

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 31, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 27, 2011, after the hearing, Administrative Judge Arthur E. Marshall, Jr., denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge’s findings of fact were based upon substantial record evidence; whether the Judge properly applied the adjudicative guidelines; and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s decision.

The Judge found that Applicant had admitted to another government agency that he had searched for, accessed, and viewed internet images of child pornography. The Judge’s findings of fact walked the reader through multiple lengthy and inconsistent statements that Applicant had made to the other Agency or to DOHA about his statement to the other Agency. The Judge noted Applicant’s claim to have recanted his admission, but the Judge did not find that such a recantation had been made.

Applicant’s appeal brief at times explicitly and at times implicitly denies that the Applicant had ever searched for and viewed child pornography. A review of the record evidence demonstrates that the Judge’s findings of fact were based on substantial record evidence and are sustainable. *See* Directive ¶ E3.1.32.1 and ISCR Case No. 10-03430 at 3 (App. Bd. Sep. 19, 2011).

Applicant relies on the favorable testimony of witnesses who were aware of allegations against Applicant. Applicant argues that their testimony undermined the Judge’s conclusion that Guideline E Disqualifying Condition 16 (e)¹ is applicable. None of the witnesses testified that they accepted the allegations regarding *child* pornography as true. Two witnesses only refer to pornography not child pornography (Tr. 20 and 24). One witness testified “They *think* that he was looking at child pornography.” *emphasis added* (Tr. 28). The fourth witness was asked if she knew if it was child pornography and said she did not know (TR. 32). In light of the Judge’s findings regarding child pornography, the witnesses’ testimony did not undermine his adverse conclusion under DC 16 (e).

Applicant challenges the Judge’s application and/or non-application of several other guidelines based on the premise that Applicant had not viewed child pornography. Since the Judge’s finding that Applicant had viewed child pornography is sustainable those arguments fail.

The record supports a conclusion 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.*

¹[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 . . .

Co., 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s adverse decision is sustainable on this record. “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). See also Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Judge’s adverse security clearance decision is AFFIRMED.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Concurring Opinion of Administrative Judge James E. Moody

I agree with my colleagues as to the proper resolution of this case. I note that the list of appeal issues in the beginning of Applicant’s brief does not explicitly include factual sufficiency as an assignment of error. However, Applicant does state the following in his challenge to the Judge’s mitigation analysis:

[Applicant] has never viewed child pornography. During one of his interviews [with another Government agency] he made a few confused statements to the interviewers, indicating that he may have inadvertently viewed such material . . . However, upon reflection, [Applicant] maintains that he has never viewed such material, knowingly or otherwise. He has, however, conducted research on the subject utilizing the Internet. This occurred only one time and was done merely out of curiosity to see what types of sites would be generated. Brief at 9.

Insofar as the Judge stated, in the Analysis section of the Decision, that Applicant had “searched, accessed, and viewed Internet images of child pornography” (Decision at 8), Applicant’s Appeal Brief raises the issue of the factual sufficiency of this statement.

The evidence submitted by the Government included a letter with an enclosure. This letter was signed by the general counsel of the other Government agency and included three pages pertaining to Applicant’s prior security clearance adjudication by the agency. This three-page

enclosure contained a detailed summary of Applicant's responses to interview questions concerning his involvement with child pornography. During this series of interviews, Applicant acknowledged that he had searched the internet in search of child pornography and that he had done so on several occasions. Although the answers are not totally consistent, for example as regards the apparent ages of the females depicted in the pictures, this document, taken as a whole, constitutes substantial evidence in support of the challenged statement. Moreover, the record as a whole supports the Judge's treatment of the mitigating conditions and the whole-person factors.

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board