

KEYWORD: Guideline D; Guideline E

DIGEST: Any attempt by a Judge independently to investigate allegations would conflict with his or her role as an impartial fact-finder. The Judge's findings are sustainable. Adverse decision affirmed,

CASENO: 11-03500.a1

DATE: 02/28/2012

DATE: February 28, 2012

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In Re:)	
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-----)	ISCR Case No. 11-03500
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)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 10, 2011, 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 decision on the written record. On December 29, 2011, after considering the record, Administrative Judge Nichole L. Noel 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 the Judge was biased against Applicant; whether the Government presented substantial evidence of security concerns; whether the Judge’s findings of fact were based upon substantial record evidence; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge made the following pertinent findings of fact: Applicant has been an engineer for a Government contractor since 1984. He has held a security clearance for 25 years and has had access to sensitive compartment information (SCI) since about 1995.

In 2010, Applicant took two polygraph interviews as part of a periodic reinvestigation of his SCI access with another Government agency (GA). During the course of the interviews, he admitted to viewing child pornography two to three times a week on his home computer. He stated that he had been doing so since 2006, most recently on the weekend immediately prior to the interviews. He stated that he deliberately sought out pornographic images of children between the ages of 13 and 17, using as search terms “teen” and “teenager.” He admitted that he masturbated to these images, or to thoughts of them, several times a week. He also admitted to having viewed a pornographic image of a 10-to-12-year-old child at least once. Based on these interviews, the GA revoked Applicant’s SCI access.

As a consequence, DoD suspended Applicant’s security clearance. During a subsequent clearance investigation, Applicant recanted his statements to the GA. Rather, he admitted that, on 20 to 30 occasions, he accessed sites presenting images of “teen pornography,” expecting to see images of persons 18 or 19 years of age. He was surprised to see images of younger children on the site, but continued to look through the images because he could not verify the ages of the persons depicted. In his response to the File of Relevant Material (FORM), he said much the same thing. He stated that he did not know that looking at a teen pornography web site on his personal computer raised a security issue.

Applicant denies an interest in child pornography and believes that he does not have a problem with pornography of any kind. He does not believe that he has a need for counseling. He would be embarrassed if his friends and family knew about the allegations, and he does not want to be labeled a pedophile. He does not believe that he has done anything wrong, and he denies any vulnerability to blackmail or coercion.

In the Analysis, the Judge concluded that the evidence raised security concerns under Guidelines D and E. Regarding mitigation, she noted that Applicant had not taken any steps to reduce his susceptibility to coercion. Moreover, she noted that the conduct at issue in this case occurred over a period of years, even during the processing of his SCI reinvestigation. She concluded that none of the mitigating conditions applied. In her whole-person analysis, the Judge noted Applicant's long experience with security clearances and the matters evaluated during the processing of applications for them. She concluded that Applicant's professed ignorance of the significance of his conduct was "feigned," and that his response to the allegations suggests a lack of rehabilitation.

Applicant states that no one at DOHA, including the Judge herself, performed an investigation of his case so that, in forming her conclusions, the Judge relied on unfounded allegations. To the extent that Applicant is contending that the Judge's decision was based on an inflexible predisposition against him rather than upon record evidence, we note that a Judge is presumed to be impartial and an applicant has a heavy burden of persuasion in order to rebut that presumption. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). Any attempt by a Judge independently to investigate allegations would conflict with his or her role as an impartial fact-finder. *See, e.g.*, ISCR Case No. 06-09462 at 2 (App. Bd. Jul. 19, 2007). Applicant has not rebutted the presumption that the Judge was impartial and unbiased.

Applicant contends that the Government did not meet its burden of production. When, as here, an applicant requests a decision on the written record, the Government must provide to the applicant "a copy of all relevant and material information that could be adduced at a hearing." Directive ¶ E3.1.7. In a DOHA hearing, the Government's burden is to present substantial evidence regarding any controverted allegation. 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." ISCR Case No. 10-04911 at 5 (App. Bd. Dec. 19, 2011).

In this case, Applicant denied the allegations in the SOR. The Government provided Applicant with a copy of the FORM, which contained the evidence underlying the allegations. This evidence included a copy of the Decision Statement by the GA, explaining its reasons for revoking Applicant's access to SCI. A Decision Statement is generally admissible in DOHA proceedings. *See, e.g.*, ISCR Case No. 07-18324 at 5 (App. Bd. Mar. 11, 2011). In this case, the Decision Statement described in detail Applicant's admissions during the course of the polygraph interviews. Item 6 at 3. Applicant does not dispute that he actually made the admissions. The admissions relate to conduct that is proscribed by law and that could result in loss of access to SCI or to classified information, conditions of Applicant's employment. Accordingly, a reasonable person could believe that Applicant would not have made the admissions were they not true.¹ Although Applicant later

¹*See* Federal Rule of Evidence 804(b)(3), which permits the admission of a "statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." The Federal Rules of Evidence serve as a guide in DOHA proceedings. Directive, ¶ E3.1.19.

recanted his original admissions, the affidavit whereby he did so acknowledged that on 20 to 30 occasions he had “viewed a teen pornography web site, not understanding that this was an issue for my clearance.” Item 7 at 2. In his response to the FORM, he acknowledged that the web site included photographs of persons under 18 years of age, but that he “only viewed them momentarily.” These statements themselves are against Applicant’s interest, and they corroborate the information contained in Item 6. We conclude that the record contains substantial evidence of security concerns under both Guidelines D and E.

We construe Applicant’s denials that he engaged in the conduct alleged in the SOR as a challenge to the sufficiency of the Judge’s findings of fact. For reasons set forth in the previous paragraph, we conclude that the Judge’s findings are sustainable. *See, e.g.,* ISCR Case No. 10-01756 at 2 (App. Bd. Jun. 2, 2011). Applicant’s denials amount to a challenge to the Judge’s weighing of the evidence. In a DOHA case, once the Government produces substantial evidence of security concerns, the applicant bears the burden of persuasion as to mitigation. Directive ¶ E3.1.15. Applicant’s argument for an alternative interpretation of the evidence is not sufficient to demonstrate that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 09-07395 at 3 (App. Bd. Sep. 14, 2010).

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,’” both as to the mitigating conditions and the whole-person factors. *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 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

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