitted new evidence, including character references and a copy of the conviction in his case. The Board cannot consider these documents. See Directive ¶ E3.1.29. ("No new evidence shall be received or considered by the Appeal Board"). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated 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*

¹Item 7, State Sexual Offenders and Predators Laws, dated September 16, 2008. This document includes legislative findings about sexual predators.

²The Judge found that Applicant was convicted of committing a lewd and lascivious act with a minor. Item 6, Applicant's sex offender registry entry, lists his offense as an *attempted* lewd and lascivious act with a minor. However, even if the Judge erred on this matter, the error is harmless. See ISCR 01-23362 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 (App. Bd. Aug. 26, 2002).

Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). The Judge’s decision that “it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance” is sustainable on this record. Decision at 8. *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’”).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board