KEYWORD: Guideline M; Guideline D; Guideline E

DIGEST: The Judge made multiple harmful errors including relying on speculation as opposed to record evidence and misapplying the adjudicative guidelines. Favorable decision reversed.

CASENO: 08-05351.a1

DATE: 03/12/2010

DATE: March 12, 2010

In Re:	)	
	)	
------	)	ISCR Case No. 08-05351
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Francisco Mendez, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 27, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline M (Use of Information Technology Systems), 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 November 30, 2009, after the hearing, Administrative Judge Mary E. Henry granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.[1]

Department Counsel raises the following issues on appeal: (1) whether the Judge erred by concluding that the evidence did not support a finding that Applicant viewed child pornography on his office computer; (2) whether the Judge erred by failing to consider Sexual Behavior Disqualifying Condition ¶13(b); (3) whether the Judge erred by concluding that Applicant mitigated the government's case under Guideline D; (4) whether the Judge erred by not considering Applicant's conduct under Personal Conduct Disqualifying Conditions ¶16(c),(d), and (f); (5) whether the Judge erred by concluding that Applicant mitigated the government's case under Guideline E; and (6) whether the Judge's "whole-person" analysis failed to account for significant contrary record evidence. For the following reasons, the Board reverses the Judge's favorable decision.

The Judge made the following pertinent findings of fact:

Applicant began work with his current company in February 2006. He has received favorable comments about his high-quality work and ability to "hit the ground running." He has not had any disciplinary issues at this job. Applicant has held a security clearance for most of the last 34 years, without any violations or accusations of mishandling classified information.

In 2002, Applicant's son was killed. Applicant and his family were devastated. Applicant briefly attended a grief counseling program to support his wife, but refused any other form of counseling. Instead, he internalized all his grief and began suffering from insomnia, which affected his ability to do his job.

Applicant completed his master's degree in 2003, about four months after his son died. He expected some type of recognition from his employer for this accomplishment. He did not get any recognition or a promotion.

Just before the first anniversary of his son's death, Applicant inadvertently opened a pornographic web site on his office computer. He closed the link immediately. However, about a month later, he searched for the site again. Thereafter, he began accessing pornographic sites and chat rooms on his office computer. At first, he accessed the sites once a month, then twice a month, then weekly, and sometimes daily. He would break off his internet pornographic activities for weeks or months, but then he would return to the sites and chat rooms even though he felt absolutely horrid when he did so. Applicant denies deliberately accessing or seeking out child pornography sites or receiving such sites by e-mail. He remembers seeing pictures of young women, who he believed were in their twenties.

[1]Department Counsel does not challenge the Judge's favorable findings and conclusions under Guideline H.

Other staff could view what Applicant was doing on the computer. Applicant and three other co-workers had computers. Two other day employees and three night shift employees also used these four computers. Applicant's supervisor told him informally to stop what he was doing without specifically mentioning his pornographic activity. Applicant knew what his supervisor meant when she made this statement to him. When he did not end his conduct, Applicant's employer fired him for misuse of its computer equipment in November 2005. Applicant then decided to cease his pornographic activities. Applicant acknowledged that his pornography viewing violated company policy and that he knew he violated company policy when he accessed these sites.

In 2006, Applicant interviewed for his present position. During his interview, he advised the interviewer that he had previously been fired for misuse of company equipment but did not tell the interviewer that pornography was involved. Applicant told his new security officer the full story two or three days after he began his job. Because of his disclosure, his current employer monitored his computer use for two years. Applicant also acknowledged that he did not tell his wife the true reason for his termination in 2005. He explained that he decided not to tell her because he was concerned for his welfare and ashamed of what he had done. He recently told his wife the true reason for his termination. At her suggestion, he started counseling in August 2009 to understand the reasons for his conduct. He believed the change in his behavior began with his son's death in 2002 and the ensuing problems of insomnia and anger.

At the time of his firing in 2005, Applicant's employer confiscated his computer and examined his hard drive, which revealed multiple visits to pornographic sites, including child pornography. Applicant raised a concern about this report because he was never told that he was fired for child pornography. He acknowledged that child pornography may have been found on his computer, but he denies he sought it out or placed child pornography on his computer. Applicant does not believe he viewed child pornography, but he could not be certain.

The FBI conducted a CART review of Applicant's computer hard drive. The CART review located a number of images of suspected child pornography. Neither the FBI nor the United States Attorney took any further action. The record contains no evidence explaining the CART review or explaining the extent of the search of Applicant's computer files.

When operating his computer at his former employer, Applicant could look at his internet explorer file history, a software program which showed the sites he had visited. He did not know how to access his hard drive. At times, he encountered problems shutting down the pornographic web sites he visited. Sometimes, when he attempted to close the web site, the web site would cascade to multiple sites and open new web sites.

Discussion

As Department Counsel does not specifically challenge the Judge's findings of fact, the issues raised on appeal are more appropriately analyzed in terms of challenges to the Judge's conclusions. This analysis is included in the following section.

Conclusions

The Judge reached the following pertinent conclusions:

The government established a case for disqualification under Guideline M, ¶40(e)[2] as Applicant accessed pornography web sites on his work computer on many occasions over a period of two years. He knew this conduct violated his company's policies on computer use, but he did it anyway. Applicant's conduct occurred during a specific period in his life after his son's death and after he received his master's degree and his employer failed to acknowledge his accomplishment. Since Applicant never participated in grief counseling, his grief began to surface in other ways. Applicant's termination from his job made him realize the need to change his behavior and he did. There is little likelihood that the behavior will occur again because the tragic death of Applicant's son is an unusual event. Applicant's inappropriate conduct occurred four years ago and has stopped. Because he otherwise acted appropriately and has changed his attitude and behavior, Applicant's past conduct does not cast doubt on his reliability and trustworthiness. Applicant has mitigated the government's security concerns under Guideline M, ¶41(a).[3]

Under Guideline D, the government established a case under ¶13(c),[4] and ¶13(d).[5] Applicant admitted that he had a concern that his wife would learn about his pornographic activities, and this concern could make him vulnerable to coercion, exploitation or duress. In addition, Applicant viewed pornography on his work computer. The images could be seen by his co-workers. Regarding ¶13(a),[6] the custodian of the records for Applicant's former employer stated that security found child pornography on Applicant's computer, but the custodian provided no information which explains how the security staff determined that Applicant had actually viewed pornography. The FBI found suspected child pornography on Applicant's hard drive, but the FBI report fails to provide concrete details about these findings. The existence of possible child pornography on his computer hard drive by itself is insufficient to establish that Applicant actually viewed child pornography. The FBI has sophisticated computer software programs capable of showing when and how long Applicant viewed child pornography, if he did. The record does not contain this information. The Judge concluded that Applicant did not actually access any child pornography sites.

[2] "[U]nauthorized use of a government or other information technology system."

[3] "[S]o much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

[4] "[S]exual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress."

[5] "[S]exual behavior of a public nature and/or that reflects lack of discretion or judgment."

[6] "[S]exual behavior of a criminal nature, whether or not the individual has been prosecuted."

Applicant has mitigated the government's security concerns under Guideline D.[7] Applicant's sexual conduct stopped four years ago when he lost his job. He buried his grief after the death of his son and this decision and a feeling that his employer did not appreciate him eventually led to inappropriate use of his work computer. His son's death is a highly unusual event and is unlikely to happen again. His past conduct does not cast doubt upon his current reliability, trustworthiness, or good judgment.

Because of his inappropriate conduct in his work place for two years, Applicant placed himself in a position of vulnerability to exploitation, manipulation, or duress. His decision to lie to his wife about the reason for his job termination also put him in a position of vulnerability. The government established a case under Guideline E. After losing his job, Applicant acknowledged the reason for his termination to all who needed to know. He has taken responsibility for his conduct and acknowledged it was wrong. He finally started counseling to understand why he viewed pornography. He is a reliable employee and has always protected government information and materials. With his counseling, he is taking steps to assure that he will continue to protect government classified information and materials and not place himself in a position of vulnerability. Applicant has mitigated the government's security concerns under Guideline E.

Under the whole person concept, Applicant's viewing of pornography and the decision to lie to his wife about the reasons for his termination showed poor judgment, but Applicant has otherwise exercised good judgment in his life. Applicant has taken the appropriate steps to assure that his inappropriate conduct will not occur in the future.

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)). "[N]o one has a right to a security clearance. . . The general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'" *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). 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.

Department Counsel first asserts that the Judge erred by finding that Applicant did not view child pornography and by not applying the provisions of Guideline D, ¶13(a). Department Counsel states that the record contains sufficient evidence to establish the government's case under the "substantial evidence" standard, that the Judge imposed a requirement for the production of evidence

[7]Specifically, ¶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 individuals's current reliability, trustworthiness, or good judgment.) and ¶14(c)(the behavior no longer serves as a basis for coercion, exploitation, or duress.)

akin to those found in criminal proceedings and that the Judge improperly shifted the burden to the government to refute Applicant's testimony that he could only speculate as to why his employer and the FBI found child pornography on his computer hard drive. Department Counsel's arguments have merit.

It is well established in industrial security clearance cases that the question of whether there is sufficient evidence to support a Judge's factual findings is a matter of law, not one of fact. *See*, *e.g.*, ISCR Case No. 94-0964 at 3 (App. Bd. Jul. 3, 1996). The deference afforded a trier of fact is not absolute. *See*, *e.g.*, ISCR Case No. 95-0178 at 2-4 (App. Bd. Mar. 29, 1996).

The record evidence regarding child pornography contains two documents. The first is a summary from the company records custodian indicating that the company's security office confiscated Applicant's hard drive and examined it in detail. Security found instances of obscene and/or sexually explicit materials, "to include child pornography" on the hard drive. The second is an FBI document and indicates that an FBI agent received the original hard drive from security personnel at Applicant's company. According to the document, a CART review located a number of images of suspected child pornography on the drive. This evidence, which includes corroboration, was sufficient to satisfy the government's burden of establishing that Applicant viewed child pornography. The burden of persuasion then fell to Applicant to refute the evidence that he had viewed child pornography.

Although not a model of clarity, the Judge's theory on the issue of whether Applicant viewed child pornography appears to be that, because pornographic web sites "cascaded" onto Applicant's computer while Applicant was viewing pornography, images of child pornography could end up on Applicant's hard drive without Applicant having necessarily viewed them. The only source of the evidence regarding "cascading" was the testimony of Applicant. Applicant offered some vague and confusing testimony concerning his understanding of the relationship between the internet, software, and hard drives, but at no time during his testimony does he hold himself out as an expert in such matters, and at no time does he state that the child pornography images on his hard drive were the result of "cascading" nor does he offer a clear explanation for why child pornography images could be found on his hard drive without his ever viewing them. No fact or opinion testimony from a witness versed in the properties or operations of computer hard drives and internet web sites exists in the record. Any explanation by Applicant in support of his position that he did not view child pornography despite the contents of the hard drives is speculative, and in his testimony he identifies it as such.[8] The Judge is required to consider an Applicant's testimony, as she would any other portion of evidence. However, that evidence must be evaluated in terms of its inherent probative value and considered in light of all the contrary evidence in the record. *See*, *e.g.*, ISCR Case No. 98-0620 at 2 (App. Bd. Jun. 22, 1999). Given the state of the evidentiary record in this case, there is insufficient evidence to support the Judge's conclusion that Applicant successfully rebutted the government's case establishing that Applicant viewed child pornography.

[8]Tr. p. 36.

The Judge commits further error on this point by bolstering her conclusions through a critique of the state of the evidence. She complains about the lack of specificity in the government documents evidencing Applicant's viewing of child pornography, noting that the company document provides no explanation as to how the security staff determined that Applicant had actually viewed child pornography. Likewise, the Judge complained that the FBI report failed to provide concrete details about the findings on Applicant's hard drive. In making these comments, the Judge is requiring a standard of proof that exceeds the substantial evidence standard. *See*, *generally*, ISCR Case No. 07-16511 at 4 (App. Bd. Dec. 4, 2009)("[T]he Government must produce substantial evidence of the truth of the allegation. Substantial evidence means "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.")(citing to Directive, Additional Procedural Guidance, ¶ E3.1.32.1). The two documents submitted by Department Counsel satisfy the substantial evidence requirement. The evidence provided by Applicant in an attempt to rebut that evidence is vague and speculative. While more detailed evidence would have been useful in this case, the Judge resolved perceived evidentiary insufficiencies to the detriment of the government, as if the government rather than Applicant bore the burden of persuasion. This was error.

During her critique of the state of the evidence, the Judge also recites supposed capabilities of the FBI in developing hard evidence which could show when and how long Applicant viewed child pornography. In addition to being unnecessary, these comments in the Judge's conclusions section are also purely speculative as they contain matters wholly outside the evidentiary record and do not appear to be matters that are properly the subject of administrative or official notice, especially without citation to appropriate sources.

Department Counsel next contends that the Judge's analysis of the Guideline D Disqualifying Conditions failed to consider significant record evidence that establishes the applicability of ¶13(b).[9] Department Counsel notes Applicant's own hearing testimony where he testified he could not stop himself from returning to the pornographic sites and stated he had become addicted to viewing pornography. The record evidence also shows that Applicant's risky behavior continued even though Applicant knew what he was doing could be readily seen by co-workers, Applicant was fully aware that his conduct was contrary to company policy, and persisted in the conduct after being told twice by his supervisor to stop doing it.

An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25. In this case, the Judge concluded that Applicant's viewing of pornography was prompted by unusual circumstances unlikely to occur again, and she concluded that his recent commencement of counseling constituted a step to assure that he will not again place himself in a position of vulnerability. An evaluation of either of these conclusions would be affected by any record evidence suggesting that Applicant's behavior was addictive or uncontrollable. The Judge's conclusion that Applicant has mitigated the

[9]"[A] pattern of compulsive, self-destructive, or high risk behavior that the person is unable to stop or that may be symptomatic of a personality disorder."

case against him must be evaluated in light of that evidence. Consequently, the Judge's failure to evaluate the case with reference to ¶13(b) was error.

Department Counsel contends that the Judge's conclusion that Applicant mitigated the government's case under Guideline D failed to take into account significant contrary record evidence and was unsustainable. Department Counsel is correct in asserting that there is record evidence that significantly undercuts the main points of the Judge's mitigation analysis, namely that Applicant's disqualifying sexual behavior is mitigated by the passage of time, unusual circumstances, and the lack of a continued basis for coercion.

Department Counsel is correct that the mere passage of time cannot be viewed in isolation, and must made be evaluated with reference to other facts and circumstances in the case. In this case, the Judge did not take into consideration the evidence that Applicant viewed child pornography and Applicant's refusal to take responsibility for it. Whatever mitigating value attaches to the passage of time since the conduct, it is seriously diminished by Applicant's failure to acknowledge the misconduct. *See*, *e.g.*, ISCR Case No. 97-0625 at 5 (App. Bd. Aug. 17, 1998). Thus, the Judge's heavy reliance on Mitigating Condition ¶14(b) is misplaced. The same failure to acknowledge on the part of Applicant also undercuts to a degree the application of Mitigating Condition ¶14(c) as Applicant remains vulnerable to coercion and exploitation on the issue of viewing child pornography.

The Judge's analysis of the "unusual circumstances" prong of ¶14(b) is also flawed. While the Judge could properly consider Applicant's explanations that his viewing of pornography was a result of his grief over his son's death and his feeling that his company was unappreciative of his accomplishments, it is error not to subject that testimony to critical analysis. It is arbitrary and capricious for a Judge to accept uncritically a witness's testimony without considering whether it is plausible and consistent with other record evidence. *See*, *e.g.*, ISCR Case No. 00-0620 at 3 (App. Bd. Oct. 19, 2001). Here, there is no objective evidence outside Applicant's testimony that establishes a nexus between the death of his son and his behavior. There is nothing in the record to establish that resorting to the viewing of pornography is a typical or rational expression of grief, nor is there any explanation for why this behavior did not occur until the passage of a year after the death of Applicant's son. The speculative nature of Applicant's explanations regarding his behavior is underscored by the fact that he has only recently had his first counseling session, and his counselor indicated at that time that he had minimal opportunity to explore and/or evaluate Applicant's insights regarding his prior use of pornographic materials.

Regarding Applicant's other explanation— he was unhappy with his company— the Judge's decision fails to explain how Applicant's dissatisfaction with his employer, arguably a fairly common phenomenon in the working world, is an unusual circumstance or is one unlikely to occur again. The Judge also fails to articulate how this manifestation of discontent with his employer is an unusual circumstance to the extent that it does not cast doubt on his current reliability, trustworthiness, or good judgment. Also, these facts raise the legitimate question that if Applicant's violation of company rules was a product of his dissatisfaction with his employer, what would Applicant's proclivities be if he became disenchanted with security rules or the U.S. government.

The Judge's decision does not address this point. Department Counsel is correct in asserting that the Judge's conclusion that Applicant mitigated the case under Guideline D fails to adequately analyze the security-significant facts.

Department Counsel argues that the Judge's analysis under Guideline E was too narrow in scope. The Judge applied Disqualifying Condition ¶16(e)[10] which addresses vulnerability to coercion. Not included in her analysis of Applicant's conduct were considerations of questionable judgment, untrustworthiness, and unreliability.[11] The Guideline E allegations in the SOR include references to the misuse of company computers and the viewing of pornography brought under other Guidelines plus the allegation that Applicant did not tell his wife the true reason for his firing until at least November 2007. Inasmuch as the SOR alleged Applicant's activities involving his company computer for separate consideration under Guideline E, and included Applicant's failure to tell his wife about the true reason for his 2005 termination as an additional important aspect of the case, the Judge was required to consider the security significance of these actions under all parts of Guideline E that reasonably applied. This would include considerations of questionable judgment and dishonesty. The Judge's failure to do so was error.

Department Counsel also questions the Judge's application of various Guideline E mitigating conditions. The mitigating conditions under Guideline E cited by the Judge are similar to the mitigating conditions considered by her under Guideline D, and, as argued by Department Counsel, the Judge committed errors in her Guideline E analysis that are similar to the errors committed in the Guideline D mitigation analysis. An additional matter in the Guideline E analysis is the Judge's reliance on the fact that Applicant has begun counseling. The Judge concluded that with this counseling, Applicant is taking steps to assure that the will continue to protect classified information and avoid being placed in a position of vulnerability. Department Counsel contends that the Judge's substantial reliance on the commencement of counseling is misplaced. Department Counsel's assertion has merit.

The record indicates that Applicant had only one session with this counselor, which took place just a week before the hearing. Additionally, Applicant's testimony reveals that he began seeing the counselor to comply with his wife's wishes. In the counseling session, Applicant totally denied any involvement with child pornography, notwithstanding the record evidence to the contrary. After the session, Applicant's counselor noted that he had minimal opportunity to evaluate

[10] In pertinent part, ¶16(e) provides "[P]ersonal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . ."

[11] Consideration of these matters would involve applying ¶16(c) and ¶16(d) which expressly provide for a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant's insights into the use of pornographic materials. These facts seriously reduce the significance of counseling as a matter in mitigation.

Lastly, Department Counsel challenges the Judge's analysis under the whole person concept. Department Counsel is correct in stating that the Judge's whole-person analysis is essentially a repeat of facts cited within her Guideline D and Guideline E analysis. Department Counsel asserts that the errors in analysis occurring earlier in the decision are repeated here. This assessment is correct, and the Judge's whole-person analysis contains no new matters that would rectify the errors described heretofore, nor does it provide an independent, sustainable basis for her overall favorable security clearance decision.

Order

The decision of the Administrative Judge granting Applicant a security clearance is REVERSED.

Signed: Jeffery D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority's analysis of the errors in the Judge's decision. I part ways only on disposition of the case. I could support remanding the case because I believe that there may be room to prepare a sustainable favorable decision given the passage of time and the relative proximity in time between the disqualifying conduct and the death of Applicant's son.

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